UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

HEALTHCARE ASSOCIATION OF NEW YORK STATE, INC., NEW YORK ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, INC., NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., NYSARC, INC., and UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK STATE, INC.,	) Index No. 1:03-cv-00413-NPM-RFT
Plaintiffs,	) **MEMORANDUM OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA REGARDING THE IMPACT OF *CHAMBER OF COMMERCE OF THE UNITED STATES V. BROWN***
v.	
GEORGE E. PATAKI, Governor of the State of New York, ELIOT SPITZER, Attorney General of the State of New York, and LINDA ANGELLO, Commissioner of Labor of the State of New York,	
Defendants.	

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* iii

ARGUMENT 1

I. THE SECOND CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THAT OF THE SUPREME COURT 1

II. SECTION 211-A IS FACIALLY PREEMPTED UNDER THE SUPREME COURT'S PREEMPTION ANALYSIS 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967) 7

Chamber of Commerce of the United States v. Brown, 128 S. Ct. 2408 (2008) ..... *passim*

Greater New York Metropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 1999) 8

Harris v. McRae, 448 U.S. 297 (1980) 9

Healthcare Ass'n of New York State v. Pataki, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) 1, 8, 11, 12

Healthcare Ass'n of New York State v. Pataki, 471 F.3d 87 (2d Cir. 2006) 2, 3, 4, 6

Livadas v. Bradshaw, 512 U.S. 107 (1994) 8

Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) 10

Perez v. Campbell, 402 U.S. 637 (1971) 8

Robert Lewis Rosen Associates, Ltd. v. Webb, 07 Civ. 11403, 2008 WL 2662015 (S.D.N.Y. July 7, 2008) 7

Wilson v. Great American Industries, Inc., 770 F. Supp. 85 (N.D.N.Y. 1991) 7

Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986) 1-2

Wojchowski v. Daines, 498 F.3d 99 (2d Cir. 2007) 7

STATUTES

N.Y. Labor Law § 211-a ..... *passim*

Cal. Gov't Code § 16645.2 11

Cal. Gov't Code § 16645.7 11

Cal. Gov't Code § 16648 11

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Representing an underlying membership of more than 3,000,000 businesses, the Chamber of Commerce of the United States of America ("Chamber") serves as the principal voice of the American business community in the courts by regularly filing *amicus curiae* briefs and litigating as party-plaintiff. It was the lead petitioner, and both briefed and presented oral argument, in the Supreme Court case on which this Court ordered this briefing, *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408 (2008).

Many of the Chamber's members perform work funded in whole or in part by the State of New York and its political subdivisions. Thus, members of the Chamber wishing to exercise their protected rights of free speech under the National Labor Relations Act ("NLRA") are subject, or potentially subject, to New York Labor Law § 211-a ("section 211-a"), including its recordkeeping requirements, litigation risks, and civil penalties. Accordingly, the validity of section 211-a in light of *Brown* is of great legal and practical importance to the Chamber.

The Chamber is authorized to file this brief under this Court's order of August 22, 2008.

ARGUMENT

The Supreme Court's intervening decision in *Brown* shows that the Second Circuit erred in upholding section 211-a as it applies to grants and in remanding the case for further fact finding regarding certain contracts. While the Second Circuit held that preemption turns on whether the money regulated is the "State's" or the "employer's," this distinction—elusive at best—is irrelevant under *Brown*. Rather, *Brown* reaffirms that NLRA preemption turns upon the straightforward question of whether the purpose of the State's spending restriction is to further a labor-policy objective, regardless of whether the affected money "belongs" to the State or employer. Applying this very test, this Court previously determined that section 211-a was enacted to further New York's labor policy and "significantly curtail[s] the ability of employers to voice their opposition to unions" in contravention of the NLRA. *Healthcare Ass'n of N.Y. State v. Pataki*, 388 F. Supp. 2d 6, 20 (N.D.N.Y. 2005). Thus, *Brown* affirms the correctness of this Court's holding that section 211-a is facially preempted in its entirety.

I. THE SECOND CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THAT OF THE SUPREME COURT

The Second Circuit here held that NLRA preemption varied depending upon section 211-a's specific applications, determining that the law was valid as applied to grants and invalid as applied to federal and local "pass through" funds; fixed-priced contracts; and, subject to additional fact finding, cost-based contracts. In contrast, the Supreme Court in *Brown* held that materially identical provisions of a California law, Assembly Bill 1889 ("AB 1889"), were facially preempted in their entirety—including a grant provision. These divergent results reflect conflicting approaches to NLRA preemption.

The Second Circuit's Approach. Based upon its reading of the Supreme Court's NLRA preemption decision in *Wisconsin Department of Industry, Labor & Human Relations v. Gould*

Inc., 475 U.S. 282 (1986), the Second Circuit determined that section 211-a is preempted only to the extent that the State "leverage[s] its money to affect the [employer's] protected activity beyond the [employer's] dealings with the State." *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 102 (2d Cir. 2006). Such leveraging occurs, according to the Second Circuit, when the State "attempts to impose limitations on the use of the [*employers'*] money rather than the *State's*." *Id.* at 105 (emphasis added).

Thus, the threshold issue under this leveraging test is whether section 211-a's spending restriction applies to "State" or "employer" money. Consequently, the Second Circuit held that section 211-a cannot be applied to "federal and local monies that only pass through the State" because it is not the State's money and thus the restriction "would constitute an attempt to regulate labor practices rather than a refusal to subsidize [union] campaign costs." 471 F.3d at 106. With respect to money that does come from the State, it held that any money "given" as a "gift[]" does not belong to the employer, but remains "State" money. *Id.* at 102 & n.7. Finding that grants are gifts that "employers cannot contend [are] their own," the Court determined that they are "State" money, such that the State may "specify in advance what a grant may and may not be used for." *Id.* at 102-03. It accordingly upheld section 211-a as applied to grants.

Conversely, the Second Circuit held, if money is "earned" by the employer, it presumptively belongs to the employer and therefore cannot be regulated by section 211-a. 471 F.3d at 102 n.7; *accord id.* at 102, 105. Thus, the Second Circuit held that money earned under a *fixed-price* contract could not be restricted under section 211-a because "preventing [employers] from using their proceeds in a particular way would not save the State any money or guarantee that the State received the goods or services for which it contracted." *Id.* at 103. Although it determined that money earned under a *cost-based* contract also presumptively belongs to the

employer, the Second Circuit held that the employer's use of even *its* money can sometimes be regulated if it affects the State's future use of the State's money. Specifically, the Court held that 211-a may be applied to the proceeds from one cost-based transaction if they "affect[] how much the State will have to pay for subsequent transactions" and if the State demonstrates that "it is not feasible for the State to avoid such expenses by designating [union-related] costs as non-reimbursable." *Id.* at 103-05. The Court remanded for fact finding on this issue.

In sum, based upon its delineation between "State" and "employer" money, the Second Circuit held section 211-a is not preempted as it applies to grants, but is preempted as to fixed-price contracts; federal and local "pass through" money; and, subject to additional fact finding, cost-based contracts.

The Supreme Court's Approach. The Second Circuit's convoluted leveraging test, based upon its opaque distinction between "State" or "employer" money, is wholly irrelevant under *Brown*. Under the Supreme Court's analysis, the dispositive question is whether the State enacted the law to further a labor-policy objective; the metaphysical question of whether the money to which the law applies is best characterized as belonging to the "State" or the "employer" is beside the point.

The Supreme Court in *Brown* held that the challenged grant and program provisions of AB 1889 were facially "pre-empted under *Machinists* because they *regulate* within a zone protected and reserved for market freedom." 128 S. Ct. at 2412 (citation and internal quotation marks omitted; emphasis added). Reviewing the text, structure, and history of the NLRA, the Supreme Court found "explicit direction from Congress to leave noncoercive speech unregulated." *Id.* at 2414. To determine whether AB 1889 constituted "regulation," the *Brown* Court asked whether the statute's "purpose" was "the furtherance of a labor policy" or "the

efficient procurement of goods and services." *Id.* at 2415. The Court made clear that AB 1889 would escape preemption only if its "objective" was to "ensur[e] that state funds are spent in accordance with the purposes for which they are appropriated." *Id.* The *Brown* Court—like all 15 judges on the Ninth Circuit *en banc* panel—determined that this was not AB 1889's purpose because "[i]n contrast to a *neutral affirmative requirement* that funds be spent solely for the purposes of the relevant grant or program, AB 1889 imposes a *targeted negative restriction* on employer speech about unionization." *Id.* (emphasis added).

The Court confirmed that if the purpose is labor policy, the state law is preempted regardless of whether the illegitimate purpose is accomplished through the police or spending power. *See* 128 S. Ct. at 2414-15. Having found that the purpose of AB 1889 was to regulate noncoercive employer speech, the Supreme Court determined that the fact that the regulation came through a spending restriction was "'a distinction without a difference.'" *Id.* at 2415 (quoting *Gould*, 475 U.S. at 287). Just as "California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition," the Supreme Court held, it was "equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds." *Id.* at 2414-15. Thus, *Brown* flatly rejects the argument, made by New York in its Supreme Court *amici* brief, that "States are entitled to attach . . . labor-related conditions on the use of their funds." Brief for the State of New York *et al.* as *Amici Curiae* Supporting Respondents at 27, *Brown*, 128 S. Ct. 2408 (No. 06-939), *available at* 2008 WL 467888.

Conflicting Approaches. The Supreme Court thus does not read *Gould*, as did the Second Circuit, to preempt only those applications of the state spending power that "affect [employers'] protected activity *beyond the [employers'] dealings with the State*." *Healthcare*

Ass'n, 471 F.3d at 102 (emphasis added). Rather, it reads *Gould* to hold that, where the "'point of the statute'" is to further a labor policy, the fact that the State has chosen "'to use its spending power rather than its police power d[oes] not significantly lessen the inherent potential for conflict' between the state and federal schemes." *Brown*, 128 S. Ct. at 2415 (quoting *Gould*, 475 U.S. at 287, 289). Thus, in contradiction of the Second Circuit's approval of restrictions on the State's own funds, the Supreme Court condemned "spending restrictions on the use of *state* funds" if the restriction's purpose was labor, rather than fiscal, policy. *Id.* (emphasis added).

Indeed, the Court specifically rejected the precise distinction employed by the Second Circuit in this case. In the Supreme Court, California sought to sustain AB 1889 as applied to money in which the State was alleged to have retained a "sovereign interest." Brief for the State Respondents at 21-37, *Brown*, 128 S. Ct. 2408 (No. 06-939), *available at* 2008 WL 405541 ("California Supreme Court Brief"). Echoing the distinction drawn by the Second Circuit here, the State argued:

> AB 1889 only restricts the use of state funds, over which California maintains a legitimate interest, and thus does not control the use of an employer's *own* funds in violation of the *Machinists* doctrine. . . . In order to control costs and to preserve the integrity of the projects financed by state grant and program funds, California maintains a legitimate interest in those funds until such time as the grant recipient or program participant has provided the State with the service the State has funded, and in the manner required by the grant or program. California has a sovereign right to ensure that its taxpayers' grant and program funds are not diverted from their intended purposes and, instead, used by the recipients to assist or deter union organizing.

California Supreme Court Brief at 10-11. But the *Brown* Court drew no distinction between "sovereign" and non-"sovereign" funds or, for that matter, between "grant" and "program" funds. Rather, having determined that the purpose of AB 1889 was to further a labor-policy objective, the Supreme Court found California's asserted "sovereign interests" irrelevant and preempted the challenged provisions of AB 1889 in their entirety.

Further confirming *Brown*'s rejection of the Second Circuit's approach, the Supreme Court dismissed California's argument that the question of whether AB 1889 "regulate[s] the program participant's *own funds*," could not be answered "in the context of a facial challenge." California Supreme Court Brief at 27. California maintained that AB 1889 was at most subject to an "'as applied' challenge[]," which, similar to the Second Circuit's remand here, would require the district court to "evaluate AB 1889's grant or program provisions as applied to . . . particular state grant[s] or program[s]" and to "make . . . factual findings as to how . . . grant[s] or program[s] operate[]." *Id.* at 20-21. Yet the Supreme Court declared the challenged provisions of AB 1889 facially preempted without a remand for further factual development, confirming that a spending restriction's *application* in particular circumstances is irrelevant if the *purpose* of the state law is to further a labor-policy objective.

The irreconcilable difference in these two approaches is concretely illustrated by the conflicting decisions of the Supreme Court and the Second Circuit with respect to grants. Whereas the Second Circuit held that section 211-a was valid as applied "to grant monies (which the employers cannot contend [are] their own)," 471 F.3d at 103, the Supreme Court held that AB 1889's grant provision was "unequivocally pre-empted," 128 S. Ct. at 2414. The Second Circuit held that grants could be regulated, regardless of the State's purpose, since they belong to the State; the Supreme Court held that grant restrictions may not be imposed for the purpose of furthering an impermissible labor policy. The conflict could not be starker. Notably, in its Supreme Court brief, California cited the Second Circuit's decision as "recognizing the strong interest that states retain in grant funds they disburse." California Supreme Court Brief at 25. But the Supreme Court, while recognizing that a "State has a legitimate proprietary interest in ensuring that state funds are spent in accordance with the purposes for which they are

appropriated," held that such an interest is irrelevant if the "legislative purpose is . . . the furtherance of a labor policy." 128 S. Ct. at 2415.

In sum, the Second Circuit's analysis, and its resulting remand, does not survive *Brown* and is obviously no longer binding as law of the case.[1] And, as we presently show, section 211-a is plainly preempted under the *Brown* standard.

II. SECTION 211-A IS FACIALLY PREEMPTED UNDER THE SUPREME COURT'S PREEMPTION ANALYSIS

Applying the intervening decision in *Brown* here, it is clear section 211-a is preempted because its purpose is to regulate noncoercive employer speech. The Supreme Court has clarified that NLRA preemption "'turns on the actual content of [the State's] policy and its real effect on federal rights.'" *Id.* at 2414 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994)). As this Court previously determined applying this very test, New York's "policy" here, like California's in AB 1889, is to chill or "refuse to subsidize" union-related employer speech, not to save costs or increase contractor efficiency. This Court also found that section 211-a, like AB 1889, has a "real effect" on the ability and willingness of employers to engage in NLRA-protected speech. Thus, like AB 1889, section 211-a is facially preempted.

Section 211-a Has A Labor-Policy Purpose. It is clear that New York enacted section 211-a to disassociate itself from union-related employer speech, not to serve any fiscal interest.

[1] It is settled law that "[a district court] is not bound by the mandate of the Court of Appeals if the Supreme Court has subsequently changed or clarified the relevant law." *Wilson v. Great Am. Indus., Inc.*, 770 F. Supp. 85, 89 (N.D.N.Y. 1991) (citation and internal quotation marks omitted); *accord Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967) ("a lower court is not bound to follow the mandate of an appellate court if the mandate is, in the interim, affected by an authority superior to the court issuing the mandate"); *see also*, *e.g.*, *Wojchowski v. Daines*, 498 F.3d 99, 105 (2d Cir. 2007) (affirming district court's decision not to apply a Second Circuit decision because its "rationale . . . was undermined by [a] more recent Supreme Court [d]ecision") (citation and internal quotation marks omitted); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, __ F. Supp. 2d __, No. 07 Civ. 11403, 2008 WL 2662015, at *4 (S.D.N.Y. July 7, 2008) (following intervening Supreme Court decision rather than Second Circuit precedents where the former "undercut the rationale" of the latter).

Brown found that AB 1889 had such a labor policy purpose because it was neither '"specifically tailored to one particular job'" nor "a neutral affirmative requirement that funds be spent solely for the purposes of the relevant grant or program." *Id.* at 2415 (citation omitted). Rather, AB 1889 was a "targeted negative restriction on employer speech about unionization." *Id.* The same is obviously true of section 211-a. Indeed, as this Court previously held, section 211-a '"by its design sweeps broadly to shape policy in the overall labor market.'" 388 F. Supp. 2d at 19 (citation and internal quotation marks omitted).

Although section 211-a shares the exact dispositive flaws of AB 1889, New York argues for a different interpretation of its purpose solely because its preamble's "*stated* purpose is unquestionably proper." Defendants' Memorandum at 7 (emphasis added). But courts "do not blindly accept the articulated purpose of [a state law] for preemption purposes." *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999), *abrogated on other grounds*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Were it otherwise, as the Supreme Court has explained, state legislatures could "nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *accord Livadas*, 512 U.S. at 127 (rejecting argument that labor law was "animated simply by the frugal desire to conserve the State's money"). Thus, as this Court previously determined, "despite [its] proprietary language," section 211-a is "regulatory in nature." 388 F. Supp. 2d at 20.

If anything, the preamble *confirms* that section 211-a is a "targeted negative restriction on employer speech about unionization." 128 S. Ct. at 2415. As *Brown* reflects, the principle of "sound fiscal management" recited in section 211-a's preamble—that "state funds . . . should be

utilized solely for the public purpose for which they were appropriated"—would logically lead to a neutral law barring *any* unauthorized use of state funds. N.Y. Lab. Law § 211-a(1). Yet section 211-a posits that the "proprietary interests of this state are adversely affected" *only* when "public funds are . . . used to encourage or discourage union organization." *Id.* By specially targeting just one of the countless possible uses of "public funds"—employer speech about union organizing—section 211-a manifests New York's targeted concern about *that* use, not a general concern that appropriated funds are "expended solely for the purpose for which they were appropriated." *Id.*

In fact, before *Brown* was decided, New York *conceded* this labor-policy objective in the Second Circuit when it described section 211-a's "refusal to fund" employer speech as necessary "to keep the State neutral in *labor* disputes." Brief for Defendants-Appellants at 15, 22, *Healthcare Ass'n*, 471 F.3d 87 (No. 05-2570-cv), *available at* 2005 WL 6136412; Reply Brief for Defendants-Appellants at 1, 3, 10, *Healthcare Ass'n*, 471 F.3d 87 (No. 05-2570-cv), *available at* 2005 WL 6136416 (emphasis added). California defended AB 1889 in virtually identical terms before the Supreme Court, arguing that, "in order to preserve California's neutrality," the State "does not subsidize" employer speech. California Supreme Court Brief at 9. But a State's decision to remain "neutral" on a controversial activity by not "subsidizing" it undeniably expresses a legislative value judgment about the activity being denied support. The purpose of the Hyde Amendment, for example, is to keep the federal government "neutral" on abortion by refusing to "subsidize" it; so it is clearly animated by policy concerns about abortion and not by a desire to reduce federal outlays, even though that is its inevitable effect. *See Harris v. McRae*, 448 U.S. 297, 319 (1980). So too, New York's purported goal of remaining "neutral in labor disputes" by "refus[ing] to fund" one aspect of them—employer speech—clearly reflects

its concerns about such speech, not some fiscal concern. The State's supposed "neutrality" is nothing more than its value judgment that *employer* speech about union organizing should be regulated through a targeted speech restriction.

Section 211-a Burdens Noncoercive Employer Speech. Consistent with its regulatory purpose, section 211-a has a "'real effect on federal rights.'" *Brown*, 128 S. Ct. at 2414 (quoting *Livadas*, 512 U.S. at 119). The *Brown* Court found that AB 1889's "enforcement mechanisms put considerable pressure on an employer either to forego his 'free speech right to communicate his views to his employees,' or else to refuse the receipt of any state funds," *id.* at 2416 (citation omitted), thereby impermissibly "chill[ing] one side of 'the robust debate which has been protected under the NLRA,'" *id.* at 2417 (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 275 (1974)). The same is true with respect to section 211-a's similar enforcement mechanisms, as this Court previously determined.

New York has never argued, nor could it argue, that section 211-a's compliance costs and litigation risks place *no* burden on noncoercive employer speech. Rather, in its memorandum, New York attempts to *minimize* section 211-a's burdens by pointing to differences from AB 1889 (*e.g.*, the absence of a segregation requirement and a *qui tam* provision). *See* Defendants' Memorandum at 7-9. But the question is not whether the State has imposed the *most onerous burden* possible on employer speech; it is whether section 211-a "impinge[s] on" speech that Congress intended to leave unregulated. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 144 (1976) (citation and internal quotation marks omitted). It is dispositive that all New York can muster is that section 211-a imposes a "*far lighter* burden" on employer speech than AB 1889, and even that is wrong. Defendants' Memorandum at 8 (emphasis added).

As this Court previously recognized, section 211-a's recordkeeping procedures are "in all material respects identical to those found in [AB 1889]," 388 F. Supp. 2d at 24, both requiring "sufficient" record to show that no "state funds" were misspent, N.Y. Lab. Law § 211-a(3); Cal. Gov't Code §§ 16645.2(c), 16645.7(c). The *Brown* Court expressly cited AB 1889's recordkeeping provision as placing a burden on employers, *see* 128 S. Ct. at 2416, notwithstanding the fact that AB 1889 provided that records need not be kept "in any particular form," Cal. Gov't Code § 16648. In addition, section 211-a's restriction on the use of "state funds" to "train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization" raises difficult accounting issues for those employers that provide in-house training, *e.g.*, requiring an employer to determine how much time, say, a manager spent training other employees about union-organizing issues and what percentage of the manager's salary should be allocated to that time, and then ensuring that no "state funds" are used to pay that portion of the manager's salary. N.Y. Lab. Law § 211-a(1), (2)(a). This is the type of "allocation of overhead" found burdensome in *Brown*. 128 S. Ct. at 2416.

Section 211-a's use restriction and recordkeeping requirements are enforced, as were those of AB 1889, by the threat of civil penalties. Indeed, whereas section 211-a provides for a civil penalty "three times the amount of money unlawfully expended," N.Y. Lab. Law § 211-a(4), AB 1889 only provided for a civil penalty of "twice the amount of [unlawfully expended] funds," Cal. Gov't Code §§ 16645.2(d), 16645.7(d). This Court has already discussed the obvious "punitive effect" of section 211-a's civil penalties. 388 F. Supp. 2d at 24. Section 211-a also allows the New York Attorney General to bring lawsuits seeking injunctive and other equitable relief against employers. *See* N.Y. Lab. Law § 211-a(4). Such lawsuits, the *Brown*

Court noted, have a "deterrent" effect because an employer confident that it has satisfied section 211-a must "still bear the costs of defending itself . . . as well as the risk of a mistaken adverse finding by the factfinder." 128 S. Ct. at 2416. Although section 211-a does not have a provision for *qui tam* actions, an action by the Attorney General, as this Court previously pointed out, "could have much the same disruptive effect" if brought "in the midst of a union campaign." 388 F. Supp. 2d at 24.

In sum, it is clear that, like AB 1889, section 211-a imposes a cognizable burden on speech and is therefore facially preempted. Thus, as in *Brown*, no further fact finding is required. The State's suggestion otherwise again simply echoes the argument rejected in *Brown*. *See* Defendants' Memorandum at 4. California there argued that "disputed fact[s] . . . render[ed] it impossible for the Chamber of Commerce to establish, as a facial matter, that AB 1889's record-keeping provisions are so unduly burdensome as to effectively regulate the use of an employer's own funds." California Supreme Court Brief at 46. In dissent, Justice Breyer similarly argued that the Court should remand for fact finding on "the degree to which [AB 1889's] provisions actually will deter" employer speech. 128 S. Ct. at 2422. The Supreme Court nonetheless declared the challenged provisions of AB 1889 facially invalid because the face of the statute revealed an improper labor policy purpose and a cognizable burden on protected speech.

CONCLUSION

In light of *Brown*, this Court should declare section 211-a facially preempted in its entirety.

Dated: September 16, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 16, 2008, I caused a copy of the foregoing MEMORANDUM OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA REGARDING THE IMPACT OF *CHAMBER OF COMMERCE OF THE UNITED STATES V. BROWN* to be served by first-class mail upon:

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