05-2570-cv

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEALTHCARE ASSOCIATION OF NEW YORK STATE, INC., *et al.*,

Plaintiffs-Appellees,

- against -

GEORGE PATAKI, Governor of the State of New York, *et al.*,

Defendants-Appellants.

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Chamber of Commerce of the United States of America ("the Chamber") is a non-profit, non-stock corporation that has no parent corporation. Because the Chamber is a non-stock corporation, no publicly held company holds 10% or more of the Chamber's stock.

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Willis J. Goldsmith

Dated: December 7, 2005

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Representing an underlying membership of more than 3,000,000 businesses, the 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 has been a party-plaintiff in two leading National Labor Relations Act ("NLRA" or "the Act") preemption cases -- Chamber of Commerce v. Lockyer, 422 F.3d 973 (9th Cir. 2005) and Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

This case is of great legal and practical importance to the Chamber because many of its members perform work funded in whole or in part by the State of New York and its political subdivisions. Thus, the right of some of the Chamber's members to exercise their protected rights of free speech under the NLRA in communicating with their employees on labor-related issues, as well as their right to counterbalance union organization attempts by, for example, training management personnel to act in a lawful manner during a union organizing campaign and consulting with attorneys or other consultants, are subject, or potentially subject, to New York CLS Labor Law § 211-a ("Labor Law § 211-a"), including its reporting requirements and its civil and criminal penalties. Accordingly, the issue before the Court is of great interest to the Chamber and its members.

The Chamber is authorized to file this Brief under Rule 29 of the Federal Rules of Appellate Procedure based upon the consent of the parties.

SUMMARY OF ARGUMENT

Appellants and their *Amici* attempt to significantly narrow the scope of Machinists preemption by asserting that Machinists preemption applies only to a discrete and limited set of economic weapons that does not encompass activities that take place during a union organizing campaign. The District Court correctly refused to apply this newly-contrived analysis. Instead, the Court applied well-settled precedent, which confirms that Machinists preemption applies broadly to bar state statutes, like Labor Law § 211-a, that "curtail or entirely prohibit self-help . . . [and] frustrate effective implementation of the Act's processes." Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986) (internal quotation marks omitted). The Ninth Circuit recently confirmed the soundness of the District Court's analysis in holding that a California statute that is substantively indistinguishable from Labor Law § 211-a was preempted under Machinists.

In support of its holding, the District Court also properly concluded that the State was not acting as a "market participant" when it enacted Labor Law § 211-a. However, in reaching this conclusion, the Court applied the incorrect "market participant" analysis, and, in doing so, improperly rejected the "market participant" analysis set forth by the Fifth Circuit in Cardinal Towing & Auto Repair v. City of

Bedford. Nevertheless, had the Court correctly applied the Cardinal Towing analysis, its conclusion would have been the same.

For all of the foregoing reasons, this Court should affirm the District Court's decision, but overturn that portion of the decision rejecting Cardinal Towing.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT LABOR LAW § 211-A IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT[1]

A. Standards Governing Machinists Preemption

While the NLRA does not contain an express preemption provision, the Supreme Court in Wisconsin Department of Industry v. Gould Inc., 475 U.S. 282, 286 (1986) observed that "[i]t is by now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." See also Healthcare Ass'n of New York State, Inc. v. Pataki, 388 F. Supp. 2d 6, 11 (N.D.N.Y. 2005). Grounded in the Constitution's Supremacy Clause, Machinists preemption "precludes state and municipal regulation concerning conduct that Congress intended to be unregulated." Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986) ("Golden State I") (internal quotation marks omitted); see Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis.

[1] In light of the District Court's holding that Labor Law § 211-a is pre-empted under Machinists and that other pre-emption arguments are therefore moot,

Employment Relations Comm'n, 427 U.S. 132 (1971) ("Machinists"). In this regard, the Supreme Court recognized "that a particular activity might be 'protected' by federal law not only when it fell within § 7, but also when it was an activity that Congress intended to be 'unrestricted by any governmental power to regulate' because it was among the permissible 'economic weapons in reserve, . . . [the] actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.'" Id. at 141 (citation omitted) (emphasis in original). As reiterated by the Supreme Court in Golden State I:

> . . . .Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance between the uncontrolled power of management and labor to further their respective interests. . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, . . . unless such restrictions presumably were contemplated by Congress. Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.

475 U.S. at 614-15 (emphasis added, citations and internal quotation marks omitted). Thus, Machinists preemption protects "certain rights of labor and

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the Chamber will not address whether Labor Law § 211-a is pre-empted on other grounds as well, as they did below.

management against governmental interference." Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 111, 112 (1989) ("Golden State II") ("the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another,' is a right specifically conferred on employers and employees by the NLRA") (quoting Machinists, 427 U.S. at 154). Further, it "preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests," and "create[s] a zone free from all regulations, whether state or federal." Bldg. & Constr. Trades Council v. Associated Builders & Contrs. of Mass./R.I., Inc., 507 U.S. 218, 226 (1993) ("Boston Harbor") (internal quotation marks omitted). As recognized by this Court, Machinists preemption "protects employers' and unions' use of 'economic weapons' that Congress aimed for them to have freely available . . . they are integral parts of the legislative scheme and cannot be subject to regulation by the states or the courts or even the Board." Bldg. Trades Employers Educ. Ass'n v. McGowan, 311 F.3d 501, 508-09 (2d Cir. 2002). In short, "[n]o state or federal official or governmental entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." Chamber of Commerce v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996).

Following this well-established line of cases, the District Court properly focused on the intended effect of Labor Law § 211-a and concluded that "[i]t is

difficult, if not impossible[,] to see . . . how an employee could intelligently exercise [his right to join or refuse to join a union under the NLRA], especially the right to decline union representation, if the employee only hears one side of the story - the union's. Plainly, hindering an employer's ability to disseminate information opposing unionization 'interferes directly' with the union organizing process which the NLRA recognizes." Healthcare Ass'n, 388 F. Supp. 2d at 23; see also Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee Cty., No. 05-1531, 2005 WL 3275787, at *3 (7th Cir. Dec. 5, 2005) ("MMAC") (ordinance preempted by NLRA because it "would give the union a leg up to organize the company's entire workforce . . . That is the kind of favoritism that the . . . [NLRA] anathematizes."). By curtailing an employer's ability to engage in economic self-help -- specifically, the ability to engage in noncoercive speech to express its views, arguments and opinions in opposition to union organization -- Labor Law § 211-a "frustate[s] effective implementation of the Act's processes." Golden State I, 475 U.S. at 614-15; see also MMAC, 2005 WL 3275787, at *3. Accordingly, as properly held by the District Court, Labor Law § 211-a is preempted under Machinists. See Healthcare Ass'n, 388 F. Supp. 2d at 25 (Labor Law § 211-a preempted under Machinists because it "interferes with the process protected by the NLRA, not any specific right protected by the statute.") (emphasis in original).

B. The Ninth Circuit has Confirmed the Soundness of the District Court's Decision

That the District Court properly concluded that Labor Law § 211-a is preempted under Machinists was confirmed by the Ninth Circuit, which analyzed a statute that is substantively indistinguishable from Labor Law § 211-a and held that Machinists preemption applied. See Chamber of Commerce v. Lockyer, 422 F.3d 973 (9th Cir. 2005) ("Lockyer II").[2]

Like Labor Law § 211-a, the statute challenged in Lockyer II provided that private employers who received state funds were prohibited from using such funds to "assist, promote or deter union organizing." Cal. Gov. Code §§ 16645.2(c) and 16645.7(c). The statute covered "any attempt by an employer to influence the decision of its employees" regarding whether to support or oppose a labor organization. Cal. Gov. Code § 16645(a)(1). Like Labor Law § 211-a, the statute (i) prohibited the use of state funds for payment of legal/consulting fees and salaries of supervisors or employees incurred in preparing, planning and carrying out an activity to assist, promote or deter union organization; (ii) imposed burdensome record-keeping requirements to show that state funds were not used

[2] In support of its holding, the District Court cited with approval a Ninth Circuit panel's decision in Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) ("Lockyer I"). Following the District Court's decision here, the same Ninth Circuit panel granted appellants' petition for a panel rehearing, withdrew its prior decision, and issued a new decision ("Lockyer II"). The Ninth Circuit panel then again affirmed the district court's ruling that NLRA preemption applied.

for speech regarding labor relations; and (iii) imposed penalties upon employers found to violate the statute. Cal. Gov. Code §§ 16645.2(c) and (d); 16645.7(c) and (d); 16646(a). In affirming the district court's decision that Machinists preemption applied, the Ninth Circuit held that the California statute "substantively regulates and disrupts 'Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests.'" Lockyer II, 422 F.3d at 989 (citation omitted).

Given that the Ninth Circuit rejected the same arguments raised by Appellants and their *Amici* here, it is not surprising that they spend little, if any, time analyzing Lockyer II in their submissions to this Court. Instead, Appellants and their *Amici* attempt to create a meaningful distinction between the California statute and Labor Law § 211-a by noting that the New York statute "deals only with three specific categories" of acts, whereas the California statute "restricted the use of state funds to pay for *any* expenses incurred 'to assist, promote, or deter union organizing.'" *Amici* Br. of James B. Atleson, et al., at 16 & n.9 (emphasis in original); see also Appellants' Br. at 31. This is a distinction without a difference. The breadth of the New York statute's three prohibitions effectively precludes employers from using state funds to pay for any expenses incurred in assisting, promoting or deterring union organizing. See Appellees' Br. at 17.

If anything, Labor Law § 211-a more pervasively infringes upon employers' protected rights because it (i) applies to any state-appropriated funds (the California statute only applies to employers who receive $10,000 or more from the State); (ii) permits the Attorney General and the state entity providing the funds to access the employer's records (the California statute grants such a right only to the Attorney General); and (iii) imposes harsher sanctions -- larger civil penalties and criminal penalties -- against employers found to violate the statute.

The District Court's decision is on all fours with Lockyer II. Indeed, there is an even stronger basis for applying Machinists preemption here.

C. Appellants and Their *Amici* Attempt to Significantly Narrow the Scope of Machinists Preemption

As this Court has made clear, "[t]he Supreme Court has construed Machinists preemption broadly to bar state interference with conduct that Congress aimed to be unregulated in furtherance of 'policies implicated by the structure of the [Act] itself.'" McGowan, 311 F.3d at 509 (citation omitted). Realizing that Labor Law § 211-a runs hopelessly afoul of this well-settled principle, Appellants and their *Amici* attempt to narrow the scope of Machinists preemption by asserting that it applies solely to a discrete set of "economic weapons" (i.e., strikes, lockouts and picketing) and not to activities that take place during a union organizing campaign. See *Amici* Br. of James B. Atleson, et al., at 13. There are multiple problems with this position.

As a threshold matter, Appellants and their *Amici* cite no authority in support of this exceedingly narrow "economic weapons" test for Machinists preemption. This is so because such an untenable reading of Machinists preemption is inconsistent with Supreme Court precedent. The "crucial inquiry" under Machinists is not whether the employer's or union's actions are found in a truncated list of economic weapons, but "whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." Golden State I, 475 U.S. at 614-15; cf. Reich, 74 F.3d at 1337 (failing to confine Machinists preemption analysis solely to "economic weapons"; noting that under Machinists, "[n]o state . . . can alter the delicate balance of bargaining and economic power that the NLRA establishes. . . ."). Applying the proper standard to the facts here, an employer's ability to engage in noncoercive speech to express its views in opposition to union organization -- lawful conduct directly related to bargaining -- is precisely the type of "self-help" that is immune from state regulation. See Section I, supra; MMAC, 2005 WL 3275787, at *3 (ordinance preempted by NLRA because it could hinder employer's ability to express its opposition to unionization).

Second, even if Appellants' and their *Amici*'s faulty "economic weapons" test was applicable, Labor Law § 211-a still would be preempted under Machinists. Courts, including this Court, have made clear that there are a plethora of

"weapons" available to employers and unions (besides strikes, lockouts and picketing) that -- if regulated by a State -- can improperly place economic pressure on the party subject to the regulation. See McGowan, 311 F.3d at 509 (State's refusal to process apprentice applications until parties negotiated a labor contract preempted because it threatened the bargaining process by putting economic pressure on the employer); see also Int'l Union, UAAIW v. C.M. Smillie Co., 362 N.W.2d 780, 782 (1984) ("advertising for strike replacements cannot realistically be separated from the employer's right to hire strike replacements, which indisputably is 'part and parcel of the process of collective bargaining' that Congress intended to be governed by the free play of economic forces.") (citation omitted). The ability to exercise its free speech right to voice opposition to union organization is a powerful "weapon" for employers in labor disputes. By chilling this ability, Labor Law § 211-a intrudes upon a right that is to be free from state regulation thereby "upset[ting] the delicate balance of interests established in the NLRA." McGowan, 311 F.3d at 509.[3]

[3] That Congress has passed various statutes restricting the use of federal funds to promote or deter union organizing is of no moment. See *Amici* Br. of James B. Atleson, et al., at 10. This assertion misses the critical (and dispositive) point that *federal* statutes -- unlike state statutes such as Labor Law § 211-a -- are not subject to any type of NLRA preemption analysis. Lockyer II, 422 F.3d at 994 ("Federal preemption principles do not apply to possible conflicts between two federal statutes. Congress has the authority to impose certain restrictions where it sees fit.") (citation omitted). Similarly, although *Amici* Brennan Center, et al., cite New York regulations that place restrictions on the use of New York State funds

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE STATE WAS NOT A "MARKET PARTICIPANT" BUT FAILED TO APPLY THE PROPER TEST

A. The District Court Erred in Rejecting the Two-Part Test Enunciated by the Fifth Circuit in Cardinal Towing & Auto Repair v. City of Bedford

In support of its holding that NLRA preemption applied, the District Court correctly concluded that the State was not acting as a "market participant" when it enacted Labor Law § 211-a. See Healthcare Ass'n, 388 F. Supp. 2d at 22-23. However, in reaching this conclusion, the Court applied the two-part analysis enunciated by the Third Circuit in Hotel Employees & Restaurant Employees Union v. Sage Hospitality Res., Inc., 390 F.3d 206 (3d Cir. 2004), cert. denied, 125 S. Ct. 1944 (2005) ("Sage Hospitality"), and the Eastern District of Wisconsin in MMAC, 359 F. Supp. 2d 749 (E.D. Wis. 2005), rev'd, No. 05-1531, 2005 WL 3275787 (7th Cir. Dec. 5, 2005), instead of the two-part test established by the Fifth Circuit in Cardinal Towing & Auto Repair v. City of Bedford, 180 F.3d 686 (5th Cir. 1999). The Chamber submits that the Third Circuit's decision in Sage Hospitality and the district court's decision in MMAC were wrongly decided (indeed, the Seventh Circuit this week reversed the MMAC district court), and that the District Court here erred in rejecting the Cardinal Towing two-part test.

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(see Br. of *Amici* Brennan Ctr., et al., at 9), these regulations are likewise not subject to an NLRA preemption analysis. See Appellees' Br. at 40-41.

In Cardinal Towing, the Fifth Circuit noted that the "law has traditionally recognized a distinction between regulation and actions a state takes in a proprietary capacity - that is, actions taken to serve the government's own needs rather than those of society as a whole." 180 F.3d at 691. This distinction has been acknowledged by the Supreme Court. "[W]hen a state or municipality acts as a participant in the market and *does so in a narrow and focused manner consistent with the behavior of other market participants*, such action does not constitute regulation subject to preemption[,]" whereas a state's attempt to "use its spending power in a manner tantamount to regulation" is behavior subject to preemption. Id. (citations and internal quotation marks omitted) (emphasis added). The Fifth Circuit further noted that:

> States have methods of influencing private conduct unrelated to the state's proprietary functions -- and thus potentially disrupting a congressional plan . . . One such method is deployment of a state's spending power . . . to encourage or discourage such private behavior . . . Following the logic of Gould, *courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power.*

Id. at 691-92 (citations omitted) (emphasis added). See Golden State I, 475 U.S. 608 (City's condition of renewal of a franchise agreement on the settlement of a labor dispute preempted by NLRA); Gould, 475 U.S. at 290 ("we cannot believe that Congress intended to allow States to interfere with the interrelated federal scheme of

law, remedy and administration under the NLRA as long as they did so through exercises of the spending power") (citation omitted); Reich, 74 F.3d at 1337 (holding that because Executive Order 12,954, which prohibited federal agencies from contracting with employers who permanently replaced striking workers, sought to set a "broad policy governing the behavior of thousands of American companies and affecting millions of workers" through a procurement policy that was explicitly based on the President's views of labor policy, it was preempted). Consistent with the Fifth Circuit's reading of Gould, the Seventh Circuit has explained that a state cannot invoke the "market participant" exception merely by relying upon the transparent assertion that it passed a statute to further its proprietary interests. See MMAC, 2005 WL 3275787, at *2 ("the principle of . . . [Gould] goes deeper; it is that the spending power may not be used as a pretext for regulating labor relations.").[4]

Based on Boston Harbor, Gould and their progeny, the Fifth Circuit established the following test in determining whether the government was acting as a proprietor or as a regulator:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of

[4] Similarly, there can be little doubt that Labor Law § 211-a was designed to advance New York State's view of an appropriate societal goal -- promoting union organization. The statute's incantation that it was passed to further the State's "proprietary" interests cannot save the statute from NLRA preemption. See MMAC, 2005 WL 3275787, at *5.

> needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Cardinal Towing, 180 F.3d at 693. See also Lockyer, 422 F.3d at 991 (citing Cardinal Towing's test in holding that state did not act as a "market participant" in passing statute that is substantively indistinguishable from Labor Law § 211-a). Applying this test, the Fifth Circuit held that the city "acted as a typical private party would act in seeking a towing service" when it passed an ordinance directing that nonconsensual police tows be handled by the single recipient of a city contract. Cardinal Towing, 180 F.3d at 693. The Fifth Circuit noted the "obvious connection" between the City's "narrow proprietary interest in its own efficient procurement of services" and the City's ordinance (selecting one company to perform all nonconsensual towing for administrative and review ease) and contract specifications (requiring towing to be done within a certain amount of time), the narrow focus of the ordinance (dealing only with true nonconsent tows where the car owner was unwilling or unable to specify a towing company), that the contract specifications only dealt with the bidder's dealing with the City, and that the contract specifications only applied to a single contract (not all City contracts going forward). Id. at 693-94. The Court concluded that the City, acting as a private party would in ordering towing services, was simply "choosing the company best able to guarantee

fast, reliable towing service," thereby "exemplif[ying] the market forces Congress sought to encourage." Id. at 695.[5]

On the other hand, the two-part test used by the Third Circuit in Sage Hospitality and the MMAC district court disregards the pivotal point made by the Supreme Court in Boston Harbor in carving out the market participant exception -- namely, preemption analysis does not apply when the government agency acts like a private party. Instead, the Third Circuit set forth the following test:

> First, does the challenged funding condition serve to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier? Second, is the scope of the funding condition "specifically tailored" to the proprietary interest?

Sage Hospitality, 390 F.3d at 216. The Third Circuit, in a footnote, simply stated without explanation that it did "not believe . . . that Boston Harbor and its progeny require[d] a factual investigation into the particular subjective motives of the relevant government agency, or a survey of what private parties do in like circumstances." Id. at 216 n.7.

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[5] For "market participant" exception purposes, Labor Law § 211-a could not be any more different than the ordinance at issue in Cardinal Towing. While the ordinance in Cardinal Towing (i) only applied to a single, selected company and (ii) was narrowly tailored to achieve the City's legitimate proprietary interests, Labor Law § 211-a (i) applies to *any* employer receiving state-appropriated funds and (ii) seeks to achieve the State's societal goal of promoting unionization by broadly restricting employers' ability to oppose unionization.

In adopting the Third Circuit's test, the MMAC district court described it as an approach that did not "focus on a government's motive for passing a law or taking an action but on the purpose and effect of the action itself."[6] 359 F. Supp. 2d at 759. The MMAC district court found that because the size and scope of the projects undertaken by a government entity make it too difficult to compare its actions to those of a private party, Boston Harbor "does not require 'a survey of what private parties do in like circumstances.'" Id. (citing and quoting Sage Hospitality, 390 F.3d at 216 n.7). The District Court here improperly decided to apply the Sage Hospitality/MMAC district court test for two reasons: (i) neither Cardinal Towing nor Lockyer actually compared the government entity's conduct to that of a private party, and (ii) "nothing in Cardinal Towing *mandate[d]* that the government prove that its conduct is 'typical behavior of private parties in similar circumstances.'" Healthcare Ass'n, 388 F. Supp. 2d at 16 (emphasis in original) (citations omitted).[7]

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[6] Significantly, and as the District Court here correctly held, even under the analysis set forth by the Third Circuit in Sage Hospitality and the MMAC district court, Labor Law § 211-a cannot be saved from preemption via the "market participant" exception. See Healthcare Ass'n, 388 F. Supp. 2d at 17-19.

[7] Contrary to both Cardinal Towing and the District Court's analysis here, and without citation to any authority, *Amici* Brennan Center for Justice, et al., miss the mark in stating that, under the "market participant" analysis, "the central inquiry . . . is whether the condition imposed by the government extends outside the ambit of the contract or grant. If the condition simply addresses the subject of the contract . . . the condition is proprietary." Br. of *Amici* Brennan Ctr., et al., at 16. Nevertheless, even under the Brennan Center's test, the State did not act as a "market participant" here. The subject matter of the contracts between the State and Appellees is the Appellees' provision of medical services to State citizens. If

That the District Court erred in applying this test was confirmed by the Seventh Circuit when it reversed the MMAC district court. See 2005 WL 3275787. The MMAC ordinance required certain firms having County contracts to negotiate "labor peace agreements" with any union wanting to organize employees who worked on county contracts. The ordinance contained restrictions on employers' ability to require employees to attend "captive-audience" meetings addressing the employer's position on unioniziation. Id. at *3. The County asserted that the ordinance's purpose was to promote labor peace by making it less likely that work stoppages would occur. The County made this assertion even though the ordinance was "supported by and tilted in favor of unions. . . ." Id. at *1.

In analyzing whether the ordinance was preempted by the NLRA, the Seventh Circuit explained -- consistent with Cardinal Towing and contrary to Sage Hospitality -- that the County's subjective motives for passing the ordinance were indeed relevant. Id. at *2 ("the [County's] spending power may not be used as a pretext for regulating labor relations."). Also consistent with Cardinal Towing and contrary to Sage Hospitality, the Court stated that a crucial inquiry was whether the County acted as a private actor in passing the ordinance. Id. at *1 ("if the . . .

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the Appellees provide such services (which they do), they are entitled to the funds. But Labor Law § 211-a improperly imposes an additional condition that employers must meet to receive these funds -- the funds cannot be used in opposing a union organization campaign. That condition, on its face, is "outside the ambit of the contract or grant."

[County] is intervening in the labor relations just of firms from which it buys services, and it is doing so in order to reduce the cost or increase the quality of those services . . . there is no preemption.").

Applying these standards to the facts, the Seventh Circuit held that (i) notwithstanding its stated motives for passing the ordinance, the County's true motive was to alter the balance the NLRA strikes between unions and employers; (ii) the County was not acting like a private actor when it passed the ordinance; and (iii) the ordinance was not narrowly-tailored toward satisfying the County's purported goal of labor peace (in fact, the Court noted that the ordinance was just as likely to increase as to decrease work stoppages). Id. at **3-4. Notably, as here, Milwaukee County was:

> trying to substitute its own labor management philosophy for that of the [NLRA] . . . The mismatch between the interest in uninterrupted service and the requirement of labor-peace agreements further demonstrates that the County's motive is dissatisfaction with the balance that the [NLRA] strikes between unions and management rather than concern with service interruptions . . . And so the inference of pretext arising from the terms of the ordinance and the spillover effect on private labor relations that the ordinance creates has not been rebutted.

Id. at **4-5. Accordingly, the Seventh Circuit reversed the district court.

While the District Court's ultimate conclusion in this case was correct -- i.e., that the State was not acting as a proprietor when it enacted Labor Law § 211-a -- the Chamber respectfully submits that the District Court's failure to consider whether

the State's activities were comparable to a private party as set forth in the Cardinal Towing analysis was erroneous.

B. The Critical Inquiry Under the "Market Participant" Exception Analysis is Whether the State Acted Like a Private Party

The "market participant" exception is a very narrow exception to NLRA pre-emption carved out by the Supreme Court in Boston Harbor, which is primarily based upon the "private party" comparison. Unlike the Third Circuit and the MMAC district court, the Supreme Court did not merely focus on whether the government agency was an owner, investor or financier of a project to determine whether it was acting as a market participant. Had it done so, it could have very easily concluded that the state agency in Boston Harbor was acting as a market participant since it was the owner, investor and financier of the project. Boston Harbor, 507 U.S. at 221-22 (stating that the state agency provided the funds for the construction, owned the facilities to be built, established all bid conditions and decided all contract awards, and generally supervised the project). Instead, the Supreme Court focused on the overall purpose and effect of the state action, noting that "the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor." Id. at 227 (emphasis in original); Reich, 74 F.3d at 1336-37 (holding that Boston Harbor's analysis rested on the fact that the government agency "was not seeking to set general policy in the Commonwealth; it was just trying to operate as if it were an ordinary general contractor whose actions

were 'specifically tailored to one particular job'"). In stark contrast, Labor Law § 211-a seeks to set a "general policy" of discouraging employers from opposing unionization.[8] See MMAC, 2005 WL 3275787 at *4 (holding ordinance preempted by NLRA because purpose of ordinance was to alter "the balance that the [NLRA] strikes between unions and management" and because the effect of the ordinance provided unions with an advantage in organizing employers' workforces; noting that the NLRA "anathematizes" such favoritism).

The Supreme Court also acknowledged that states "have a qualitatively different role to play from private parties." Boston Harbor, 507 U.S. at 229. While private parties may also "regulate" by, for example, participating in a boycott on the basis of labor policy, such "regulation" is not preempted by the NLRA. Id. On the other hand, where the state acts to regulate private conduct, "it performs a role that is characteristically a governmental rather than a private role," and, "as regulator of private conduct, the State is more powerful than private parties." Id. Thus, to balance the government's need to participate in the market when it purchases goods and services with its regulatory capabilities, the "market participant" analysis focuses on the nature of the activities the state seeks to regulate and whether, by

[8] The State has argued that Labor Law § 211-a does not reflect a State policy of discouraging employers from opposing unionization because the statute also restricts employers from engaging in activities that *encourage* unionization. Labor Law § 211-a(2). Such legislative legerdemain is easily seen through. After

regulating such conduct, the state is acting as a proprietor or as a policymaker. Id. See also Golden State I, 475 U.S. at 615 n.5 (holding that the focus of preemption analysis is on "'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted'") (quoting Garmon, 359 U.S. at 243). Based on this reasoning, in Boston Harbor, the Supreme Court held that the government entity was not acting as regulator when it required construction contractors on a specific project to agree to a project labor agreement, which are permitted under Sections 8(e) and (f) of the NLRA for the construction industry, because the government agency was acting like a private contractor. It was buying construction services by conditioning its purchase "upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find." 507 U.S. at 233 (internal quotation marks omitted). The State was "not regulat[ing] the workings of the market forces that Congress expected to find; it exemplifie[d] them." Id. (internal quotation marks omitted). Accordingly, the Court held that the State was acting as a proprietor and that its acts "[we]re not 'tantamount to regulation' or policymaking." Id. at 229.

Following Boston Harbor, the Fifth, Seventh and Ninth Circuits in Cardinal Towing, MMAC, and Lockyer II, respectively, properly held that the touchstone of

(continued…)

all, it is the rare non-union employer, if any, who spends funds to promote unionization.

the market participant analysis is whether the government entity was acting like a private party (as opposed to a regulator). In Cardinal Towing, the Fifth Circuit held that the city's ordinance was not preempted by the NLRA because the city was acting like a private party by posting contract specifications which ensured the efficient performance of a single contract; in MMAC, the Seventh Circuit rejected the County's claim that it passed an ordinance "to further its [proprietary] interest as a buyer of services . . . it is pretext to regulate the labor relations of companies that happen, perhaps quite incidentally, to do some County work" (2005 WL 3275787, at *5); and in Lockyer II, the Ninth Circuit held that California was not acting like a private party, but instead sought to "shape the overall labor market in a pervasive, nonproprietary manner . . . [and] broadly color the state's impact on labor relations between employees and prospective union representatives." 422 F.3d at 991.

On the other hand, by disregarding the private party comparison, the Third Circuit in Sage Hospitality and the district court in MMAC broadened the "market participant" exception to a point where the exception swallows the rule. The focus on whether the state is an owner, investor, or financier in determining whether the state is acting as a proprietor will virtually always allow a state to invoke the "market participant" exception based on its spending or contracting power since the state's interest as owner, investor, or financier is based on its financial commitment. As a result, the two-part test used by the Third Circuit in Sage Hospitality and the

district court in MMAC undermines the Supreme Court's conclusion that Congress did not "intend[] to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration'" through the exercise of their spending power. Gould, 475 U.S. at 290 (citation omitted). To the contrary, under the Third Circuit's and the MMAC district court's analysis, states can now regulate labor relations by compelling organization or prohibiting the use of economic weapons in exchange for government contracts or to stabilize and secure tax revenue.

C. Had the District Court Applied the Two-Part Test Set Forth in Cardinal Towing, it Still Would Have Correctly Concluded that Labor Law § 211-a is not Covered by the "Market Participant" Exception

Had the District Court applied the two-part test from Cardinal Towing, it would have reached the same conclusion -- that the State was not acting as a market participant when it enacted Labor Law § 211-a. First, Labor Law § 211-a does not reflect the State's interest in "the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances." Cardinal Towing, 180 F.3d at 693. It does not, for example, set the prices that the State is willing to pay for services or establish the terms and conditions under which the State will do so. Rather, Labor Law § 211-a prohibits the use of state funds, once a contract has been awarded, to "(a) train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization, or to encourage or discourage an

employee from participating in a union organizing drive; (b) hire or pay attorneys and others to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; or (c) hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive." Labor Law § 211-a(2). Would, or could, a private party impose a similar condition on the use of its payment for the goods or services purchase? Possibly, but it "would be surpris[ing] if private contractors were to care" how a private employer spent the payment for goods and services, "so long as the goods or services contracted for were provided in a timely fashion and met quality standards." Reich, 74 F.3d at 1336.

Moreover, Labor Law § 211-a is regulatory in nature because, as found by the District Court, it "is not sufficiently narrow to overcome the 'inference that its primary goal was to encourage a general policy rather than address a specific problem.'" Healthcare Ass'n, 388 F. Supp.2d at 17 (quoting Cardinal Towing, 180 F.3d at 693); see also MMAC, 2005 WL 3275787, at *5 (ordinance preempted by NLRA because "the inference of pretext arising from the terms of the ordinance and the spillover effect on private labor relations that the ordinance creates has not been rebutted."). The District Court properly concluded that Labor Law § 211-a

"does not address a specific proprietary problem," but rather, that it "is broadly drafted to apply to *all State contracts, regardless* of amount." Id. (emphasis in original). Moreover, finding the language of Labor Law § 211-a similar in nature to the California statute struck down twice by the Ninth Circuit, the District Court properly held that Labor Law § 211-a was "'designed to have a broad social impact, by altering the ability of a wide range of recipients of state money to advocate about union issues,'" and that "'by its design sweeps broadly to shape policy in the overall labor market.'" Id. at 18-19 (quoting Lockyer I, 364 F.3d at 1163); see also MMAC, 2005 WL 3275787, at *4 (noting that in passing ordinance, the county was "trying to substitute its own labor-management philosophy for that of the . . . [NLRA]."). The District Court also properly rejected the State's argument that it was acting as a proprietor by simply stating that Labor Law § 211-a was enacted to protect the State's financial interests. 388 F. Supp. 2d at 19; see also MMAC, 2005 WL 3275787, at *2. Labor Law § 211-a is far closer to the statute found preempted in Gould than the contract specification found not be to preempted in Boston Harbor.

CONCLUSION

The Chamber respectfully submits that the District Court's decision should be affirmed, except to the extent that the District Court rejected the Cardinal Towing analysis.

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

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Dated: December 7, 2005

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6668 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Charles R. Morse

Dated: December 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on December 7, 2005, I caused two copies of the foregoing BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES to be served by first-class mail upon:

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