

2006

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Recommended Citation

Debra Charish, *Union Neutrality Law or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law Section 211-A*, 14 J. L. & Pol'y (2006).

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**UNION NEUTRALITY LAW OR EMPLOYER GAG LAW?
EXPLORING NLRA PREEMPTION OF NEW YORK LABOR LAW
SECTION 211-A**

*Debra Charish**

INTRODUCTION

Union membership has declined sharply during the past several decades.¹ Organized labor is presently seeking out new and unique ways to rebuild labor's numbers.² One specific method organized labor has discovered to reinforce its ranks is to press state legislatures for so-called "union neutrality" laws that appear to favor unions.³ One such law is New York State's Labor Law Section 211-a.⁴ In 1996, the New York legislature enacted Section

* Brooklyn Law School Class of 2007; B.A. in Industrial and Labor Relations, Cornell University, 2004. The author would like to thank her family and friends for their enduring love and support. She would also like to thank the various practioners for their assistance in answering her questions, as well as the staff and editors of the *Journal of Law and Policy* for their diligence and support.

¹ See Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616 (May 1995) (noting that the union density rate has declined from a high of 35% in 1954).

² See David Moberg, *Organize, Strategize, Revitalize; Unions Debate Best Way to Revive Labor's Fortunes*, IN THESE TIMES, Feb. 16, 2004, at 18. Proposals to revitalize unions include wide-scale organizing efforts, restructuring unions so that there exists a smaller number of unions that are focused on specific industries, and increasing internal union democracy. *Id.*

³ See Healthcare Ass'n of N.Y. State, Inc. v. Pataki (*HANYS*), 388 F. Supp. 2d 6, 9 (N.D.N.Y. 2005) ("unions clearly view [New York's "union neutrality" statute] as sending a pro-union message").

⁴ N.Y. LAB. LAW § 211-a (McKinney 1996) (amended 2002).

211-a, which prohibits employers from using state funds to discourage or encourage union organizing.⁵ With this law, labor unions sought to enhance their position against the employers through the law's prohibition on state-supported employers' use of state funds to affect union membership—thus, employers would be relegated to spending funds derived from profits or other sources not provided by the state.⁶

While unions continue to push for the adoption of state union neutrality laws, they presently face a risk that a court may find such laws to be preempted by the National Labor Relations Act (NLRA).⁷ The Supreme Court has set forth two separate standards for NLRA preemption: *Garmon* preemption and *Machinist* preemption.⁸ The *Garmon* preemption prohibits states from regulating conduct that is arguably protected or prohibited by the NLRA.⁹ Alternatively, the *Machinists* preemption prevents state interference in areas that Congress intended to leave to the free play of economic forces.¹⁰ However, these strands of preemption are subject to various exceptions.¹¹ If a court finds that the state is regulating matters covered by the NLRA under one of these two doctrines, and the regulation is not saved by the exceptions, the regulation is rendered invalid, often through the court's dismissal of a lawsuit.¹²

⁵ *Id.* The statute was later amended in 2002 to incorporate record keeping and enforcement measures. See *infra* Part III.B.

⁶ See *infra* Part III.A.

⁷ See Jackson Lewis, Importance of Employer Speech at Heart of Second Blow to California's Union Neutrality Legislation, (Sept. 14, 2005), <http://www.jacksonlewis.com/legalupdates/articleprint.cfm?aid=846> (asserting that the Ninth Circuit's second opinion in *Chamber of Commerce of the U.S. v. Lockyer*, which held that California's union neutrality law was preempted by the NLRA, left little doubt that future state legislation seeking to impose employer neutrality during union organizing campaigns will fail).

⁸ Stephen Befort & Brian Smith, *At the Cutting Edge of Labor Law Preemption: A Critique of Chamber of Commerce v. Lockyer*, 20 LAB. LAW. 107 (Summer 2004).

⁹ *Id.* See *infra* Part II.B.1.

¹⁰ Befort & Smith, *supra* note 8, at 107. See *infra* Part II.B.2.

¹¹ Befort & Smith, *supra* note 8, at 107.

¹² 4-36 NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE § 36.01

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This is precisely what occurred in the federal district court in the Northern District of New York on May 17, 2005. In *Healthcare Association of New York State, Inc. v. Pataki*,¹³ (hereinafter *HANYS*) the plaintiffs (a coalition of organizations representing over 550 non-profit and public hospitals, nursing homes, and health care agencies) argued that Section 211-a is preempted by federal labor law, and is thus invalid.¹⁴ The court agreed with the plaintiffs. In finding Section 211-a preempted by federal labor law under the *Machinist* doctrine, Judge McCurn concluded that the statute hindered an employer's ability to disseminate information to employees, which amounted to a direct interference with the union organizing process recognized by federal labor law.¹⁵ The case is currently being appealed in the Court of Appeals for the Second Circuit.¹⁶

This Note argues that New York Labor Law Section 211-a is fully preempted by the NLRA under principles governed by the *Garmon* preemption and the *Machinist* preemption, that no exceptions to preemption apply, and that the decision of the district court in *HANYS* should therefore be affirmed. Furthermore, should *HANYS* not be affirmed, the impact on employers' rights of free speech would be irreparably chilled, which is not conducive to

(Matthew Bender & Co., Inc. 2005).

¹³ 388 F. Supp. 2d 6 (N.D.N.Y. 2005).

¹⁴ See *infra* Part III.C. Several groups also moved to appear as amicus curiae, due to the vastly differing opinions between labor and management on the effects of Section 211-a on labor relations in the workplace. *HANYS*, 388 F. Supp. at 8. These groups were the Business Council, the Coalition, and the Brennan Center. *Id.*

¹⁵ See *infra* Part III.C.

¹⁶ Oral arguments were heard before the Second Circuit Court of Appeals on February 10, 2006, and the court's decision is now pending. In addition to the appellants' and appellees' briefs submitted to the Court of Appeals, several groups submitted amicus curiae briefs. On behalf of the plaintiffs-appellees, amicus curiae briefs were submitted by the National Labor Relations Board, Chamber of Commerce of the United States of America, New York State Association of Health Care Providers, Inc., et. al., and National Right to Work Legal Defense Foundation, Inc. On behalf of the defendants-appellants, amicus curiae briefs were submitted by the Brennan Center for Justice, et. al. and fourteen New York scholars on labor and employment law.

advancing the goals of the collective bargaining process. Part I briefly provides background information on union membership and the methods which the unions are engaging to reverse the declining membership trend. Part II explains the development of federal labor law's preemption of state labor legislation through the Supreme Court's development of case law addressing these issues. Part III describes the provisions contained in Section 211-a and Judge McCurn's conclusion in *HANYS* that the federal labor law preempts the statute. Part IV examines arguments on how the *Garmon* and *Machinist* preemption standards, and their various exceptions, should be applied to Section 211-a, and concludes that federal labor law preempts the New York statute. Part V examines the policy implications and impact that an affirmation of the decision in *HANYS* will have in the sphere of labor management relations.

I. THE EMERGENCE OF TACTICS TO BOLSTER UNION MEMBERSHIP

Since the years following World War II, union membership as a percentage of the total workforce nationwide has been steadily diminishing.¹⁷ When the American Federation of Labor-Congress

¹⁷ Frederick D. Braid, *Laws Muzzle Employers*, NAT'L L. J. (May 24, 2004), available at <http://www.hklaw.com/content/whitepapers/lawsmuzzle.pdf>. The decline in union membership has been attributed to numerous economic and social factors. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev 351, 362 (March 2002). First, following WWII, U.S. employment experienced a shift away from manufacturing and mining and toward the service sector. See Press Release, Jeffrey Young, Voice of America, The Challenge Facing U.S. Labor Unions (Sept. 4, 2005), available at <http://author.voanews.com/english/archive/2005-09/2005-08-02-voa17.cfm?renderforprint=1&textonly=1&&CFI=6536443&CFTOKEN=42953398>.

Whereas manufacturing and mining were typically union strongholds, the service sector has historically contained a lower percentage of unionized workers. *Id.* Second, the employment model has shifted from internal labor markets characterized by long-term employment relationships toward unstable employment relationships and an expanding contingent workforce. Befort, *supra*, at 366-67. As a result, organizing has become increasingly difficult because workers fail to see the benefits of union representation when their employment is short-term. *Id.* at 370-71. Third, advances in technology,

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of Industrial Organizations (AFL-CIO) was established in 1955, the unions represented more than one-third of private-sector employees.¹⁸ The most recent data on union membership reveals that in 2005, 12.5% of workers were union members, with a mere 7.8% of private-sector employees belonging to a union.¹⁹

While the unions uniformly desire to bolster membership, they have recently diverged in their approaches toward accomplishing this common goal.²⁰ This divergence in outlook led two of the largest unions, the Service Employees International Union (SEIU) and the Teamsters, to withdraw from the AFL-CIO²¹ on July 25, 2005, and form the Change to Win Coalition.²² The Change to Win

communication, and transportation have induced employers to engage in off-shore production as a means of avoiding unions and simultaneously lowering labor costs. *Id.* at 363-64. *See also* Patrick Mirza, et al., *Ten Changes That Rocked HR: It's No Wonder HR is Expected to Help Manage Change. Look at What it Has Been Through*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT (Dec. 1, 2005), available at 2005 WLNR 22386727. Fourth, globalization has forced employers to cut costs in order to effectively compete in the new economy, resulting in employers more adamantly resisting unions' wage demands or engaging in union avoidance. *See* Befort, *supra*, at 364. *See also* Mirza, *supra*. Fifth, commentators often note that the demographic identity of the workforce has become dramatically more diverse. ROBERT J. RABIN, ET AL., LABOR AND EMPLOYMENT LAW 234, (2nd ed. 1995). *Id.* *See also* Befort *supra*, at 365 (providing the following demographic statistics: In 1950, the workforce was composed of 33.9% adult women. By 2000, this percentage increased to 61.1%. Since 1950, the proportion of nonwhite employees has increased by greater than 50%). Lastly, some commentators and unions blame the decline of unionization on unlawful employer coercion of employees during the union election process, or alternatively on lawful but aggressive employer campaigning. *See infra* Part V.

¹⁸ *See* Michael J. Stief III & Marijane E. Treacy, *Labor Unions Throw Out the Old Rulebook: The AFL-CIO's Split Harbingers a New Era of Activism, With Fresh Challenges for Employers*, 28 NAT'L L. J. 9 (Oct. 31, 2005).

¹⁹ U.S. Census Bureau, U.S. Dep't of Labor, Union Members in 2005 (Jan. 20, 2006), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

²⁰ Voice of America, *supra* note 17.

²¹ The AFL-CIO "is a voluntary federation of 52 national and international labor unions." AFL-CIO, This is the AFL-CIO, <http://www.aflcio.org/aboutus/thisistheaflio/>.

²² *America's Labour Federation: Losing its Grip*, ECONOMIST, July 30, 2005, at 72, available at 2005 WLNR 11967175.

Coalition focuses on wide-scale organizing efforts at the workplace as a means of rectifying decreasing union membership.²³ In contrast, the AFL-CIO focuses its efforts chiefly on politics, by providing monetary funds to support political candidates that it feels would be sympathetic towards labor, and by targeting specific state laws.²⁴

On the organizing front, one tactic that the unions have used over the past several years to reverse the decline in union membership is to shift their focus away from seeking secret ballot elections.²⁵ Secret ballot elections are held by the National Labor Relations Board (NLRB) upon the filing of a petition to determine whether a majority of the employees desire union representation.²⁶ Between the filing of the petition and the holding of the election, the union and the employer mount campaigns to inform employees of their views on unionization.²⁷ Since these employer communications to employees during the campaigns frustrate unions' organizing efforts, unions have targeted their efforts on obtaining card check agreements, particularly in those industries that cannot relocate, including municipalities, universities, and healthcare complexes such as hospitals and nursing homes.²⁸ A

²³ Voice of America, *supra* note 17.

²⁴ *Id.* The AFL-CIO targets legislation involving the minimum wage and safety measures in the workplace, as well as seeking to prevent the spread of Right to Work laws to states in which this legislation is not currently enacted. *Id.* A Right to Work Law is "a state law that prevents labor-management agreements requiring a person to join a union as a condition of employment." BLACK'S LAW DICTIONARY 615 (2nd Pocket ed. 2001). Recently, the AFL-CIO has encouraged the enactment of union neutrality laws by states, including New York Labor Law Section 211-a. *See infra* Part III.A.

²⁵ Braid, *supra* note 17.

²⁶ Peter M. Panken, *Union Organizing and NLRB Representation Cases: A Management Perspective*, SK083 ALI-ABA 421, 427 (2005). For a comprehensive discussion of the procedures for a secret ballot election, *see id.* at 427-31.

²⁷ *Id.* at 428-29. Unions usually want the time between the filing of the petition and the holding of the election to be minimized, so that the employer has less time to communicate the disadvantages of a union to its employees. *Id.* at 429.

²⁸ Norman Poltenson, *Judge Throws Out 'Labor Neutrality Law'*, 19 BUS. J - CENT. N.Y. 1 (May 20, 2005).

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card-check eliminates the need for organizing campaigns and secret ballots by merely requiring that the union present the employer with union authorization cards signed by a majority of the employees in an appropriate bargaining unit in order for the union to be recognized.²⁹ Organized labor lobbied to amend federal labor law to permit card checks to serve as a substitute for secret ballot elections in determining a union's majority status.³⁰ Though unsuccessful, its movement to formalize permissible voluntary recognition through advance card check agreements with employers has seen greater success.³¹

An alternative method employed by unions is to obtain neutrality agreements from employers through private bargaining efforts.³² Neutrality agreements generally require that an employer maintain a neutral position during a union's campaign to organize the employer's workforce.³³ Under a typical neutrality agreement, the employer will voluntarily recognize the union upon a showing of authorization cards signed by the majority of its employees.³⁴ Additional provisions may also be found in neutrality agreements, such as a "gag order" on employer communication to employees about its views on unionization and permitting the union to access the employer's facilities to distribute pro-union literature.³⁵ While

²⁹ *Id.*

³⁰ Braid, *supra* note 17.

³¹ *Id.* According to data provided by the AFL-CIO, in 2004 between 150,000 and 200,000 employees were organized through card-check agreements, while only 70,000 employees were organized through traditional NLRB secret ballot election processes. *See* Stief & Treacy, *supra* note 18.

³² *See* Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 372 (2001) ("[a] central component of the unions' transformed organizing strategy is greater reliance on the pre-recognition neutrality agreement negotiated with an employer whose employees a union is attempting to organize").

³³ Joseph A. Barker, *Keeping Neutrality Agreements Neutral*, 84 MICH B.J. 33, 36 (Aug. 2005).

³⁴ *See generally* George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAW. 215 (Fall 2000) (describing provisions contained in neutrality agreements).

³⁵ *See* Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction its*

these agreements may seem counterintuitive to employers' interests, employers may be willing to compromise their right to oppose union organizing efforts for various reasons, such as to take advantage of business opportunities that may be available solely to employers of union members.³⁶

Major national unions consider the attainment of neutrality agreements to be an important contemporary mechanism for reversing the declining influence of unions in the private workforce,³⁷ and the AFL-CIO has promoted this contractual approach for shifting the context in which organizing occurs.³⁸ The neutrality agreements are advantageous to unions in that they assist them in their efforts to increase membership by bypassing the NLRB's time-consuming, expensive, and ultimately unpredictable process.³⁹ However, there are various obstacles to the unions' attainment of neutrality agreements. One such obstacle is that some employees have filed complaints with the NLRB against unions seeking to overthrow card check and neutrality agreements and impose the traditional secret ballot election, because the employees believe the agreements are attempts to coerce them to join unions

Own Obsolescence? 16 LAB. LAW. 201, 203 (Fall 2000) (describing numerous provisions in neutrality agreement beyond the maintenance of campaign neutrality).

³⁶ See Barker, *supra* note 33, at 34 (describing multiple reasons for why employers may agree to negotiate union neutrality agreements).

³⁷ Cohen, *supra* note 35 at 202 (noting that numerous national unions in a variety of industries have successfully secured neutrality agreements with employers).

³⁸ Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 IND. & LAB. REL. REV. 42 (Oct. 2001).

³⁹ Cohen, *supra* note 35, at 202. See also Barker, *supra* note 33, at 34 (noting that the unions may seek neutrality agreements to circumvent the delay and uncertainty inherent in the secret ballot election process). While the unions win about 50% of secret ballot elections conducted by the NLRB, they win almost 90% of the cases where a card check or neutrality agreement is employed. *Id.* See also BRADLEY W. KAMPAS & SCOTT OBORNE, NINTH CIRCUIT STRIKES DOWN CALIFORNIA'S UNION-NEUTRALITY LEGISLATION, 2004-7 BENDER'S LABOR & EMP. BULL. 1 (Matthew Bender & Co., Inc. 2004) (noting that a 1999 AFL-CIO study determined that unions win 84% of elections when employers are bound by one-sided neutrality clauses).

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against their will.⁴⁰ A significant barrier to the unionizing technique is employer opposition because neutrality agreements require an employer's authorization.⁴¹ Unsurprisingly, organized labor considers the removal of employer opposition to be of the highest priority.⁴²

Due to the limitations of negotiated union neutrality agreements, unions have recently turned their efforts toward fervently lobbying for legislation that encourages or mandates employer neutrality at the state and local levels.⁴³ Unions seeking to organize new members have particularly targeted nonprofit employers whose source of funding is primarily derived from the state government in their push for legislation preventing employers who receive state money from using such funds to discourage unionization.⁴⁴ This legislation starkly differs from privately negotiated neutrality agreements. In private neutrality agreements, employers expressly and voluntarily agree to waive their right to communicate with employees through provisions negotiated with the union.⁴⁵ The neutrality agreement formulated as a result of private bargaining between the employer and union often contains express provisions that allow the employer to respond to employee questions or to misrepresentations by the union.⁴⁶ In contrast, state

⁴⁰ See Barbara Wieland, *Neutrality Pacts Hit Nerve for Workers*, LANSING STATE JOURNAL, May 16, 2004, at 1D (explaining how employees at Dana Corp.'s plant filed complaints with the NLRB against the United Auto Workers union).

⁴¹ Cohen, *supra* note 35, at 201. The agreements may also be subject to unfair labor practices. See Barker, *supra* note 33, at 34 (describing possible legal challenges to union neutrality laws). See also Davies, *supra* note 34 (providing a comprehensive analysis of the legal and practical issues arising from the negotiation and implementation of neutrality agreements).

⁴² Lewis, *supra* note 7.

⁴³ *Id.*

⁴⁴ See Nicholas D'Ambrosio, *New York's Labor Neutrality Law Struck Down by Court*, THE BUSINESS REVIEW, June 10, 2005, available at <http://www.bizjournals.com/albany/stories/2005/06/13/smallb2.html>.

⁴⁵ Cohen, *supra* note 35, at 207. The NLRA protects employers' free speech rights. 29 U.S.C. § 158(c). See *infra* Part IV.A.1.

⁴⁶ Appellees' Brief in Opposition at n.15, *HANYS*, No. 05-2570 (2d Cir. argued Feb. 10, 2006).

imposed union neutrality laws compel limitations on employer communications about unions regardless of their willingness to have the expression of their views restricted.⁴⁷

There have been many recent proposals for legislation prohibiting employers who receive state government funding from spending those funds to advocate for or against unionization.⁴⁸ Although many of these proposals were vetoed or died in committee,⁴⁹ the New York State legislature enacted Labor Law Section 211-a in 1996, which commands that employers shall not use state funds for certain specified acts to discourage or encourage union organizing.⁵⁰ Employers, unions, and the State all have differing views on the statute. Employers facing union organization campaigns have bitterly nicknamed Section 211-a the “employers’ gag law” and view the law as a measure to defeat employer opposition to union organization.⁵¹ Conversely, New York State’s position, as articulated by Governor Pataki, is that Section 211-a is a “union neutrality law” which seeks to ensure that taxpayers’ money is used for its intended purpose.⁵² Unions favor the law for its allegedly pro-union effect of providing protection for workers seeking to organize unions.⁵³ Rather than

⁴⁷ *Id.* (noting that state union neutrality laws impose a “one size fits all” neutrality policy on employers).

⁴⁸ California’s “union neutrality” law is codified as Cal. Govt. Code §§ 16645-49. Similar statutes are, or have been, under consideration in a number of states. For a listing of proposed union neutrality statutes and their outcomes in various state legislatures see John Logan, *Innovations in State and Local Labor Legislation*, in 3 THE STATE OF CALIFORNIA LABOR 181, 196-98 (Institute for Labor and Employment ed., University of California Press 2003). Additionally, a number of local government entities, such as Milwaukee County, have passed similar regulations. See *Metropolitan Milwaukee Ass’n of Commerce v. Milwaukee County*, 359 F. Supp. 2d 749 (E.D. Wis. 2005) (holding that Milwaukee’s union neutrality law which applies to contractors is not preempted by the NLRA).

⁴⁹ See Logan, *supra* note 48, at 196-98.

⁵⁰ N.Y. LAB. LAW § 211-a (McKinney 1996) (amended 2002).

⁵¹ Poltenson, *supra* note 28, at 1.

⁵² *HANYS*, 388 F. Supp. 2d at 9.

⁵³ *Id.* (noting that the President of New York State’s AFL-CIO declared that Section 211-a “ensures that taxpayer dollars will not be used to interfere

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seeking to obtain neutrality agreements with individual employers, today many unions have refocused their efforts by pushing for the adoption of state and local legislation encouraging or mandating employer neutrality.⁵⁴ While the unions' efforts have been met with success in a few state legislatures, these union neutrality laws are beginning to be tested in the courts and because they impose limitations on the employers' free speech, a zone protected by Congress, they may be found to be preempted.

II. THE NLRA AND THE PREEMPTION DOCTRINE

Labor-management relations policy in the United States is governed by the National Labor Relations Act (NLRA).⁵⁵ The preemption doctrine establishes that the NLRA has primacy over all competing state efforts to regulate labor relations, in order to ensure the uniformity of labor policy throughout the United States.⁵⁶ The Supreme Court has established two theories of NLRA preemption over state laws: the *Garmon* preemption and the *Machinists* preemption.⁵⁷ Significantly, however, any finding of preemption requires that the state is engaging in conduct that constitutes regulation of the overall labor market.⁵⁸ The NLRA therefore does not preempt state conduct when it acts as a proprietor or market participant.⁵⁹ When a state act institutes labor conditions on parties in the same manner as a private contractor, then the state is merely participating in the market in its own self-interest, and consequently the market participant exception will apply.⁶⁰

with a worker's constitutional right to join a union")

⁵⁴ KAMPAS & OBORNE, *supra* note 39.

⁵⁵ NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE, *supra* note 12.

⁵⁶ *Id.*

⁵⁷ Befort & Smith, *supra* note 8, at 107.

⁵⁸ *Id.* at 115 (noting that the preemption doctrine will not be implicated where the state engages in conduct that directly effects the parties in a labor dispute but does not constitute regulation).

⁵⁹ 51 C.J.S. LABOR RELATIONS § 42.

⁶⁰ NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE, *supra* note 12.

A. Brief History of the NLRA

In 1935, Congress enacted the National Labor Relations Act (NLRA)⁶¹ to provide uniform federal regulation of the workplace.⁶² The NLRA continues to be the foundation for labor law in the United States.⁶³ The NLRA sets forth the various rules and values governing private sector labor management relations,⁶⁴ including the right of workers to organize and bargain collectively.⁶⁵ In its original form, the NLRA was biased in favor of organized labor, in that it solely protected employees from abuses by their employers.⁶⁶ However, it was later modified with the enactment of the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959, which set forth prohibitions on certain union conduct,⁶⁷ providing for a more neutral policy towards employers and unions.

B. Basis of Preemption of State Law by the NLRA

In examining the many provisions contained in the NLRA, one will not find any explicit declaration of the Act's preemptive effect.⁶⁸ Since Congress has remained silent on the issue of preemption, the preemptive effect of the NLRA is, to a large extent, a judicially-created doctrine.⁶⁹ The Supreme Court in particular has expanded the Act's preemptive effects through its invalidation of numerous state efforts to regulate labor relations.⁷⁰ The courts have reasoned that the NLRA was created because the

⁶¹ 29 U.S.C. §§ 151-69.

⁶² 1-1 LABOR & EMP. LAW § 1.01 (Matthew & Bender & Co., Inc. 2005).

⁶³ RABIN, *supra* note 17, at 15.

⁶⁴ *Id.*

⁶⁵ 29 U.S.C. § 151.

⁶⁶ LABOR & EMP. LAW § 1.01, *supra* note 62.

⁶⁷ *See id.* (explaining the changes to the NLRA imposed by the Taft-Hartley and Landrum-Griffin Acts).

⁶⁸ NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE, *supra* note 12 at n.2.

⁶⁹ *Id.* at 1.

⁷⁰ *Id.*

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states were unable to achieve stable labor relations on their own.⁷¹ With a firm belief that the preemption doctrine seeks to ensure uniform standards for labor policy throughout the United States, the courts have consistently held that the NLRA trumps state efforts to regulate labor relations.⁷² More specifically, in 2003 the Second Circuit recognized the principle that the Supremacy Clause of the United States Constitution ensures that federal law has priority over state law whenever there is conflict among them, and that the NLRA's preemptive effect derives from Congress' "unambiguous intent" in enacting the NLRA to limit state regulation of activity related to labor-management relations.⁷³ Two separate forms of NLRA preemption have emerged that address state laws that improperly regulate labor relations—*Garmon* preemption and *Machinist* preemption.⁷⁴

I. Garmon Preemption

The *Garmon* doctrine prohibits state regulation of activities that are arguably protected by section 7 of the NLRA, and forbids state regulation of conduct arguably constituting an unfair labor practice under section 8.⁷⁵ Hence, the NLRA preempts not merely state regulation that actually conflicts with the NLRA's provisions, but also state regulation of conduct that is arguably protected or

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Rondout Elec., Inc. v. N.Y. State Dept. of Labor*, 335 F.3d 162, 166 (2d Cir. 2003).

⁷⁴ See Robert Rachal, *Machinists Preemption Under the NLRA: A Powerful Tool to Protect an Employer's Freedom to Bargain*, 58 LA. L. REV. 1065, 1066 (Summer 1998).

⁷⁵ *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, (*Boston Harbor*) 507 U.S. 218, 224 (1993) (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (U.S. 1959)). Section 7 of the NLRA protects employees' right to form or join a union, collectively bargain, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 of the NLRA prohibits employers and unions from committing unfair labor practices, including interference with employees' section 7 rights. 29 U.S.C. § 158.

prohibited by the NLRA.⁷⁶ The *Garmon* preemption was set forth in *San Diego Building Trades Council v. Garmon*,⁷⁷ in which the Supreme Court concluded that a state court could not award damages to an employer resulting from peaceful picketing by unions, because the picketing was arguably protected by section 7 of the NLRA, or arguably constituted an unfair labor practice under section 8.⁷⁸ In this case, the unions, none of which were selected by a majority of employees as their collective bargaining agent, engaged in peaceful picketing, which resulted in economic injuries to the employers.⁷⁹ The California state court awarded damages to the employers.⁸⁰ However, on appeal, the Supreme Court held that the state court was precluded from awarding the employers damages because the picketing activity was potentially regulated by federal law; the picketing was arguably protected by section 7 of the NLRA or arguably constituted an unfair labor practice under section 8.⁸¹ Thus evolved what is termed the *Garmon* preemption doctrine, by which issues legislated in the NLRA may not be regulated by legislation of the individual states.

The *Garmon* preemption doctrine exists to prevent states from regulating activities that may conflict with national labor policy.⁸² It is based upon the doctrine of primary jurisdiction, by which the issue of whether the NLRA protects or prohibits state conduct is determined by the National Labor Relations Board (NLRB) as opposed to being resolved by the state courts.⁸³

The Supreme Court has established two exceptions to the

⁷⁶ Befort & Smith, *supra* note 8, at 110.

⁷⁷ 359 U.S. 236 (1959).

⁷⁸ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (U.S. 1959).

⁷⁹ BRUCE HARRISON & RANDI KLEIN HYATT, PROJECT LABOR AGREEMENTS AND THE GOVERNMENT: HAS THE MARKET PARTICIPATION EXCEPTION COME TO SWALLOW THE FEDERAL PREEMPTION RULE?, 5-2 BENDER'S LABOR & EMP. BULL. 2 (Matthew Bender & Co., Inc. 2005).

⁸⁰ *Garmon*, 359 U.S. at 237-38.

⁸¹ *Id.* at 244.

⁸² *Id.* at 246.

⁸³ 2-36 LABOR AND EMP. LAW § 36.05 (Matthew Bender & Co., Inc. 2005).

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Garmon preemption.⁸⁴ First, under what is referred to as the “peripheral concern exception,” state regulations will not be preempted where the activity regulated is a mere peripheral concern of federal labor law.⁸⁵ In determining whether this exception is applicable, the courts focus on the likelihood that the state will regulate conduct that the NLRA protects or prohibits.⁸⁶ Second, under the local interest exception, state regulation will not be preempted where the feelings of strong local interests are involved.⁸⁷ Typically, the courts have found this exception to apply where the state regulation is rooted in violence, threats, intimidation, and obstruction of property.⁸⁸ The Court has expanded the local interest exception to apply to defamation actions based on claims of malicious libel,⁸⁹ and to a state claim for intentional infliction of emotional distress.⁹⁰ However, not all state tort claims raise significant enough state concerns to avoid preemption by federal labor law; business torts, for example, are generally found to fall outside of the local interest exception.⁹¹ While these two open-ended exceptions to the *Garmon* doctrine could have broad applications, they have been interpreted narrowly by the courts.⁹²

⁸⁴ *Garmon*, 359 U.S. at 243-44.

⁸⁵ *Id.*

⁸⁶ LABOR AND EMP. LAW § 36.05, *supra* note 83 (citing *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983)).

⁸⁷ *Garmon*, 359 U.S. at 244.

⁸⁸ LABOR AND EMP. LAW § 36.05, *supra* note 83. *See e.g.* *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (holding that federal labor law did not preempt an employer’s state law claim in the nature of a tort action for damages arising from a union’s threats of violence, even though the threats arguably constituted an unfair labor practice under the NLRA).

⁸⁹ LABOR AND EMP. LAW § 36.05, *supra* note 83 (citing *Linn v. Plant Guard Workers Union, Local 114*, 383 U.S. 53 (1966)).

⁹⁰ LABOR AND EMP. LAW § 36.05, *supra* note 83 (citing *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977) (holding that claims regarding discrimination were preempted, but the state outrageous conduct claim was not preempted)).

⁹¹ LABOR AND EMP. LAW § 36.05, *supra* note 83.

⁹² *Id.*

2. Machinist Preemption

The *Machinist* doctrine prevents states from interfering with the use of economic weapons by parties to a labor-management dispute during the course of collective bargaining, even if the NLRA does not explicitly protect the use of those weapons.⁹³ In *Lodge 76, International Association of Machinists v. Wisconsin Employee Relations Commission*,⁹⁴ the Supreme Court set forth the *Machinist* preemption by holding that the NLRA preempts the authority of a state labor board to enjoin a union from refusing to work overtime because it is an economic self-help activity that Congress intended to leave unregulated.⁹⁵ In this case, the union members refused to work overtime during negotiations for the renewal of an expired collective bargaining agreement with the employer.⁹⁶ The employer filed a complaint with the NLRB, asserting that this refusal constituted an unfair labor practice under the NLRA.⁹⁷ The NLRB determined that the refusal did not violate the NLRA, and therefore dismissed the charge.⁹⁸ The employer also filed an unfair labor practice complaint with the Wisconsin Employees Relations Commission.⁹⁹ This state labor board determined that the refusal constituted an unfair labor practice under state law, and consequently ordered the union to desist from its refusal to work overtime.¹⁰⁰ The Wisconsin state court affirmed the state labor board order.¹⁰¹ However, on appeal the Supreme Court reversed the lower court's affirmation because the union's concerted refusal to work overtime was peaceful conduct and Congress did not intend for the states to regulate such peaceful self-help activity.¹⁰² Thus evolved what is termed the *Machinist*

⁹³ NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE, *supra* note 12.

⁹⁴ 427 U.S. 132 (1976).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² HARRISON & HYATT, *supra* note 79.

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preemption doctrine, by which issues not expressly legislated in the NLRA, but which are deemed contrary to the spirit of national labor policy, may not be regulated by legislation of the individual states.

The *Machinist* doctrine recognizes that Congress intended for some activities to be left unregulated and to be controlled instead by the free play of economic forces,¹⁰³ in contrast to the *Garmon* doctrine which seeks to preserve the NLRB's primary jurisdiction by rendering invalid state conduct that the NLRA arguably protects or prohibits.¹⁰⁴ The *Machinist* preemption affects attempts by the state to restrict the economic self-help weapons that may be utilized by the employer or union during a labor dispute, such as strikes, lockouts, or slowdowns.¹⁰⁵ Employers as well as unions have the right to use economic weapons where more peaceful measures are unavailing.¹⁰⁶ State regulation of conduct essential to an economic conflict between labor and management conflicts with protections rooted in national labor policy and is preempted under the *Machinist* doctrine, even though federal labor law does not expressly protect the conduct.¹⁰⁷

3. Market Participant Exception to Garmon and Machinist Preemption

In *Building and Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* ("Boston Harbor"), the Supreme Court created an exception to the *Garmon* and *Machinist* preemption doctrines, commonly known as the market participant exception, which permits states to act in a proprietary capacity.¹⁰⁸

¹⁰³ Int'l Ass'n of Machinists & Aero. Workers v. Wis. Employment Relations Comm'n (*Machinists*), 427 U.S. 132, 144 (U.S. 1976).

¹⁰⁴ LABOR AND EMP. LAW § 36.05, *supra* note 83.

¹⁰⁵ HARRISON & HYATT, *supra* note 79.

¹⁰⁶ Robert Rachal, *Machinists Preemption Under the NLRA: A Powerful Tool to Protect an Employer's Freedom to Bargain*, 58 LA. L. REV. 1065, 1068 (Summer 1998).

¹⁰⁷ NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE, *supra* note 12.

¹⁰⁸ *Boston Harbor*, 507 U.S. at 227. See Logan, *supra* note 48, at 115.

In *Boston Harbor*, the Massachusetts Water Resources Authority (MWRA), a state agency providing sewage services, hired Kaiser Engineers as its project manager for a project to clean up the pollution in Boston Harbor.¹⁰⁹ Kaiser negotiated a labor agreement with Building and Construction Trades Counsel, and MWRA mandated that Bid Specification 13.1 be incorporated into its solicitation of bids for work on the project.¹¹⁰ Bid Specification 13.1 stipulated that each successful bidder must agree to abide by the labor agreement's provisions.¹¹¹ The Court of Appeals concluded that Bid Specification 13.1 was preempted by the NLRA under both the *Garmon* and the *Machinist* preemption.¹¹² However, the Supreme Court reversed, holding that the NLRA does not preempt a valid pre-hire labor agreement negotiated by private parties where the state authority acted as an owner of a construction project.¹¹³ The Court distinguished between the state government acting as a regulator and as a proprietor.¹¹⁴ The Court articulated that NLRA preemption solely applies to state regulation of labor and not to a state's interactions with private organizations in the marketplace.¹¹⁵

While circuit courts diverge in their application of the market participant exception,¹¹⁶ the Second Circuit during its market participant analysis cited with approval the test applied by the Fifth Circuit in *Cardinal Towing*.¹¹⁷ This test involves a two-part

¹⁰⁹ *Id.* at 220-21.

¹¹⁰ *Id.* at 221-22.

¹¹¹ *Id.* at 222 (specifically, Bid Specification 13.1 provided that "each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the . . . [labor agreement] . . . and will be bound by the provisions of that agreement in the same manner as any provision of the contract").

¹¹² *Id.* at 223-24.

¹¹³ *Id.* at 218-19.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *HANYS*, 388 F. Supp. 2d at 15.

¹¹⁷ 180 F.3d 686 (5th Cir. 1999); *HANYS*, 388 F. Supp. 2d at 7 (citing *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (holding that the Telecommunications Act did not preempt school officials from seeking enforcement of the provisions of their lease because the school officials acted in

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analysis:

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

a proprietary capacity). The Federal District Court for the Northern District of New York in *NextG Networks of N.Y. v. City of N.Y.* also specifically articulated the *Cardinal Towing* test in its analysis of whether the City's actions were proprietary or regulatory. *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 at *17 (N.D.N.Y. 2004). A second test, the *Sage Hospitality* test, derived from *Hotel Employees and Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, emerged in the Third Circuit for deciding whether the market participant exception applies. *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3rd Cir. 2004). The *Sage Hospitality* test employs a two-part analysis for which the second factor is substantially similar to *Cardinal Towing*, but the first factor does not suggest that the state has to prove that its action is typical of the actions of private entities. *HANYS*, 388 F. Supp. 2d at 15. The district court for the Eastern District of Wisconsin in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County (MMAC)* employed the *Sage Hospitality* test, but was reversed by the Seventh Circuit, which engaged in an analysis consistent with *Cardinal Towing*. *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 282 (7th Cir. 2005) (“[I]f the state 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 rather than to displace the authority of the National Labor Relations Act and the National Labor Relations Board, there is no preemption.”); *See Reply Brief for Defendants-Appellants* at 15, *HANYS*, No. 05-2750 (2d Cir. argued Feb. 10, 2006). In *HANYS*, the district court chose to apply the *Cardinal Towing* standard, but did not require the state to prove that its conduct is “typical of similarly situated private entities” because it agreed with the district court’s reasoning in *MMAC* that states often act in areas that private parties do not. *HANYS*, 388 F. Supp. 2d at 17. Since the district court’s decision in *MMAC* has been reversed, and both parties concede that *Cardinal Towing* is the appropriate test to apply in the Second Circuit, this Note asserts that Section 211-a is subject to the *Cardinal Towing* test in determining whether the market participant exception saves it from NLRA preemption. *See Reply Brief for Defendants-Appellants, supra*, at 15.

problem?¹¹⁸

The first prong looks at the nature of the expenditure and protects comprehensive state policies with broad application from preemption, as long as the state is acting in a proprietary manner,¹¹⁹ which involves acting like a private entity with regard to the purchase of goods and services for its own use.¹²⁰ The second prong looks at the scope of the expenditure and protects from preemption narrow spending decisions that do not have the effect of broader social regulation.¹²¹

A point of contention currently exists on whether Section 211-a passes these two criteria, thereby saving it from preemption analysis. While the district court for the Northern District of New York has articulated the inapplicability of the market participant exception to the legislation, in accordance with a modified *Cardinal Towing* test,¹²² this issue is currently being considered by the Second Circuit.¹²³

III. NEW YORK'S UNION NEUTRALITY STATUTE

In the wake of recent pressure by labor organizations on state legislatures to pass union

¹¹⁸ *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 693 (5th Cir. 1999).

¹¹⁹ NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE, *supra* note 12, quoting *Chamber of Commerce of the United States v. Lockyer (Lockyer I)*, 364 F.3d 1154 (9th Cir. 2004).

¹²⁰ JAMES E. BODDY, JR., PREEMPTED OR NOT PREEMPTED - A RECENT DECISION ADDRESSES LABOR PEACE AGREEMENTS FOR GOVERNMENT CONTRACTORS, 5-6 BENDER'S LABOR & EMP. BULL. 1 (Matthew Bender & Co., Inc. 2005).

¹²¹ *Id.*

¹²² See *supra* note 117 and accompanying text.

¹²³ Similarly, a federal district court and the Ninth Circuit in a three judge panel in *Chamber of Commerce of the U.S. v. Lockyer* declared that the California union neutrality statute was not saved from preemption by the market participant exception. 364 F.3d at 1159. A rehearing en banc was later granted and the Ninth Circuit's holding was recently withdrawn by the en banc court. See *infra* note 164 and accompanying text.

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neutrality statutes,¹²⁴ New York State enacted its own version in 1996 through Section 211-a of the New York Labor Law.¹²⁵ The law in its original form underwent various revisions in 2002, which consequently broadened its scope as well as set forth reporting and enforcement measures.¹²⁶ Approximately nine years after the law's original enactment, the federal district court for the Northern District of New York ruled that the law is preempted by the NLRA.¹²⁷

*A. The Legislative History and the Original 1996 Version of
New York's Union Neutrality Law*

In 1996, a Bill was introduced to the New York State Senate seeking to amend the New York Labor Law. The Bill's designated purpose was to prevent state funds from being used to train managers and supervisors in methods to unfairly influence labor relations.¹²⁸ The justification for the Bill was an awareness of various instances in which state funds were being used by employers to finance anti-unionization seminars, and the desire to prohibit state funds from being utilized to finance activities contrary to the right of employees to organize and to engage in collective bargaining.¹²⁹ The Bill specifically noted one instance in which the Office of Aging sponsored a seminar where a labor attorney from an anti-union firm performed a work-shop on methods to avoid unionization in the nursing home industry.¹³⁰

Local 1199 of the Service Employees International Union, a politically powerful New York City-based health care union and the largest union representing healthcare employees in New York State, and the AFL-CIO heavily lobbied for the Bill.¹³¹ Various

¹²⁴ See *supra* Part I.

¹²⁵ N.Y. LAB. LAW § 211-a (McKinney 1996) (amended 2002).

¹²⁶ N.Y. LAB. LAW § 211-a (McKinney 2002).

¹²⁷ *HANYIS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005).

¹²⁸ Assemb. 8058, 219th Leg., Reg. Sess. (N.Y. 1996).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Tamara Loomis, *Statute Limiting Anti-Union Activity Takes Effect Dec. 29*, 228 N.Y. L.J. 1 (Dec. 12, 2002).

unions, including the New York State chapter of the AFL-CIO, New York State United Teachers, the Civil Service Employees Association, and the Public Employees Federation also wrote letters to Governor Pataki urging him to support the Bill.¹³² These unions emphasized their belief that the Bill, if enacted, would protect the rights of New York employees to organize for collective bargaining by prohibiting the use of state funds in anti-union efforts.¹³³ Opponents of the Bill asserted that it was unnecessary because there had been very few instances in which state funds were used to discourage unionization.¹³⁴

Despite opposition from employers, on August 8, 1996, New York enacted the Bill in Labor Law Section 211-a, which went into effect on October 7, 1996.¹³⁵ Initially, the law prohibited employers from using state funds for the purpose of training supervisory or managerial employees in methods of discouraging union organization.¹³⁶ The law in its original form, therefore, was solely targeted at employers who actively discouraged unionization as part of employee training.¹³⁷ Additionally, the original law did not include provisions for enforcement or penalties for violations.¹³⁸ New York unions complained that due to the lack of such provisions, employers were able to evade the law simply by asserting that they were spending state funds to teach managers about compliance with the NLRA.¹³⁹ In order to remedy the perceived flaws in Section 211-a, major labor organizations fervently lobbied for amendments to the law.¹⁴⁰ These labor

¹³² Assemb. 8058, 219th Leg., Reg. Sess. (N.Y. 1996).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ N.Y. LAB. LAW § 211-a (McKinney 1996) (amended 2002).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Logan, *supra* note 48, at 181 n.67. The original law merely provided: "Notwithstanding any other provision of law, no monies appropriated by the state for any purpose shall be used or made available to employers to train managers, supervisors, or other administrative personnel regarding methods to discourage union organization." N.Y. LAB. LAW § 211-a (McKinney 1996).

¹³⁹ Logan, *supra* note 48, at 181 n.67.

¹⁴⁰ Charles H. Kaplan, et al., *N.Y. Employers Face New Laws on Smoking*,

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organizations urged the State to adopt stricter, more effective measures that would prohibit all employers receiving state funding, including private healthcare organizations that accept Medicaid reimbursements and other funds for treatment and services provided to their patients, from using these funds to encourage or discourage union activities.¹⁴¹

B. New York's 2002 Amended Union Neutrality Law

Governor Pataki signed into effect amendments to Section 211-a on December 29, 2002.¹⁴² These amendments greatly broadened the scope of the union neutrality law in a number of ways.¹⁴³ First, as amended, Section 211-a prohibits employers from using state funds not only to discourage union organization, but also to encourage such activity.¹⁴⁴ The legislature expressly declared in the Section its justification for the law:

[W]hen public funds are appropriated for the purchase of specific goods and/or the provision of needed services, and those funds are instead used to encourage or discourage union organization, the proprietary interests of the state are adversely affected. As a result, the legislature declares that the use of state funds and property to encourage or discourage employees from union organization constitutes a misuse of the public funds and a misapplication of scarce resources, which should be utilized solely for the public purpose for which they were appropriated.¹⁴⁵

The scope of the law reaches any employer who does business with New York State, including healthcare, social services,

Discrimination, Organizing, Layoffs, LAB. & EMP. DEP'T. (Thelen Reid & Priest), May 12, 2003, at 3, http://www.constructionweblinks.com/Resources/Industry_Reports_Newsletters/May_12_2003/NY_employment_laws.htm.

¹⁴¹ John Caher, *Judge Strikes Barring Discussion of Union Activity*, N.Y. L.J. (May 20, 2005).

¹⁴² N.Y. LAB. LAW § 211-a (McKinney 2002).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at § 211-a(2).

¹⁴⁵ *Id.* at § 211-a(1).

universities, and other not-for-profit organizations that generally receive the most state money and are largely dependent upon state funding such as Medicare or Medicaid payments.¹⁴⁶

Second, the amendments expand the coverage of the statute by specifying prohibited activities, including the training of managers, the hiring or paying of attorneys or consultants, or the hiring or compensating of employees to either encourage or discourage union organization.¹⁴⁷ The law requires detailed accounting and financial reporting requirements.¹⁴⁸ Employers who receive state funds and engage in activities to encourage or discourage union organization must maintain valid and accurate financial records that sufficiently demonstrate that state funds were not used to pay for such activities.¹⁴⁹ The state agency providing the funds to the employer and the New York State Attorney General could request to review these financial records at any time, and the employer is obligated to provide the records within ten business days of this request.¹⁵⁰ Moreover, the statute grants the New York State Attorney General specific enforcement powers in the form of seeking orders to enjoin the commission of a violation of the law.¹⁵¹ A court may order the return of any misspent funds to the State and the imposition of civil penalties up to one thousand dollars.¹⁵² Additionally, courts have the authority to impose penalties greater than the amount unlawfully expended where the employer knowingly violated the statute or engaged in a previous violation within the preceding two years.¹⁵³

Lastly, the 2002 version of Section 211-a contains a provision authorizing the New York State Labor Commissioner to formulate

¹⁴⁶ Kaplan, *supra* note 140. *See also* Braid, *supra* note 17. The plaintiffs in *HANYS* alleged that they and their member providers receive between 80 and 100% of their revenue from government sources. *See* Complaint, *HANYS* ¶¶ 17-21.

¹⁴⁷ N.Y. LAB. LAW § 211-a(2).

¹⁴⁸ *HANYS*, 388 F. Supp 2d at 9.

¹⁴⁹ N.Y. LAB. LAW § 211-a(3).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at § 211-a(4).

¹⁵² *Id.*

¹⁵³ *Id.*

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regulations that describe both the form and content of the required financial records, and to render guidance to state entities as to the enforcement of the law through the development of contractual and administrative measures.¹⁵⁴

C. Healthcare Association of New York State, Inc. v. Pataki
Ruled that Section 211-a is Preempted.

On October 30, 2002, Margery E. Lieber, Assistant General Counsel for Special Litigation for the National Labor Relations Board (NLRB), wrote to Linda Angello, New York State Labor Commissioner, expressing the NLRB's concerns that Section 211-a may be preempted by the National Labor Relations Act (NLRA).¹⁵⁵ On January 30, 2003, officials from the New York State Attorney General's Labor Bureau and the State's Department of Labor sent a response to the NLRB¹⁵⁶ defending the validity of Section 211-a as a legally permissible choice by the State not to fund certain activities.¹⁵⁷ During this time, a group of healthcare and social service associations in New York wrote a letter to NLRB General Counsel Arthur Rosenfeld and the Special Litigation Branch, seeking an injunction to prevent the enforcement of Section 211-a, or alternatively, seeking to intervene in actions that the NLRB intended to bring in federal court.¹⁵⁸ The NLRB did not respond to the request.¹⁵⁹

On April 3, 2003, a coalition of healthcare organizations representing over 550 non-profit and public hospitals, nursing

¹⁵⁴ *Id.* at § 211-a(5). These regulations had not yet been promulgated when the decision of the federal district court in *HANYS* that Section 211-a was preempted by the NLRA was rendered. Memorandum of Law in Support of Motion to Dismiss at 18, *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03 Civ. 0413), *available at* 2003 WL 24152872.

¹⁵⁵ Herbert G. Birch, Inc., N.L.R.B. no. 29-RC-10227 (July 15, 2004), *available at* <http://www.nlr.gov/nlr/legal/decisions/>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

homes, and residential healthcare facilities¹⁶⁰ filed a lawsuit in the United States District Court for the Northern District of New York against the Governor, the Attorney General, and the Commissioner of Labor for the State of New York.¹⁶¹ The plaintiffs alleged that Section 211-a is preempted by the NLRA and is unconstitutional because it violates their free speech rights under the First Amendment and due process rights under the 14th Amendment.¹⁶² District Judge McCurn ruled that Section 211-a is preempted by the NLRA under the *Machinist* doctrine and granted the plaintiffs summary judgment.¹⁶³ He concluded that the Section hindered an

¹⁶⁰ Logan, *supra* note 48, at 182. See also *HANYS*, 388 F. Supp. 2d at 8. Specifically, plaintiffs were Healthcare Association of New York State, New York Association of Homes and Services for the Aging, New York State Health Facilities Association Inc., NYSARC Inc. and United Cerebral Palsy Associations of New York State. *HANYS*, 388 F. Supp. 2d at 6. These five health-care organizations have members or affiliates that provide a broad range of health-care services. The Healthcare Association of New York State was the lead plaintiff, which is an organization representing 550 New York State non-profit and public health-care organizations, including hospitals, nursing homes, and home-care agencies. Poltenson, *supra* note 28, at 1. The Chamber of Commerce of the United States of America, HR Policy Association, and the Business Council of New York State, Inc. filed an *amici curiae* brief in support of Plaintiffs. See Brief of Amici Curiae Chamber of Commerce of the U.S., et. al., *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03-0413). On behalf of defendants, the Brennan Center for Justice at NYU School of Law, along with thirty anti-poverty consumer, senior citizen, community, religious, civic, immigrant and advocacy organizations, filed an *amicus curiae* brief. See Brief of Amici Curiae Brennan Center for Justice, etc., *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03-0413).

¹⁶¹ *HANYS*, 388 F. Supp. 2d at 8.

¹⁶² Gerald B. Silverman, *Health Care Groups Sue New York to Overturn Labor Organizing Law*, 66 DAILY LABOR REPORT A-5 (2003).

¹⁶³ *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005). The *Machinist* preemption was promulgated in *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*. 427 U.S. 132 (1996) (holding that the NLRA preempted the state labor board's order enjoining the union from refusing to work overtime for the employer because the NLRA intended to leave unregulated the economic pressure asserted by the union in its refusal to work the assigned overtime). The Second Circuit has determined the applicability of the *Machinist* preemption in a few contexts. The Second Circuit has held that New York State's implementation of the prevailing wage

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employer's ability to disseminate information to employees, which amounted to a direct interference with the union organizing process recognized by the NLRA.¹⁶⁴ The Judge further held that the market participant exception to preemption did not apply since the State was acting in a regulatory, not proprietary, capacity.¹⁶⁵ Judge McCurn did not reach the issue of the *Garmon* preemption, nor did he address the constitutional questions raised by the plaintiffs.¹⁶⁶ The case is now on appeal in the U.S. Second

supplement through the annualization regulation was not prohibited by *Machinist* preemption because it had no connection to labor/management bargaining. *Rondout Elec., Inc. v. N.Y. State DOL*, 335 F.3d 162 (2d. Cir. 2003). In contrast, the Second Circuit held that *Machinist* preemption did prohibit a state from refusing to register an electrical contractor's apprentice program due to ongoing negotiations for a new collective bargaining agreement between the union and contractors, because the refusal interfered with bargaining. *Bldg. Trades Emplrs. Educ. Ass'n v. McGowan*, 311 F.3d 501 (2d. Cir. 2002). In *HANYS*, Judge McCurn relied heavily upon the 9th Circuit's decision in *Chamber of Commerce of the U.S. v. Lockyer (Lockyer I)*, 364 F.3d 1154 (9th Cir. 2004) declaring that a California law prohibiting the use of state funds to assist, promote or deter union activity was preempted by the NLRA under the *Machinist* doctrine. Caher, *supra* note 141. *Lockyer I* was recalled for reconsideration by the Ninth Circuit, and the prior opinion was withdrawn with the Ninth Circuit affirming its decision in a three judge panel opinion. *Chamber of Commerce of the U. S. v. Lockyer (Lockyer II)*, 422 F.3d 973 (9th Cir. 2005). In this opinion the Ninth Circuit held that the California law was preempted under both the *Garmon* and the *Machinist* doctrines and that the market participant exception did not apply. *Id.* On January, 17, 2006, a majority of nonrecused regular active judges ordered a rehearing en banc. *Chamber of Commerce of the U.S. v. Lockyer*, Nos. 03-55166, 03-55169, 2006 WL 158673 (9th Cir. 2006). On February 9, 2006, the en banc court held that the opinion and dissent in *Lockyer II* are withdrawn. *Chamber of Commerce of the U.S. v. Lockyer*, Nos. 03-55166, 03-55169, 2006 WL 302357 (9th Cir. 2006).

¹⁶⁴ Caher, *supra* note 141.

¹⁶⁵ NLRA; NLRA PREEMPTION: ANOTHER LOOK AT THE PROPRIETARY/REGULATORY DICHOTOMY; HEALTHCARE ASSOCIATION V. PATAKI, 2005 U.S. DIST. LEXIS 9186 (N.D.N.Y. MAY 17, 2005), 5-7 BENDER'S LABOR & EMP. BULL. 12 (Matthew Bender & Co., Inc. 2005) [hereinafter ANOTHER LOOK AT THE PROPRIETARY/REGULATORY DICHOTOMY].

¹⁶⁶ Caher, *supra* note 141. The First Amendment and due process issues arising from the provisions contained in Section 211-a are beyond the scope of this Note.

Circuit.¹⁶⁷

On appeal, the State contends that Section 211-a is not preempted under the *Machinists* doctrine because the statute simply places limitations on the use of state funds and employers are free to use their own private funds for union-related activities.¹⁶⁸ According to the State, the statute does not impose employer neutrality, and as such it does not regulate in a field that the NLRA intended to be left unregulated.¹⁶⁹ Should the Court of Appeals decide to reach the issue of the *Garmon* preemption, the State maintains that Section 211-a is not preempted under this theory because neither the NLRA nor precedent provides employers with an affirmative right to present their views to employees.¹⁷⁰ In any event, the State asserts that Section 211-a would be saved from preemption under the market participant exception because the State is acting as a market participant under Section 211-a by seeking to ensure that its appropriated funds are used solely for their designated purpose.¹⁷¹

IV. NLRA PREEMPTS SECTION 211-A

Due to Section 211-a's interference with employer free speech, which is arguably protected by Section 8(c) of the NLRA and committed to the NLRB's jurisdiction, the NLRA preempts Section 211-a under the *Garmon* preemption, should the Second Circuit decide to reach this issue.¹⁷² Neither the peripheral concern exception to the *Garmon* preemption nor the local interest exception saves Section 211-a from preemption. Since the district court in *HANYS* correctly concluded that the NLRA preempts

¹⁶⁷ Press Release, Chamber of Commerce, Chamber Welcomes Ruling that Upholds Employer Rights Businesses Retain Right to Discuss Unionization with Workers (Sept. 8, 2005), <http://www.uschamber.com/press/releases/2005/september/05-146.htm>.

¹⁶⁸ Reply Brief for Defendants-Appellants, *supra* note 117, at 1.

¹⁶⁹ *Id.*

¹⁷⁰ Brief for Defendants-Appellants at 42, *HANYS*, No. 05-2750 (2d Cir. argued Feb. 10, 2006).

¹⁷¹ Reply Brief for Defendants-Appellants, *supra* note 117, at 15.

¹⁷² Appellees' Brief in Opposition, *supra* note 46, at 48-50.

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Section 211-a under the *Machinist* preemption and that it is not saved from preemption by the market participant exception, it did not address whether the statute was also preempted under the *Garmon* preemption.¹⁷³ Section 211-a's core spending provisions as well as its enforcement, sanction, and record-keeping provisions are preempted under the *Machinist* doctrine due to their chilling effects on employer free speech, which runs counter to the Congressional intent to leave unfettered fundamental aspects of the labor-management relationship.¹⁷⁴ The market participant exception to both strands of preemption is inapplicable to Section 211-a because an application of the *Cardinal Towing* test reveals that New York State is regulating labor relations, rather than acting as a proprietor or market participant.¹⁷⁵

A. NLRA Preempts Section 211-a Under the Garmon Preemption

The *Garmon* preemption prohibits state regulation of conduct that is arguably protected by the NLRA.¹⁷⁶ A close look at the legislative history and relevant case-law leads to the conclusion that section 8(c) of the NLRA arguably protects employer free speech rights¹⁷⁷ and that the NLRB has primary jurisdiction over employer speech through its administration of union representation elections.¹⁷⁸ Section 211-a's restriction on state funding is preempted under the *Garmon* doctrine as an impermissible interference with the ability of employers to express their views on unionization to employees in the context of a union organizing

¹⁷³ *HANYS*, 388 F. Supp. 2d at 25.

¹⁷⁴ Appellees' Brief in Opposition, *supra* note 46, at 35.

¹⁷⁵ *HANYS*, 388 F. Supp. 2d at 19-20 (holding that under the first and second prongs of the *Cardinal Towing* test, New York State is acting as a regulator under Section 211-a).

¹⁷⁶ *See supra* Part II.B.1.

¹⁷⁷ Ian M. Adams & Richard L. Wyatt, Jr., *Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment*, 22 J. CONTEMP. L. 19, 26-27 (1996).

¹⁷⁸ Appellees' Brief in Opposition, *supra* note 46, at 51.

campaign.¹⁷⁹ Nor is Section 211-a saved from preemption by either of the two exceptions to the *Garmon* doctrine.

1. *Interference with Employer Speech Rights*

The central issue to the *Garmon* preemption's application to Section 211-a is whether employer speech rights are actually protected by the NLRA in that they constitute an affirmative right, or at a minimum are arguably protected.¹⁸⁰ Section 8(c) of the NLRA is titled: "Expression of views without threat of reprisal or force or promise of benefit,"¹⁸¹ and provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.¹⁸²

The relevant precedent and legislative history of the adoption of section 8(c) of the NLRA demonstrates that employer free speech is protected, or at least arguably protected, by the NLRA.¹⁸³ The NLRB, soon after it was created, essentially required that employers take a neutral stance during an election campaign.¹⁸⁴ The Supreme Court opposed this requirement in *NLRB v. Virginia Electric & Power Co.*, holding that the First Amendment protected the expression of non-coercive, anti-union views by employers.¹⁸⁵

¹⁷⁹ Braid, *supra* note 17.

¹⁸⁰ See Reply Memorandum of Law at 4, *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03-0413), available at 2004 WL 3522317.

¹⁸¹ 29 U.S.C. § 158(c).

¹⁸² *Id.*

¹⁸³ Adams & Wyatt, *supra* note 177, at 26-27.

¹⁸⁴ 2-34 LABOR & EMP. LAW § 34.01 (Matthew Bender & Co., Inc. 2005).

¹⁸⁵ *Id.* See *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941) "The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act." *Id.*

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However, the NLRB continued to hold that employers violated the NLRA when they expressed these anti-union viewpoints.¹⁸⁶ Congress thereby amended section 8(c) of the NLRA to clearly articulate the free speech rights of both employers and unions.¹⁸⁷ After the adoption of section 8(c), the NLRB articulated that it may invalidate an election if it found that the parties engaged in objectionable conduct which rendered free choice by the employees unlikely.¹⁸⁸ The Supreme Court recognized that the congressional intent behind the establishment of section 8(c) was to encourage free debate on issues in which labor and management contain opposing viewpoints.¹⁸⁹ In *NLRB v. Gissel Packing Company, Inc.*, the Supreme Court further held that an employer is free to communicate to its employees its views on unionizing as long as the communications do not violate the express provisions of section 8(c), which prohibit threats of reprisal or force or promise of benefit.¹⁹⁰ Section 8(c) is therefore commonly referred to as the employer “free speech” provision.¹⁹¹

The Second Circuit has recognized that employers may express their opposition to the unionization of their workforce, and in expressing such views they are entitled to free speech protection under section 8(c) of the NLRA.¹⁹² According to the Second Circuit, section 8(c) embodies the First Amendment right of

¹⁸⁶ LABOR & EMP. LAW § 34.01, *supra* note 184.

¹⁸⁷ *Id.* The legislative history of section 8(c) demonstrates that it was enacted “to insure both to employers and labor organizations full freedom to express their views to employees on labor matters.” See Memorandum of Law at 8, *HANYS*, 388 F. Supp. 6 (N.D.N.Y. 2005) (No. 03-0413), available at 2003 WL 24152875 (citing S. Rep. No. 80-105, at 23-24 (1947)). The drafters of section 8(c) clearly expressed their purpose in formulating 8(c) as preventing the Board from: “attempt[ing] to circumscribe the right of free speech [even] where there were also findings of unfair labor practices.” Adams & Wyatt, *supra* note 177, at 26 (citing 93 Cong. Rec. 6601 (1947)).

¹⁸⁸ LABOR & EMP. LAW § 34.01, *supra* note 184 (citing *NLRB v. General Shoe Corp.*, 192 F.2d 504 (6th Cir. 1951)).

¹⁸⁹ LABOR & EMP. LAW § 34.01, *supra* note 184.

¹⁹⁰ 1-5 LABOR & EMP. LAW § 5.05 (Matthew Bender & Co., Inc. 2005) (citing *Gissel*, 395 U.S. at 617-19).

¹⁹¹ *Id.*

¹⁹² *Beverly Enters., Inc. v. NLRB*, 139 F.3d 135, 140 (2d Cir. 1998).

employers to freely communicate to their employees any of their opinions about unionism in general, or any of their views about a particular union, provided that the communications do not assert a threat of reprisal or force or promise of benefit.¹⁹³ Providing the employer with the opportunity to communicate freely with its employees not only affirms the employer's right to freedom of speech, but it also supports the employees by enabling them to make informed decisions.¹⁹⁴ The Second Circuit has also noted that in drafting section 8(c), Congress sought to ensure that an employer's lawful speech was not chilled "by preventing the [NLRB] from using anti-union statements, not independently prohibited by the [NLRA], as evidence of unlawful motivation" in a union organizing campaign.¹⁹⁵ The Second Circuit's continued acknowledgement and perpetuation of employers' freedom of speech, and its recognition that this right is embodied in section 8(c), demonstrates that New York courts have construed section 8(c) as conferring speech rights on employers.

The defendants in *HANYS* argued that the NLRB lacks the power to affirmatively protect employer speech, and thereby the *Garmon* preemption does not apply to Section 211-a.¹⁹⁶ This argument ignores well-settled Supreme Court precedent recognizing the Board's competence to judge the impact of statements made in the context of the labor management relationship.¹⁹⁷ For instance, in *NLRB v. Gissel Packing Company, Inc.*, the Supreme Court suggested that it may be appropriate for reviewing courts to defer to the NLRB's inferences as to the lawfulness of the content of employer speech under the NLRA, since the NLRB has competence in this area.¹⁹⁸ Moreover, the NLRB has explicitly stated that it was chosen by Congress to

¹⁹³ *Kinney Drugs v. NLRB*, 74 F.3d 1419, 1428 (2d Cir. 1996).

¹⁹⁴ *Id.*

¹⁹⁵ *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1347 (2d Cir. 1990).

¹⁹⁶ See Brief of Amici Curiae Chamber of Commerce of the U.S., et. al., *supra* note 160, at 21 (citing Memorandum of Law in Support of Motion to Dismiss at 18, *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03 Civ. 0413), available at 2003 WL 24152872).

¹⁹⁷ *Adams & Wyatt*, *supra* note 177, at 32.

¹⁹⁸ *Id.*

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regulate employer speech in the representation and unfair labor practice areas, and as such state regulation of this activity is impermissible.¹⁹⁹ The *HANYS* defendants also contend that section 8(c) does not provide an affirmative employer free speech right, but rather is drafted as an exception to the prohibition against unfair labor practices.²⁰⁰ Since the NLRA does not include non-coercive employer speech in any category of speech deemed an unfair labor practice, however, employers are free to engage in non-coercive speech.²⁰¹ Furthermore, the NLRB has articulated that national labor policy provides employers and unions with the freedom to voice their opinions on unionization in a non-coercive manner.²⁰²

In their argument against an affirmative right to employer free speech, the *HANYS* defendants argued that the source of the employer's right of free speech is the First Amendment, rather than section 8(c) of the NLRA.²⁰³ This position ignores precedent and legislative history, which both demonstrate that section 8(c) protects and embodies the employer's first amendment right to free speech.²⁰⁴ Significantly, in *Gissel*, the Supreme Court treated the employer's right of speech, which is presumably preserved in both the First Amendment and section 8(c), as a statutory right.²⁰⁵ The enactment of section 8(c), therefore, has resulted in the NLRB examining employer speech by referencing the language of this

¹⁹⁹ See Brief for the National Labor Relations Board as Amicus Curiae in Support of Plaintiffs-Appellees and in Support of Affirmance at 22, *HANYS*, No. 05-2570 (2d Cir. argued Feb. 10, 2006) [hereinafter NLRB Amicus Curiae Brief].

²⁰⁰ See Reply Memorandum of Law, *supra* note 180, at 4.

²⁰¹ *Id.*

²⁰² See NLRB Amicus Curiae Brief, *supra* note 199, at 19 (citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966) (noting that section 8(c) manifests Congress' intent to protect free debate from state regulation); *Trent Tube Co.*, 147 NLRB 538, 542 (1964) (holding that absent threats, the NLRB will not restrict the right of unions and employers to inform employees of their views on unionization)).

²⁰³ *HANYS*, 388 F. Supp 2d at 22.

²⁰⁴ *Adams & Wyatt*, *supra* note 177, at 26-27.

²⁰⁵ *Id.* at 34.

section and *Gissel*, rather than the First Amendment.²⁰⁶

Section 211-a appears to impede on the affirmative freedom of speech conferred upon employers by the NLRA and recognized by the Second Circuit. The statute applies to all state contracts, regardless of amount.²⁰⁷ Employers whose budgets are entirely or primarily derived from state funds, principally those in the human or social services industries, are affected by Section 211-a's speech limitations.²⁰⁸ Such employers may find themselves unable to exercise their rights to inform employees of their views of unionization during an organizational campaign.²⁰⁹ As a result of Section 211-a, employees would likely only hear the views of union organizers, which creates a coercive bias toward unionization.²¹⁰

Healthcare providers, as employers, further assert that Section 211-a decreases the value of their speech rights. The healthcare providers in New York who are largely, if not completely, funded by New York State have complained that Section 211-a impeded them from speaking freely with their employees during unionization campaigns, thereby preventing healthcare workers from being afforded the opportunity to hear both sides of the unionization debate.²¹¹ New York State's argument that the employers can use their own private funds aside from state grants towards unionization efforts²¹² is inapplicable to these employers, because these employers do not have private funds available with

²⁰⁶ *Id.*

²⁰⁷ Kaplan, *supra* note 140.

²⁰⁸ See Brief of Amici Curiae Chamber of Commerce of the U.S., et. al., *supra* note 160, at 10. See also Braid, *supra* note 17.

²⁰⁹ See Brief of Amici Curiae Chamber of Commerce of the U.S., et. al., *supra* note 160, at 17.

²¹⁰ Braid, *supra* note 17.

²¹¹ Poltenson, *supra* note 28, at 1.

²¹² Prior to Governor Pataki signing the 2002 Bill suggesting the amendments to Section 211-a, the Governor's Counsel, James McGuire, requested comments on the Bill from Kathy Bennett, the Chief of the Legislative Bureau of the Attorney General's Office. In a memorandum, Bennett responded that the Bill merely prevents employers from using state funds to engage in any of the prohibited activities. Independence Residences, Inc. N.L.R.B. no. 29-RC-10030 (June 7, 2004), available at <http://www.nlr.gov/nlr/legal/decisions/>.

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which to fund communications regarding unionization.²¹³

*2. Section 211-a Does Not Fall Under Either of the Two
Exceptions to Garmon Preemption*

Both exceptions to the *Garmon* preemption are inapplicable to Section 211-a. First, the peripheral concern exception does not apply here because in this case, the employers' free speech rights are not peripheral to the NLRA.²¹⁴ Rather, free speech rights are firmly established in section 8(c) of the NLRA as demonstrated by legislative history, congressional intent, and case law precedent.²¹⁵ A prime concern in the drafting of section 8(c) was the right to open debate in the face of a union organizing campaign, and the employees' right to hear both sides of the debate.²¹⁶ Thus, it appears that the concern about open debate and free speech rights is a fundamental component of the NLRA.

Second, the local interest exception, which allows states to regulate where the feelings of strong local interests are involved, also is inapplicable. The local interest exception can be found in the traditional law of torts whereby states are permitted to grant compensation for violent or threatening conduct.²¹⁷ All of the antecedents to the local interest exception cited in *Garmon* were cases in which violence, intimidation, and obstruction of property

²¹³ See Frederick D. Braid Aff. ¶ 15, *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03-0413) (arguing that in an NLRB election at Independence Residences Inc., the employer, which was virtually entirely dependent on government funding, could only utilize private contributions that were not specified in the means in which they could be used, in its efforts to communicate with employees during organizing campaigns.). *But see* Brent Garren Aff. ¶ 32, *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03-0413). (arguing that in an NLRB election at Independence Residences, Inc. (IRI), the employer, which was virtually entirely dependent on state funding, complied with Section 211-a's provisions and waged an aggressive anti-union campaign that sufficiently provided its employees with relevant information about unionization.).

²¹⁴ See Brief of Amici Curiae Chamber of Commerce of the U.S., et. al., *supra* note 160, at 23.

²¹⁵ See *id.*

²¹⁶ *Id.*

²¹⁷ LABOR AND EMP. LAW § 36.05, *supra* note 83.

served as the basis for state regulation.²¹⁸ However, in subsequent decisions the court expanded the scope of the exception to include defamation actions that arise in the context of labor disputes and actions for intentional infliction of emotional harm.²¹⁹ Section 211-a does not address tort claims nor does it relate to violent or threatening conduct, which is the primary context with which this exception has been raised.²²⁰ Section 211-a also does not fit the further exceptions carved out in other areas for the exception. Likewise, the law is not deeply rooted in local feeling, and it is therefore not saved from preemption by the local interest exception.²²¹ Thus, the NLRA preempts Section 211-a under the *Garmon* doctrine and Section 211-a is not saved from preemption by the two carved out exceptions.

*B. NLRA Preempts Section 211-a Under the Machinist
Preemption Doctrine*

The *Machinist* preemption prohibits state regulation of fundamental aspects of the collective bargaining process which Congress intended to be left “to be controlled by the free play of economic forces.”²²² Section 211-a’s core spending restriction interferes with non-coercive speech by employers, which is counter to the Congressional intent to protect free debate from regulation in the context of a union organizing campaign.²²³ The enforcement, sanction, and record-keeping provisions found in Section 211-a further chill employer free speech by imposing disincentives and compliance burdens.²²⁴

1. Congress Intentionally Left the Area of Employer Speech

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See Brief of Amici Curiae Chamber of Commerce of the U.S., et. al., *supra* note 160, at 24.

²²² See NLRB Amicus Curiae Brief, *supra* note 199, at 19 (citing *Machinists*, 427 U.S. at 140).

²²³ *Id.*

²²⁴ *Id.* at 17.

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Unregulated

When state action has an impact on the labor-management relationship, it does not necessarily follow that this action would impede the effective implementation of the NLRA's policies.²²⁵ As recognized by the Second Circuit, the *Machinist* preemption applies only where the state action regulates the use of economic self-help weapons that may be utilized by the employer or union during a labor dispute, such as strikes, lockouts, or slowdowns, which are recognized and protected under the NLRA.²²⁶ State interference with substantive aspects of the bargaining process to an extent that Congress would find unacceptable is preempted under the *Machinist* doctrine.²²⁷ State laws of general applicability, such as the regulation of labor conditions, usually are not preempted by the NLRA, whereas state regulations that target a process central to the union organizing and collective bargaining system established by the NLRA are generally preempted.²²⁸

The *Machinist* preemption applies to Section 211-a because the law in effect regulates an employer's ability to engage in non-coercive speech to express its views regarding union organization.²²⁹ An employer's ability to engage in non-coercive speech is conduct that Congress sought to be left unregulated in furtherance of the NLRA's policies.²³⁰ Employers may want to convey to their employees the possible disadvantages of unionization, such as the costs to employees of union dues and fees, and whether a particular union has a record of corruption,

²²⁵ *HANYS*, 388 F. Supp 2d at 21 (citing *New England Health Care, Employees Union, District 1199 v. Rowland*, 221 F. Supp. 2d 297, 328 (D. Conn. 2002) (quoting *New York Tel. Co. v. New York St. Dept. of Labor*, 440 U.S. 519, 531 (1979))).

²²⁶ *HANYS*, 388 F. Supp 2d at 21 (citing *Rondout Elec., Inc. v. N.Y. State DOL*, 335 F.3d 162, 167 (2d Cir. 2003)).

²²⁷ *Id.*

²²⁸ *Alcantara v. Allied Properties, LLC*, 334 F. Supp. 2d 336, 342 (E.D.N.Y. 2004) (quoting *Lockyer I*, 364 F.3d at 1167).

²²⁹ *HANYS*, 388 F. Supp 2d at 22.

²³⁰ *Id.*

violence, racial discrimination, or misrepresentation.²³¹ Although Section 211-a does not prevent employers from utilizing private funds for these activities, the reality is that the state government is often the largest source, and in certain instances virtually the only source, of funding for many employers, especially in the healthcare industry.²³² Absent the ability to train supervisors and administrative personnel, compensate personnel, and hire attorneys and consultants in efforts to convey the employer's message on union organizing, the employer may be left without assistance in expressing its views on unionization in a manner that will not render unfair labor practice charges.²³³ Consequently, the flow of information to employees which may help them decide whether unionizing is in their best interests is hindered, thereby working at cross-purposes with the federal law which was designed to foster informed decisions by employees on unionization.²³⁴ The core statutory language of Section 211-a, which prohibits encouraging or discouraging union organization, therefore interferes with the union-organizing process recognized by the NLRA by restraining free debate regarding union organization.²³⁵ Section 211-a's interference with non-coercive employer speech during a union organizing campaign restricts an area that Congress intended to be left unregulated.

2. Section 211-a's Enforcement, Sanction, and Record-Keeping Provisions Further Support Preemption

Aside from Section 211-a's core spending provisions prohibiting state funds from being used to encourage or discourage union organization, Section 211-a's enforcement, sanction, and record-keeping provisions directly and negatively affect the union

²³¹ See Memorandum of Law, *supra* note 184, at 9.

²³² See Brief of Amici Curiae New York State Association of Health Care Providers, et al. in Support of Plaintiffs-Appellees and Affirmation of the District Court, at 4 n.5, *HANYS*, No. 05-2750 (2d Cir. argued Feb. 10, 2006).

²³³ See NLRB Amicus Curiae Brief, *supra* note 199, at 26.

²³⁴ See Reply Memorandum of Law, *supra* note 180, at 3.

²³⁵ *HANYS*, 388 F. Supp 2d at 22-23.

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organizing process.²³⁶ The enforcement provisions could feasibly result in an injunction which, if it occurs during a union-organizing campaign, may have a disruptive effect on the employer's ability to voice its opinion to employees.²³⁷ Also, unions can press the Attorney General to investigate alleged claims of misuse of state funds.²³⁸ In fact, the Attorney General has audited employers for compliance with Section 211-a during union organization campaigns, and some of these audits occurred due to union requests.²³⁹ Consequently, employers risk being accused of mispending state funds in any instance in which they speak about the merits of union organization, thereby deterring employers from speaking freely on such merits.²⁴⁰ The balance of power between unions and employers would therefore be interrupted because the mere threat of enforcement would empower the unions to extract concessions from employers in negotiating recognition agreements.²⁴¹

An additional problem is that sanctions for Section 211-a violations can be punitive in nature, including increased fines for knowing violations or criminal penalties.²⁴² These punitive sanctions are at odds with the sanctions imposed by the NLRA for violations, which are strictly remedial.²⁴³ Additionally, threatening employers with fines and criminal penalties if they use state payments to discourage unionization is contrary to the employers' rights under federal labor policy, which entitles employers to

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See Greenberg Traurig, Greenberg Traurig Alert: Ninth Circuit Rules that California's "Neutrality Statute" is Preempted by the National Labor Relations Act, (Sept. 2005), http://www.gtlaw.com/pub/alerts/2005/09_04.asp.

²³⁹ NLRB Amicus Curiae Brief, *supra* note 199, at 17 n.8.

²⁴⁰ Greenberg Traurig, *supra* note 238.

²⁴¹ NLRB Amicus Curiae Brief, *supra* note 199, at 17 n.8.

²⁴² *Id.* at 22.

²⁴³ *Id.* (citing NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212 (2d Cir. 1980); "Punitive sanctions are inconsistent . . . with the remedial philosophy of the NLRA." Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, 475 U.S. 282, 288 n.5 (1985)).

discourage union representation in a number of circumstances.²⁴⁴

Before the *HANYS* decision in 2005, the NLRB noticed Section 211-a's potential conflict with the concept of free debate under the NLRA. In a letter to the New York State Labor Commissioner on October 30, 2002, Margery E. Lieber, NLRB Assistant General Counsel for Special Litigation, expressed to the Commissioner the NLRB's concerns over Section 211-a's impact on employers' free speech rights in union-organizing drives.²⁴⁵ The letter noted:

[I]t appears that the labor neutrality law will effectively regulate conduct that is intended by Congress to be free from governmental interference.

For example, the law imposes a requirement of employer neutrality during union organizing drives by restricting state funds from being used to encourage or discourage unionization (Section 2); imposes a burdensome record-keeping requirement for those employers who choose not to remain neutral (Section 3); and imposes substantial risk of punitive civil penalties and Attorney General prosecution of employers for any perceived violations of its provisions (Section 4). These provisions, taken together, appear to go well beyond New York's choice not to fund certain conduct as they interfere with rights under the NLRA to freely discuss labor relations issues during union organizing.²⁴⁶

Thus, the NLRB asserted that since Section 211-a directly regulates the union-organizing process itself, and imposes substantial compliance costs on employers who participate in that

²⁴⁴ See *id.* at 18 (noting that employers have the right to discourage representation where a union seeks recognition in an inappropriate bargaining unit, where the union insists upon representing supervisors or managers, or where the union uses coercive tactics).

²⁴⁵ See Brief of Amici Curiae Chamber of Commerce of the U.S., et. al., *supra* note 160, at 3.

²⁴⁶ *Id.* (citing letter dated Oct. 30, 2003, from the NLRB to Commission or Labor Linda Angello). The Acting General Counsel of the NLRB, Arthur Rosenfeld, also expressed his belief that New York's "union neutrality" law should be struck down because it "is a political ploy that undermines federal Labor Law." Independence Residences, Inc. N.L.R.B. no. 29-RC-10030 (June 7, 2004), available at <http://www.nlr.gov/nlr/legal/decisions/>.

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process, the statute interferes with an area Congress intended to leave free of state regulation and thereby is preempted under the *Machinist* doctrine.²⁴⁷

C. Section 211-a is Not Precluded from NLRA Preemption by the Market Participant Exception

In applying the two factors of the *Cardinal Towing* test, it is evident that the market

participant exception is inapplicable to Section 211-a because New York State is acting as a regulator rather than a proprietor or market participant. First, despite the proprietary purpose articulated in the statute, New York State is not acting as a proprietor by concerning itself with employers' use of state funds subsequent to the provision of services and by restricting employers' spending of their own money.²⁴⁸ The State is also regulating labor relations by discouraging employers from voicing their views on unionization during an organizing campaign.²⁴⁹ Second, Section 211-a is regulatory in nature because it involves broader policy setting through its application to all state contracts.²⁵⁰ Hence, Section 211-a is not saved from NLRA preemption.

In addressing the first issue under *Cardinal Towing*, whether Section 211-a reflects New York State's interest in its efficient procurement of needed goods and services, the New York district court in *Legal Aid Society v. City of New York* articulated that the objective effects, rather than the subjective motivations, of the challenged state action ought to be gauged by determining "whether the action functions to promote a particular labor policy in general or else to serve legitimate proprietary needs within a more discrete setting."²⁵¹ Furthermore, in *Aeroground, Inc. v. City and County of San Francisco* the district court held that the air

²⁴⁷ *HANYS*, 388 F. Supp. 2d at 23.

²⁴⁸ Appellees' Brief in Opposition, *supra* note 46, at 22-23, 27.

²⁴⁹ *HANYS*, 388 F. Supp. 2d at 20.

²⁵⁰ *Id.* at 17.

²⁵¹ *Legal Aid Society v. City of New York*, 114 F. Supp. 2d 204, 237 (N.D.N.Y. 2000).

commission's declaration that the purpose of its card check rule was a proprietary interest in the revenues resulting from the efficient operation of the airport, could not defeat the actual application of the rule.²⁵² Therefore, while the legislature articulated that the purpose of Section 211-a was to ensure that scarce public resources were used solely for their intended purposes (i.e., to benefit the public), which it deems is proprietary in nature, the subjective motivations of the State are irrelevant; rather, the objective effects of the statute are to be considered.²⁵³

Even if we were to consider the subjective motivations, the legislative history provides ample reason to believe that Section 211-a was not enacted for financial reasons alone. While the State insists that the purpose of the legislation is to safeguard public money and not to lower barriers to union organization, business employers who oppose New York's union neutrality law have cited speeches by labor officials and their political allies' legislation as evidence that the law's actual purpose is to enhance unionization, not to protect the integrity of public money.²⁵⁴ The Bill that served as the basis for the enactment of the Section even declares that the purpose of the legislation was to prohibit state funds from being utilized to finance activities contrary to the right of employees to organize and to engage in collective bargaining.²⁵⁵

Section 211-a is also not automatically characterized as proprietary merely because it addresses the financial interests of a public entity²⁵⁶ or because it involves a state's spending power.²⁵⁷ In *Aeroground*, the court held that while the commission may have intended the rule to be for a strictly financial purpose, "simply addressing the financial interests of a public entity does not make

²⁵² *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950, 958 (D. Cal. 2001).

²⁵³ *HANYS*, 388 F. Supp. 2d at 19 (citing N.Y. LAB. LAW § 211-a(1)).

²⁵⁴ Logan, *supra* note 48, at 190.

²⁵⁵ Assemb. 8058, 219 Leg., Reg. Sess. (N.Y. 1996).

²⁵⁶ ANOTHER LOOK AT THE PROPRIETARY/REGULATORY DICHOTOMY, *supra* note 165.

²⁵⁷ *Wis. Dep't. of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986) (holding that there is no validity to the distinction between a state's regulatory power and a state's spending power).

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such efforts those of a market participant.”²⁵⁸ New York State is not acting in a proprietary role because particularly in the Medicaid context Section 211-a places restrictions on the use of state funds once a contract has already been awarded, as opposed to setting prices for services.²⁵⁹ It is unlikely that private parties would be concerned with the recipient’s use of its payments for goods and services that have already been provided.²⁶⁰ Section 211-a regulates employers’ spending of their own money because Medicaid reimbursement for services previously rendered is the facility’s money, and hence the state does not have a proprietary interest in the funds.²⁶¹ In addition, since a large portion of these Medicaid payments derive from federal and local sources, the state has no proprietary interest over these funds when they merely pass through the state treasury for administration to employers.²⁶²

In looking beyond Section 211-a’s recitation of a proprietary interest, it is evident that Section 211-a is a regulatory decision that alters national labor policy by seeking to stifle the employers’ exercise of free speech rights.²⁶³ Other states have addressed similar issues and have found the market participation exception inapplicable. For instance, in *New England Health Care, Employees Union, District 1199 v. Rowland*, the district court of Connecticut held that the state’s anticipatory subsidies and use of state resources during nursing-home strikes constituted regulatory actions that were focused on the broad policy-oriented interest of ensuring the health and safety of the public, and as such the state’s actions were not considered to be proprietary.²⁶⁴ According to the

²⁵⁸ Aeroground, 170 F. Supp. 2d at 958.

²⁵⁹ Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Plaintiffs-Appellees at 25, *HANYS*, No. 05-2750 (2d Cir. argued Feb. 10, 2006). See Michael Parker Aff. ¶ 36, *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03-0413) (explaining that the State reimburses for services already rendered by paying Medicaid providers after it has already received a service in the quality and quantity for which it had contracted).

²⁶⁰ Appellees’ Brief in Opposition, *supra* note 46, at 27.

²⁶¹ *Id.* at 22-23.

²⁶² *Id.* at 26-27.

²⁶³ *Id.* at 28.

²⁶⁴ *New England Health Care, Employees Union, District 1199 v. Rowland*,

court, where the policy decisions constituted regulation that had a discernible impact on the bargaining relationship between labor and management, the market participant exception is not fitting.²⁶⁵ Likewise, Section 211-a is a regulatory scheme that focuses on the state's economic well-being, and has an impact on the labor-management relationship.²⁶⁶ Despite its facially neutral language, the statute affects the policy of neutrality in labor relations by fostering one-sided debate in union organizing campaigns.²⁶⁷ The statute essentially permits unions to actively participate in union organization campaigns, while curtailing the ability of employers to voice their opposition to unions.²⁶⁸

For the second *Cardinal Towing* factor, courts often look to the scope of the state's conduct in deciding the application of the market participant exception.²⁶⁹ If a state's activity is focused on one specific project, courts usually determine that the state is acting in a proprietary capacity.²⁷⁰ On the other hand, where the

221 F. Supp. 2d 297, 327 (D. Conn. 2002).

²⁶⁵ *Id.* at 328.

²⁶⁶ *HANYS*, 388 F. Supp. 2d at 19 (“Section 211-a ‘by its design sweeps broadly to shape policy in the overall labor market’ . . . [and is an] ‘important part of the state’s system for safeguarding the public fisc.’”) (quoting *Lockyer I*, 364 F.3d at 1163); Brief of Brennan Center for Justice et. al. as Amici Curiae Supporting Defendants at 2, *HANYS*, 388 F. Supp. 2d (N.D.N.Y. 2005) (No. 03-0413), available at 2003 WL 24152867.

²⁶⁷ ANOTHER LOOK AT THE PROPRIETARY/REGULATORY DICHOTOMY, *supra* note 165 (citing *HANYS*, 388 F. Supp. 2d at 20).

²⁶⁸ *Id.*

²⁶⁹ Befort & Smith, *supra* note 8, at 117-18.

²⁷⁰ *Id.* at 117. See also *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 693 (5th Cir. 1999) (holding that a city was acting as a proprietor when it passed and enforced an ordinance involving contract provisions for bidders for the city's towing services); *Boston Harbor*, 507 U.S. at 232 (holding that a state agency was acting as a proprietor when it contracted for the construction of sewage treatment and other facilities that it would own and manage); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (holding that the School District acted as a proprietor where it entered into a single lease agreement with respect to a single building that required the provider of wireless communication services to certify that it was in compliance with FCC regulations). *But see* *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002) (determining that an

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state's conduct is akin to policy setting, courts typically construe the state's activity as regulation.²⁷¹ In *Boston Harbor*, the Supreme Court held that a bid specification that was specifically tailored to one particular project did not constitute regulation.²⁷² The New York district court in *Van-Go Transport Co. v. New York Board of Education* distinguished the case from *Boston Harbor* in holding that New York City Board of Education's policy of refusing to conditionally certify replacement workers was regulatory because the policy extended beyond the contract in issue through its industry-wide effect of restricting the ability of contractors to hire strike replacement workers, which is an established federal right.²⁷³ Likewise, the New York statute has a broad scope and encourages a general policy rather than narrowly seeking to address a specific proprietary problem.²⁷⁴ Section 211-a applies to all state contracts, regardless of the amount of funding.²⁷⁵ In this respect, Section 211-a is even broader in scope than California's Neutrality Statute, which was not implicated unless the state funds exceeded a specified monetary floor of \$10,000.²⁷⁶ Hence, the market participant exception is not applicable to Section 211-a.

V. PROHIBITING EMPLOYERS FROM USING STATE FUNDS FOR
UNION-RELATED ACTIVITIES WILL HAVE A NEGATIVE IMPACT ON
LABOR MANAGEMENT RELATIONS IN NEW YORK STATE

Section 211-a is discernibly one-sided in favor of unions, and is effectively a measure

executive order constituted proprietary action even though the order constituted a blanket, across-the-board rule that was uniformly applied to government contractors). *Allbaugh*, however, may be inconsistent with the holdings of other market participant cases. Befort & Smith, *supra* note 8, at 119.

²⁷¹ Befort & Smith, *supra* note 8, at 117 (citing *Dillingham Const. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999) (holding that the state acted as a regulator where it established an apprentice prevailing wage law that was not created for a particular project)).

²⁷² *Boston Harbor*, 507 U.S. at 232.

²⁷³ *Van-Go Transp.*, 53 F. Supp. 2d at 288.

²⁷⁴ *HANYS*, 388 F. Supp. 2d at 17.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 18.

designed by New York State to use its purchasing power to impose neutrality on employers during union organizing campaigns,²⁷⁷ as evidenced by the statute's history and impact. The law originated from the vigorous lobbying efforts of two politically influential unions—the Service Employees International Union and the AFL-CIO.²⁷⁸ While the unions pushed for Governor George Pataki to sign Section 211-a, employer groups were strongly opposed to the law.²⁷⁹ Section 211-a's effects also favor unions, as demonstrated by Judge McCurn's holding in *HANYS* that: “despite its facially neutral language, section 211-a effects the policy of neutrality in the labor arena. It does this by in essence allowing unions to actively participate in union organization campaigns, while at the same time significantly curtailing the ability of employers to voice their opposition to unions.”²⁸⁰

The troublesome result of New York Labor Law Section 211-a's imposition of neutrality on employers is the significant disruption of the National Labor Relations Act's recognized and purposeful balance of the employer's speech rights against the union's speech rights.²⁸¹ The NLRA designates that the NLRB conduct a secret-ballot election to resolve disputes over union recognition.²⁸² Inherent in that process is an opportunity for both unions and employers to convey their views on unionization to employees before the election is held.²⁸³ The NLRA has a policy of encouraging vigorous debate between labor and management, which is considered an important means toward ensuring that employees make informed decisions about union representation.²⁸⁴ As a result of the balance of speech rights among labor and management in pre-election communications to employees, unions

²⁷⁷ NLRB Amicus Curiae Brief, *supra* note 199, at 4.

²⁷⁸ Appellees' Brief in Opposition, *supra* note 46, at n.6 (citing *U.S. Court Rejects California Labor Neutrality Law*, ALBANY TIMES UNION, Sept. 27, 2002, at B2). See also Loomis, *supra* note 131.

²⁷⁹ See *supra* Part III.A.

²⁸⁰ *HANYS*, 388 F. Supp. 2d at 20.

²⁸¹ See Lewis, *supra* note 7.

²⁸² See NLRB Amicus Curiae Brief, *supra* note 199, at 20.

²⁸³ Braid, *supra* note 17.

²⁸⁴ *Id.*

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historically won approximately 55% of the secret ballot elections conducted by the NLRB.²⁸⁵ When employer neutrality is imposed, however, there is a wide disparity in election results, with unions winning an appreciably greater number of elections.²⁸⁶ This result illustrates the disruptive effect of union neutrality laws in the area of labor management relations. Proponents of neutrality agreements and card check, however, maintain that these methods of union organizing are preferable to NLRB-supervised elections.²⁸⁷ The supporters stress that these agreements account for more new union members than NLRB election victories, largely due to the diminishment of employers' anti-union speech or conduct during election campaigns.²⁸⁸ Critics of neutrality agreements and card check counter that employee free choice can only be realized through a vibrant election campaign supervised by the NLRB, in which both the employer and the union inform employees of their views on unionization.²⁸⁹

The provision in Section 211-a specifically prohibiting the use of state funds to train supervisors or managers regarding methods to encourage or discourage unionization, or to hire or pay attorneys or consultants to encourage or discourage union organization impedes employers' efforts to engage in the full range of activities and speech that the NLRA and NLRB permit during a union organizing campaign.²⁹⁰ In the wake of the aggressive agenda

²⁸⁵ Lewis, *supra* note 7. See also Barker, *supra* note 33, at 34 (noting that unions win secret ballot elections about half the time).

²⁸⁶ Lewis, *supra* note 7 (noting a 1999 AFL-CIO study concluding that unions win 84% of elections when employers are bound by agreements containing one-sided neutrality provisions). See also Barker, *supra* note 33, at 34 (stating that it has been estimated that as many as 90% of the instances in which a card-check or neutrality agreement is in place, the union has obtained the status of bargaining representative).

²⁸⁷ James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 22 (March 2005) (asserting that the NLRB election paradigm should be restructured or completely replaced by alternative approaches, such as card check and neutrality agreements).

²⁸⁸ *Id.* at 830, 832.

²⁸⁹ *Id.* at 841.

²⁹⁰ Michael Parker Aff., *supra* note 259, at ¶ 14.

announced by the AFL-CIO and the Change to Win Coalition to revitalize the unions through lobbying and wide-scale organizing efforts, employers may require legal advice on the new tactics employed by the labor unions and the lawful responses management may provide to employees' questions about unions, as well as advice in the development of a strategy to respond to an aggressive approach from the unions.²⁹¹ Also, the NLRB has recognized the significance of unrestricted access to attorneys and well-trained managerial staff as a means of fostering its goal of prompt resolution of representation disputes.²⁹² According to the NLRB, attorney advice may assist employers in bringing forward evidence of unfair labor practices of the petitioning union, in communicating to its employees in a lawful manner, and in promptly correcting any mistakes in expressing its views.²⁹³

Supervisors and managers may also find it increasingly necessary to become educated about their rights to communicate with employees about the employer's philosophy on unions.²⁹⁴ Since supervisors have direct contact with employees, they are the most essential personnel in communications with the employees, and they are in the best position to make a determination as to critical issues the employer should address and information that needs to be clarified or emphasized.²⁹⁵ Therefore, by placing restrictions on state funding for advise, counseling, and training which are lawful under the current federal labor relations scheme, Section 211-a interferes with the NLRA's policy for labor management relations.

²⁹¹ Stief & Treacy, *supra* note 18. See Unions and Management Representatives Disagree on Extent of Consultants' Influence, 75 DLR C-1, April 19, 1988 (providing an estimate by a management labor relations attorney that 99% of companies retain attorneys or management consultants when faced with a union organizing drive "because they don't know how to react legally or practically.").

²⁹² NLRB Amicus Curiae Brief, *supra* note 199, at 25.

²⁹³ *Id.* at 26 (citing NLRB v. Savair Mfg. Co., 414 U.S. 270, 277 (1973); ITT Lighting Fixtures, Div. of ITT Corp. v. NLRB, 712 F.2d 40 (2d Cir. 1983); Columbia Alaska Reg'l Hosp., 327 NLRB 876, 877 (1999)).

²⁹⁴ Stief & Treacy, *supra* note 18.

²⁹⁵ Frederick D. Braid Aff., *supra* note 213, at ¶ 21.

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In addition to Section 211-a's core spending provision prohibiting employers from using state funds to discourage or encourage unionization, the statute's record-keeping and penalty provisions further have a chilling effect on employers' ability to communicate their views to employees during an union election campaign. The President of the Healthcare Association of New York State, which was the main plaintiff in *HANYS*, expressed his frustrations with the state record-keeping requirements by asserting that healthcare providers were finding it impossible to separate state funds from federal monies expended to treat a Medicaid patient.²⁹⁶ If hospitals are thereby unable to comply with the record-keeping requirements, they are in violation of Section 211-a and can face harsh penalties.²⁹⁷ As a result, employers, especially nonprofit healthcare providers, may be intimidated into deciding not to oppose the union-organizing effort in order to avoid being charged with violating Section 211-a and then having to deal with the difficulties proving that they are not using state dollars on labor consultants.²⁹⁸ Section 211-a thus effectively prevents employers from exercising their free speech rights during a unionization campaign.²⁹⁹ An affirmation of the district court's ruling in *HANYS* will guarantee that employers that are largely funded by the state government are able to provide their employees with factual information and freely communicate their views during a unionization campaign to the same extent as other employers, thereby allowing workers to hear both sides of the unionization debate and make an informed decision about whether they want union representation.³⁰⁰

²⁹⁶ Coalition Of Health Care Employers Urges Federal Government To Act Against State Employer Gag Law, *HANYS* (Jan. 7, 2003), <http://www.hanys.org/communications/pr/010703pr.cfm>.

²⁹⁷ *Id.*

²⁹⁸ Seanna Adcox, Pataki Signs Bill Barring Use of Public Funds to Fight Union Organizing Efforts, *MENTAL HEALTH E-NEWS* (Oct. 1, 2002), http://www.nyaprs.org/pages/view_eneews.cfm?enewsid=2152.

²⁹⁹ Coalition Of Health Care Employers Urges Federal Government To Act Against State Employer Gag Law, *HANYS* (Jan. 7, 2003), <http://www.hanys.org/communications/pr/010703pr.cfm>.

³⁰⁰ D'Ambrosio, *supra* note 44.

Section 211-a's chilling effect on speech is imposed even on employers who receive a significant portion of funding from private sources.³⁰¹ An examination of California's Neutrality Statute is particularly instructive with regard to Section 211-a.³⁰² The practical effect of California's Neutrality Statute's compliance, enforcement, and penalty provisions was to force employers who received grants from the State to remain neutral during union-organizing campaigns by placing significant restrictions on employers' rights to spend money on otherwise legal, non-coercive means of communicating their views on unionization to employees.³⁰³ In California, unions used the Neutrality Statute's enforcement provisions to obtain bargaining leverage in labor disputes, while the Statute's intended purpose—to provide recovery on claims for funds spent on union organizing activities in violation of the statute—fell to the wayside.³⁰⁴

There exists a substantial record containing numerous instances where labor unions in California leveraged the significant compliance burdens of the Neutrality Statute as a means of enhancing their bargaining position against employers.³⁰⁵ After the enactment of California's Neutrality Statute, unions in California sought to coerce employers into refraining from hiring consultants and attorneys, and from communicating their views about unionization to employees, by sending threatening complaints containing allegations of employer violations of the statute to the employers and the California Attorney General's office, many of which provided no factual support.³⁰⁶ For example, one union allegation of a violation of the Neutrality Statute contained little factual support, and even contained an offer to settle the alleged violation if the employer agreed to enter into a neutrality

³⁰¹ See Braid, *supra* note 17.

³⁰² Although the *Lockyer II* decision was withdrawn and the case is currently being reheard by the en banc court, the record for California's Neutrality Statute was laid out by the 9th Circuit in *Lockyer I*.

³⁰³ Greenberg Traurig, *supra* note 238.

³⁰⁴ *Id.*

³⁰⁵ *Lockyer II*, 422 F.3d at 980.

³⁰⁶ *Id.* at 980-81.

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agreement with the union.³⁰⁷ Several lawsuits were also filed against employers pursuant to the Neutrality Statute by California's Attorney General and by the unions themselves.³⁰⁸ In one case, the Service Employees International Union, Local 399, which at the time of the suit was a member union of the AFL-CIO, alleged that a nursing home unlawfully used state funds to deter union organizing by its employees, as well as failed to maintain financial records sufficient to demonstrate that the funds were not used towards union organizing efforts.³⁰⁹ The Service Employees International Union furthermore pressed various employers who received funding from the California government to either permit unionization or otherwise face penalties under the Neutrality Statute,³¹⁰ which demonstrates the pro-union impact of California's law.³¹¹

What occurred in California foreshadows the likely effects of Section 211-a should the law be permitted to remain in force. California's Neutrality Statute and Section 211-a contain very similar provisions.³¹² Both laws mandate that employers must maintain financial records in order to demonstrate compliance.³¹³ Penalties imposed by the laws include rescission and civil penalties for those employers who commit knowing and repeated violations.³¹⁴ One difference between the statutes is that California's Neutrality Statute includes a state taxpayer suit provision, which provides for private enforcement of the statute.³¹⁵ While Section 211-a lacks such a provision, it permits the state attorney general to seek an order restraining the employer's

³⁰⁷ *Id.* at 980.

³⁰⁸ *Id.* at 981.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 982.

³¹² See *HANYS*, 388 F. Supp. 2d at 23 (noting that "section 211-a and the *Lockyer* statute are remarkably similar").

³¹³ *Id.* at 24 (noting that the mandatory record keeping provisions in both statutes are similar).

³¹⁴ *Id.*

³¹⁵ *Id.*

commission of the alleged violation.³¹⁶ If such state action occurs during a union organizing campaign, it may very well have the same disruptive effect as a taxpayer lawsuit.³¹⁷ Moreover, when the Service Employees International Union brought suit against a nursing home in California, it premised a cause of action in its lawsuit that did not rely on California's Neutrality Statute's private enforcement provision.³¹⁸ Rather, it alleged that the nursing home's misuse of state funds gave the union a cause of action for injunctive relief and restitution on behalf of the State of California.³¹⁹ Therefore, unions could potentially sue under New York State law to enforce Section 211-a's restriction on the use of state funds.³²⁰

In fact, in a few instances prior to the challenge to Section 211-a brought in *HANYS*, the unions brought complaints to the Attorney General about alleged employer Section 211-a violations.³²¹ For example, in response to a complaint brought by the Union of Needletrades Industrial and Textile Employees (UNITE) alleging Section 211-a violations, the New York State Comptroller informed an affiliate of United Cerebral Palsy Associations of New York State, (CPANY) one of the plaintiffs in *HANYS*, that it would be initiating an investigation of its use of both state and county funds during its organization campaign, without mentioning to CPANY the supposed illegal conduct.³²² Should the Second Circuit not find that Section 211-a is preempted, it is more than likely that these complaints will multiply as they did in California, inevitably inhibiting the ability of employers to engage in the election campaign.³²³

³¹⁶ *Id.* (citing N.Y. LAB. LAW § 211-a(4)).

³¹⁷ *Id.*

³¹⁸ *Lockyer II*, 422 F.3d at 981.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ Appellees' Brief in Opposition, *supra* note 46, at 56.

³²² Michael Parker Aff., *supra* note 259, at ¶ 16. The letter stated that the Comptroller received a report detailing allegations with respect to misuse of public funds. Letter from Leonard A. Mancusi, Special Assistant to the Comptroller, to Katie Meskell, Executive Director of CPANY, Oct. 10, 2003.

³²³ Appellees' Brief in Opposition, *supra* note 46, at 56.

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Proposals for union neutrality legislation similar to those passed by California and New York have been introduced in the legislatures of numerous other states.³²⁴ However, should the Ninth Circuit agree with its vacated opinion in *Chamber of Commerce of the United States v. Lockyer*, which declared that the California Neutrality Statute was preempted under both the *Machinist* and the *Garmon* doctrines, this holding will likely signal an end to the trend of state legislation imposing employer neutrality during union organizing campaigns.³²⁵ An affirmation of *HANYS* would further signal to other states that legislation setting forth spending limitations that impede employers' free speech rights during union organizing campaigns are preempted by the NLRA.³²⁶ An affirmation would also provide employers in New York receiving state funds with the freedom to communicate their views on unionization to employees in a non-coercive manner without fear of incurring substantial penalties, and the restoration of a level playing field in contested union organizing campaigns by fostering open debate.³²⁷ Furthermore, should the Second Circuit not affirm the *HANYS* decision, the likely resultant proliferation of state union neutrality laws differing in the restrictions they impose on labor activities would subject multi-state employers to differing rules as to their spending of state funds, the books and records they need to keep, and the penalties to which they would be subjected for violating the statutes.³²⁸ This development would frustrate Congress' purpose in establishing a uniform national labor policy.³²⁹

On the other side, should the Second Circuit decide to affirm *HANYS*, the unions may construe Section 211-a's preemption as a crippling setback to their efforts to reverse the declining trend in

³²⁴ *Lockyer II*, 422 F.3d at 981.

³²⁵ Greenberg Traurig, *supra* note 238. See also Lewis, *supra* note 7.

³²⁶ *Id.*

³²⁷ Braid, *supra* note 17.

³²⁸ Appellees' Brief in Opposition, *supra* note 46, at 42. See also NLRB Amicus Curiae Brief, *supra* note 199, at 22 (noting that Board elections would be conducted differently in states having union neutrality agreements from those who do not).

³²⁹ *Id.* at 43.

union membership. The unions have insisted that the utilization of labor consultants and labor attorneys by employers during organizing campaigns has constituted a significant reason for the decline in union membership and the decrease in union success rates in NLRB elections.³³⁰ Union advocates maintain that the NLRA's ideological underpinnings are to favor and promote union organization, yet employers focus on the NLRA's protection of informed employee choice with regard to whether they desire union representation.³³¹ The latter value is inherent in the system of labor relations imposed by the NLRA, and resultantly allows for free debate and the active opposition of American employers to union organizing efforts as a means of ensuring that employees are not receiving one-sided, biased information on unionization.³³² Some commentators point to the NLRA's facilitation of employer opposition, through its use of representation elections as the preferred method of determining union majority status, as a contributing factor to the steep decline of unionization in the United States.³³³ Employers are therefore permitted under the NLRA to wage an anti-union campaign with the only proviso being that threats, coercion, or promise of benefits are impermissible.³³⁴ Unions claim, however, that employers abuse

³³⁰ Unions and Management Representatives Disagree on Extent of Consultants' Influence, 75 DLR C-1, April 19, 1988. The unions consider seminars offered by consultants on such topics as union decertification to be union busting techniques, and have asserted that labor lawyers are becoming more involved in union prevention tactics. *Id.* However, this explanation for the union decline has been refuted by employers, attorneys, and consultants who contend that the decline in union membership is due to a myriad of other significant factors. *Id.*

³³¹ Peter M. Panken, *supra* note 26, at 425.

³³² Befort, *supra* note 17, at 371 (stating that the active opposition of employers to union organizing efforts is a unique attribute of the American system of labor relations).

³³³ *Id.* at 371-72 (noting that the NLRA's electoral model differs from other industrialized countries. Whereas such countries employ a system in which employers must automatically bargain with a union, in the United States an employer is not obligated to bargain with a union until it demonstrates majority status in a representation election. *Id.*)

³³⁴ *Id.* (referring to the provisions in NLRA section 8(c)).

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this system by engaging in unlawful conduct and delaying and obstructing organizing drives.³³⁵ Studies on whether employers' anti-union tactics in fact influence election outcomes is conflicting,³³⁶ and Arthur Rosenfeld, Acting General Counsel of the NLRB, has maintained that the decline in union membership is not necessarily due to unfair tactics by employers.³³⁷

Despite the conflicting views of the effects of the NLRA's procedures for union organizing, under national labor policy as it presently exists, both the unions and employers have the freedom to voice their opinions regarding union representation in a non-coercive manner and employees have the freedom to become informed about both the advantages and disadvantages of unionization.³³⁸ The liberty to campaign in the workplace may be validly waived by either the union or employer, but solely in instances where the waiver constitutes a voluntary choice resulting from bargaining.³³⁹ Section 211-a is therefore at odds with federal labor policy as it currently exists.³⁴⁰ Should the unions believe that union neutrality laws are an effective and important mechanism for bolstering union membership, they ought to lobby Congress to amend the NLRA directly or to write exemptions into other laws.³⁴¹

³³⁵ Fred O. Williams, *NLRB Wants State's 'Union Neutrality' Law Struck Down*, BUFFALO NEWS (May 10, 2003) at C-1.

³³⁶ Befort, *supra* note 17, at 372 (citing conflicting empirical studies). See Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983), in SAMUEL ESTREICHER & STEWART J. SCHWAB, FOUNDATIONS OF LABOR AND EMPLOYMENT LAW 105-11 (Foundation Press 2000) (contending that the decline in union success in representation elections is largely due to deficiencies in the NLRA, namely that it does not eliminate coercive antiunion employer tactics).

³³⁷ Williams, *supra* note 335.

³³⁸ NLRB Amicus Curiae Brief, *supra* note 199, at 19.

³³⁹ *Id.* at 20 (citing *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986)).

³⁴⁰ See NLRB Amicus Curiae Brief, *supra* note 199, at 30 (stating that Section 211-a essentially rewrites the NLRA).

³⁴¹ See *id.* (noting that Congress alone has the authority to revise the NLRA). In fact, amendments to the NLRA which would alter the Board's representation process were proposed in 1977 and 1978, but were subsequently

CONCLUSION

Section 211-a directly interferes with the NLRA's policy of open debate as a method of providing employees with information in union representation elections.³⁴² The law effectively deprives employees of their employer's viewpoint when they are considering unionization.³⁴³ The law thereby imposes a bias toward unionization by leaving union organizers free to communicate to employees the advantages of unions, while employers' free speech rights to provide the opposing viewpoint are diminished.³⁴⁴ Since this regulation is an impermissible interference with federal regulation of labor management activities, Section 211-a is fully preempted by the NLRA.³⁴⁵

The determination made by the Second Circuit in its consideration of the State's appeal

from the district court's holding in *HANYS* is likely to have a pronounced effect on labor relations in New York State. If the Second Circuit upholds the district court's decision, employers will be free to use state funding to either encourage or discourage union organizing activities. Employers contend that this freedom will restore the balance between labor and management by allowing employees contemplating joining a union to hear both sides of the unionization debate.³⁴⁶ Since organized labor in New York viewed the law as a means toward curbing the problem of public subsidy of anti-union campaigns,³⁴⁷ they will have to look to methods other than neutrality laws to achieve this goal.³⁴⁸

rejected by Congress. *Id.* at 4. More recently, the Employee Free Choice Act, H.R. 1696, 108th Cong. (2005) has been introduced to Congress, and seeks to advocate neutrality and card-check processes that would essentially eliminate the traditional process of government conducted secret-ballot elections.

³⁴² See Appellees' Brief in Opposition, *supra* note 46, at 37.

³⁴³ Braid, *supra* note 17.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ Caher, *supra* note 141.

³⁴⁷ Logan, *supra* note 48, at 187.

³⁴⁸ *Id.* Other methods can include responsible contractor legislation or legislation expanding collective bargaining coverage, which do not raise

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The State laments the district court's decision as an affront to its discretion in placing restrictions on the spending of state funds.³⁴⁹ However, the mere fact that the State is using its spending power is insufficient to save Section 211-a's interference with the NLRA and its subsequent preemption, because Congress would not have intended to permit a state to overtake the NLRA's federal scheme of law, remedy, and administration simply because the state was using its spending power.³⁵⁰ As recognized by the district court in *HANYS*, while

ensuring 'essential state-funded services for the most vulnerable New Yorkers' is a laudable goal . . . 'the State must take care that, in its zeal to act, it does not do so unnecessarily and outside the permissible bounds of its discretion and thereby tread on the federally protected zone of labor rights.'³⁵¹

preemption or constitutional issues, and may prove more effective at circumventing aggressive anti-union campaigns. *Id.* at 189.

³⁴⁹ Caher, *supra* note 141.

³⁵⁰ See NLRB Amicus Curiae Brief, *supra* note 199, at 5.

³⁵¹ *HANYS*, 388 F. Supp. 2d at 25 (quoting Brief of Amici Curiae Brennan Center for Justice, etc. at 1, *HANYS*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005) (No. 03-0413); New England Health Care, Employees Union, District 1199 v. Rowland, 221 F. Supp. 2d 297, 345 (D. Conn. 2002)).