# No. 05-2570-cv

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

**HEALTHCARE ASSOCIATION OF NEW YORK STATE, INC., NEW YORK STATE ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, INC., NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., NYSARC, INC. and UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK,**

***Plaintiffs-Appellees***

**v.**

**GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK and LINDA ANGELLO, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK,**

***Defendants-Appellants***

---

**ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK**

---

# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

---


**ABBY PROPIS SIMMS**
*Deputy Assistant General Counsel*

**DAWN L. GOLDSTEIN**
*Senior Attorney*

**ARTHUR F. ROSENFELD**
*Acting General Counsel*

**JOHN E. HIGGINS, JR.**
*Deputy General Counsel*

**JOHN H. FERGUSON**
*Associate General Counsel*

**ERIC G. MOSKOWITZ**
*Assistant General Counsel*

**National Labor Relations Board**
**1099 14th Street, NW, Suite 8600**
**Washington, DC 20570**
**Telephone: (202) 273-2930**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** Page(s)

**Cases--Cont'd:** Page(s)

**Cases--Cont'd:** Page(s)

**Cases--Cont'd:** Page(s)



**Federal Statutes:**

National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*):



**Federal Legislative Materials:**



**NLRB Rules and Regulations:**

Page(s)

**New York State Statutes:**



**New York State Legislative Materials:**



**Miscellaneous:**

## STATEMENT OF AMICUS CURIAE'S INTEREST

The National Labor Relations Board ("Board" or "NLRB") is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. § 151 *et seq*. The Board conducts secret ballot elections in which employees decide whether to be represented by a labor organization. The Board also regulates employers' and unions' conduct that has a reasonable tendency to impair employee free choice. Congress determined that the Board's centralized NLRA administration is necessary to obtain uniform application of Congress' policies and avoid conflicts likely to result from a variety of local laws or procedures.

By FRAP 29(a), the Board respectfully submits this amicus-curiae brief setting forth its position regarding plaintiffs-appellees' preemption challenge to N.Y. Labor Law Section 211-a ("Section 211-a"). The Board (Chairman Battista and Member Schaumber; Member Liebman dissenting) concluded that Section 211-a is preempted by the NLRA because it regulates private sector partisan labor relations activities in conflict with Congressional intent.

## SECTION 211-a

In 2002, the New York Assembly banned the use of state funds to hire, train, or pay certain persons to encourage or discourage unionization. Such expenditures are declared "a misuse of the public funds and a misapplication of

scarce public resources, which should be utilized solely for the public purpose for which they were appropriated." § 211-a(1) ("Subsection 1"). New York asserts that using public funds for prohibited purposes adversely affects its proprietary interests. *Id.*

Section 211-a bars state-funded organizations from using state funds to: pay attorneys or consultants, train managers, or hire certain employees, if any of those activities have the purpose of encouraging or discouraging union organization or an employee from participating in a union organizing drive. § 211-a(2) ("Subsection 2").[1] Affected employers who choose not to remain neutral and wish to retain professional aid or to train their managers to respond to a union campaign must keep audited financial records for three years demonstrating that only private funds paid for the activities, and must make these records available upon request by state authorities. § 211-a(3). The Attorney General can sue violators for: injunctive relief, the return of unlawfully used funds, and a civil penalty up to one thousand dollars or, in some cases, up to three times the unlawfully spent funds, whichever is greater. § 211-a(4). Violators are also guilty of a criminal misdemeanor. N.Y. Labor Law § 213.

[1] The Attorney General apparently will enforce only Subsection 2's specific prohibitions, not Subsection 1's broad restriction.

## ARGUMENT

## SECTION 211-a IS A REGULATORY SCHEME THAT CONLIFCTS WITH NATIONAL LABOR POLICY AND IS THEREFORE PREEMPTED BY THE NLRA

### 1. Introduction

Congress enacted the NLRA largely to provide an administrative mechanism for peacefully and expeditiously resolving questions concerning union representation.[2] Congress established an integrated scheme of rights, protections, and prohibitions governing employee, employer, and union conduct during organizing campaigns and representation elections. The basic employee rights are embodied in Section 7, 29 U.S.C. § 157, which protects the right "to self-organization" and "to form, join, or assist labor organizations," as well as the right "to refrain from ... such activities." To protect these employee rights, Congress enacted Section 8, *id.* at § 158, which creates a network of prohibitions on employer and union conduct that would restrain the exercise of Section 7 rights. However, "to encourage free debate on issues dividing labor and management," *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966), Congress enacted Section 8(c), which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof … shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no

[2] *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964).

threat of reprisal or force or promise of benefit," 29 U.S.C. § 158(c). Section 9, regulates the union recognition process, providing election machinery for determining and certifying employees' decisions on unionization. Under Section 9, the Board regulates employer and union conduct that could be prejudicial to a fair election, even if not prohibited by Section 8. *General Shoe Corp.*, 77 NLRB 124, 126 (1948).

Critics of the NLRA statutory scheme have long complained that employers have undue opportunities to influence employees against unionization. To remedy this perceived problem, amendments to the Board's representation process have been proposed,[3] such as those considered by Congress in 1977 and 1978, and, after much controversy, rejected.[4] Some states have used their purchasing power to pressure employers to remain neutral during union organizing campaigns. Section 211-a is one such measure. It is explicitly premised on the view that certain employer expenditures to influence unionization, even if permitted under the NLRA's regulatory scheme, are "a misuse of the public funds." Section 211-a's

[3] Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1805 (1983).

[4] Labor Law Reform Act of 1977-1978, which passed the House of Representatives but was successfully filibustered in the Senate. H.R. Rep. No. 95-637, 95th Cong., 1st Sess. 69 (1977) (accompanying H.R. 8410); S. Rep. No. 95-628, 95th Cong., 2d Sess. 23-26 (1978) (accompanying S. 2467). The recentlyintroduced "Employee Free Choice Act," S. 842, H.R. 1696, 109th Cong. (2005), in part, would require Board certification after a card check reveals majority support for a union.

use of financial and other regulatory pressures to deter professional or informed partisan employer speech conflicts with federal policy, expressed in Section 8(c), "to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, 80th Congress, 1st Sess., pp. 23-24 (1947). Section 211-a also inhibits employer expenditures that advance Section 9's purposes. As we explain more fully below, Section 211-a, while nominally about state spending, is really an impermissible regulatory attempt to substitute state labor policy for existing federal labor policy.

**2. Applicable Preemption Principles**

"It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). Although the NLRA contains no express preemption provision, any state law is preempted if it "either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created," or stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 240 (1967) (quotation and citations omitted); *see also Livadas v. Bradshaw*, 512 U.S. 107, 120, 134-35 (1994) (state policy preempted by conflict with implicit NLRA rights); *Brown v. Hotel Employees*, 468 U.S. 491, 501

(1984). Under preemption principles, state governments ordinarily cannot choose to withhold benefits from persons in commerce solely because these persons have engaged in NLRA-regulated conduct, *Gould*, 475 U.S. at 286, or conduct deliberately left unregulated for federal policy reasons, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989)(*Golden State II*). *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, No. 05-1531, 2005 WL 3275787 at *3, (7th Cir. December 5, 2005)("Milwaukee").[5]

### 3. Section 211-a is a Regulatory Enactment

The threshold question in NLRA preemption analysis is whether the challenged action constitutes regulation, not proprietary action of government acting as an ordinary market participant. *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227-232 (1993) ("*Boston Harbor*"); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-18 (2d Cir. 2002).

[5] Although general preemption principles "are no less applicable in the field of labor law," *Brown*, 468 U.S. at 501, two unique NLRA preemption doctrines exist. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) ("[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence" of the Board); *Lodge 76, Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 147 (1976) (prohibiting regulation of activities intentionally left by Congress "to be controlled by the free play of economic forces"). Preemption categories are not "rigidly distinct." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000)(quotation omitted); *see also Livadas*, 512 U.S. at 118 n.11 (finding difference between conflict preemption and *Machinists* preemption analyses in that case "entirely semantic").

In *Boston Harbor*, a court-ordered cleanup required construction to proceed without delays from causes such as labor disputes. 507 U.S. at 221. Based on its general contractor's recommendation, the responsible state agency imposed a pre-hire contracting requirement, common in construction, to ensure completion within the court's strict deadlines. *Id.* Under that requirement, bidding construction firms had to sign a pre-hire collective-bargaining agreement, authorized by NLRA Section 8(e) and (f).

The *Boston Harbor* Court recognized that state governments often "must interact with private participants in the marketplace," and when acting only in such a proprietary capacity, are immune from NLRA pre-emption "because pre-emption doctrines apply only to state *regulation*." *Id.* at 227. The Court cautioned, however, that government cannot immunize its conduct from scrutiny simply by showing a private employer *could* have acted in the same manner. "A private actor… can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive," yet such an actor "would be attempting to 'regulate' the suppliers and would not be acting as a typical proprietor." *Id.* at 229. Thus, while the NLRA sometimes allows private parties to act as *de facto* regulators, the Court reaffirmed that state governments may not do the same. *Id.*

To preserve the necessary distinction between a government's market participation and its *de facto* regulation, the Court concluded that a government

entity would enjoy preemption immunity only when it "acts as a market participant with *no interest in setting policy*;" *i.e.*, only where government "pursues its *purely* proprietary interests." *Id.* at 229, 231 (emphasis added).

Under that exacting standard, the Court found the prehire contracting requirement exempt from preemption. In assessing the contracting requirement's typicality, the Court quoted then-Chief Judge Breyer's dissent below that the state agency "act[ed] just like a private contractor would act, and condition[ed] its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find." *Id.* at 233. Furthermore, the Court found the challenged action "specifically tailored to one particular job." *Id.* at 232. Thus, the Court concluded the agency's conduct did not "'regulate' the workings of the market forces that Congress expected to find," rather, "it exemplifie[d] them." *Id.* at 233.

*Boston Harbor*'s ultimate teaching is that a court must distinguish ordinary regulation from a protected class of proprietary action that is "so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)(quoted in *Sprint*, 283 F.3d at 420). To make that distinction, a reviewing court must undertake a two-part analysis of the

challenged action's "manifest purpose and inevitable effect." *Gould*, 475 U.S. at 291.

First, the court must determine whether the challenged action serves the government's "purely proprietary interests" in a project or transaction. *Boston Harbor*, 507 U.S. at 231; *Sprint*, 283 F.3d at 420-21 (inquiring whether government action is "plainly proprietary"). To satisfy a reviewing court, a government must be able to "defend[] [its action] as a legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. at 291; *Cardinal Towing*, 180 F.3d at 693, *quoted by Chamber of Commerce of the U.S. v. Lockyer*, 422 F.3d 973, 991 (9th Cir. 2005) (*Lockyer II*), *en banc request pending* (Nos. 03-55166, 03-55169)("the challenged action essentially reflect[s] 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."); *Milwaukee*, 2005 WL 3275787 at *4 (asking whether county engaged in "tried and true" remedy to serve allegedly proprietary interests).

Second, a court must inquire whether the challenged action's scope is "specifically tailored" to achieving government's purely proprietary interests. *Boston Harbor*, 507 U.S. at 232. *Accord Sprint*, 283 F.3d at 420-21(emphasizing lease agreement applied to single building); *see also Cardinal Towing*, 180 F.3d at 693 ("the narrow scope of the challenged action defeat[s] an inference that its

primary goal was to encourage a general policy rather than address a specific proprietary problem").

Moreover, a state's proprietary claim should be scrutinized to "safely [rule] out" a regulatory purpose before finding the action proprietary. *Cardinal Towing*, 180 F.3d at 693. That approach reflects the reality that lawmakers are frequently subject to pressures to engage in policy-making and are much less constrained by market forces than private actors. *Id.* at 693 n.2.[6]

**a. Section 211-a fails to serve purely proprietary interests**

Examination of Section 211-a shows that it is not proprietary, but instead, a barely disguised attempt to regulate labor relations. First, New York has failed to prove that Section 211-a is typical of similarly-situated private parties' actions. This failure runs directly contrary to *Boston Harbor*, which compared the state actions against ordinary behavior of private parties. 507 U.S. at 229, 232, 233; *see also Sprint,* 283 F.3d at 420-21; *Cardinal Towing,* 180 F.3d at 693.

[6] For the reasons stated above, the district court here erred in finding that New York need not prove typicality. *Pataki*, 388 F.Supp.3d at 16-17. However, the district court correctly rejected granting uncritical deference to New York's self-serving declaration of its allegedly proprietary purpose in Subsection 1. *See Gade v. National Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 106 (1992); *Greater NY Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999)(abrogated on other grounds).

Here, Section 211-a's Subsection 1 restricts the use of state moneys received by private employers, regardless of whether the contracted-for "specific goods" or "needed services" are received. A typical private purchaser of goods or services would not insist on permanently controlling downstream use of money paid to the contractor, where such restriction is unrelated to the purchaser's timely receipt of quality goods or needed services. New York has made no showing that private-sector proprietors typically attempt to permanently control employers' use of their compensation in this unusual manner – including restricting access to professional advice. Section 211-a simply does not comport with "the ordinary behavior of private parties." *Cardinal Towing*, 180 F.3d at 693. Because this permanent downstream control of money paid to contractors is wholly "unrelated to the employer's performance of contractual obligations to the [Government]," it is not proprietary. *See Boston Harbor*, 507 U.S. at 228-29; *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002).

Second, Section 211-a's regulatory nature is indicated by its policy-based focus on labor speech expenditures. The statute does not prohibit spending money on costly professional advice enabling employers to exercise their rights under other federal employment laws such as the Fair Labor Standards Act, the

Americans with Disabilities Act, or Title VII. *Only* employers' costs in securing professional advice to influence employee unionization are restricted.

Third, the only justification proffered in the statute's Legislative Memorandum–concern about health care workers forcibly attending "captive audience" meetings while untrained personnel attend patients–is not remedied by the law. *See* McKinney's 2002 Session Laws of New York, p. 2082 (Memorandum in Support of Chapter 601). The statute does not restrict payment for attendance of health care workers at such meetings. Nor does it address the stated problem of unqualified health care employees caring for patients. The statute merely refuses to finance an employer's use of a trained professional or manager to encourage or discourage unionization. This mismatch between the statute's justification and impact undermines New York's assertion of purely proprietary interests.

Fourth, Section 211-a's regulatory character is revealed by its use of enforcement mechanisms unavailable to private proprietors, namely, treble fines and criminal sanctions. Even if employers fund their partisan activities with private resources, they must bear the burden of proving to the state Attorney General or a court that no state funds were spent. By contrast, private employers willing to voice the state-approved message of neutrality may use state funds to

become informed about that option and are free of the substantial risk of regulatory sanctions.[7]

Finally, Section 211-a is significantly different from the proprietary policies at issue in *Boston Harbor* and *Allbaugh,* which concerned government bodies making typical commercial judgments about conducting economical, efficient construction. In both cases, government bodies exercised traditional options Congress expressly authorized for private construction-industry employers under NLRA Section 8(e) and (f), 29 U.S.C. §§ 158(e) and (f). *Boston Harbor*, 507 U.S. at 229-33; *Allbaugh*, 295 F.3d at 35. Here, however, Section 211-a's partisan activity limitations are not the type "Congress explicitly authorized and expected frequently to find." To the contrary and as discussed further below, Section 211-a discourages private employers from engaging in informed partisan speech that Congress thought enhanced employee free choice, and from hiring professional counsel that benefits the Board's and reviewing courts' decision-making processes.

**b. Section 211-a is not specifically tailored to achieve a purely proprietary purpose**

Using the standard applied in *Boston Harbor* and its progeny, the district court correctly found Section 211-a's broad scope indicates New York's interest in establishing a general policy. *Healthcare Association of New York State, Inc. v.*

[7] *See also Livadas*, 512 U.S. at 129 (professions of "neutrality" do not suffice to render state action non-preempted).

*Pataki*, 388 F.Supp.2d 6, 17-19 (N.D.N.Y. 2005). *See Sprint*, 283 F.3d at 420-21 ("The School District entered into a single lease agreement with respect to a single building.... [It did not seek] to establish any general municipal policy."); *Lockyer II*, 422 F.3d at 991 (where, as here, the statute "seeks to broadly color the state's impact on labor relations" it is regulatory). *Accord UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003) (action likely regulatory where it "seeks to set a broad policy"), *cert. denied*, 541 U.S. 987 (2004); *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1337-38 (D.C. Cir. 1996).

Section 211-a is not limited to a single project or service. Rather, it is a general statute applying without time limit to every state-funded organization, regardless of employer size, contract amount, contract purpose, particular circumstances, or prevailing market conditions. Section 211-a is therefore unlike the *Boston Harbor* contract requirement or the *Sprint* lease which, like other limited duration contracts, were products of the contracting parties' judgment concerning the most favorable terms available in particular markets at the time. *Boston Harbor*, 507 U.S. at 231-32; *Sprint*, 283 F.3d at 420-21. Likewise, Section 211-a bears no resemblance to *Allbaugh*'s market-sensitive executive order, which "le[ft] contractors free to determine whether they will use [project labor agreements] on government contracts, just as they may determine whether to use

[them] on projects for private owner-developers that neither require nor prohibit their use." 295 F.3d at 35.

For all these reasons, although couched in terms of New York's policy judgment regarding purported "misuse of the public funds," Section 211-a cannot "plausibly be defended as a legitimate response to state procurement restraints or to local economic needs." *Gould*, 475 U.S. at 291. Instead, the State seeks to reshape national labor policy, and thus impermissibly assumed a regulatory role inappropriate under our federal system.

**4. <u>Stripped of Proprietary Immunity, Section 211-a is Preempted Because It Conflicts With National Labor Policy</u>**

As noted above, any state law is preempted if it "either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created," or stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Nash*, 389 U.S. at 240. The Court explained earlier in *Hines v. Davidowitz*, 312 U.S. 52 (1941):

> For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed.

*Id.* at 67 n.20 (citation omitted). As demonstrated below, Section 211-a would frustrate the NLRA's purposes, impair the Board's ability to properly discharge its duties, and stand as an obstacle to federal policy.

**a. Section 211-a impedes the free flow of information about unionization**

As the Board early recognized, employee free choice concerning unionization depends on employees having "full freedom to receive aid, advice and information from others" concerning organizational rights. *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938). To reinforce employees' right to receive information bearing on the representation decision, Congress added Section 8(c) to the NLRA in the 1947 Taft-Hartley amendments, to protect "[t]he expressing of any views, argument, or opinion" against being found to be an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit." This was done "to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, *supra*, at pp. 23-24. Section 8(c) manifests Congress' intent "to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62. *Accord NLRB v. Pratt & Whitney Air Craft Division, United Technologies Corp.*,789 F.2d 121, 134 (2d Cir. 1986)("[g]ranting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions").

Section 211-a frustrates Congress' purpose of encouraging free debate about unionization. Employers who resist New York's pressure to remain neutral during an organizing campaign cannot obtain professional representation, advice, and training in order to influence employee choice without incurring the risk of litigating against the state Attorney General. Moreover, any union attempting to organize that employer could increase that risk by requesting that the state Attorney General initiate enforcement proceedings attacking that employer's partisan activity spending.[8] The threat of that litigation and the risk of treble fines and criminal sanctions if employers cannot prove compliance with Section 211-a to the State's satisfaction has a natural tendency to chill the free speech that Congress' policy seeks to foster. In Board elections, "the employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative." *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962). Contrary to national labor policy, Section 211-a impedes employers' ability to speak out when, in their view, their employees may be about to make an unwise representation choice.

[8] The state Attorney General has already audited employers for Section 211-a compliance during organizational campaigns. A-113-121; A-387-403. Some of those audits occurred in response to union requests. A-389-403. The mere threat of enforcement would grant unions the power to extract concessions in negotiating recognition agreements.

Moreover, by restricting the funding of professional representation, advice, and training used to influence employee choice, Section 211-a hampers employers from campaigning even where their opposition to unionization is grounded in national labor policy. For example, federal law entitles employers to discourage representation where a union seeks recognition in a bargaining unit inappropriate under Section 9(a),[9] or where the union insists on representing supervisors or managers who, in Congress' judgment, have a duty of undivided loyalty to their employer,[10] or where the union seeking representation rights uses coercive tactics that interfere with employee free choice.[11] A state law that threatens fines and criminal penalties if employers use contractual payments to discourage unionization, contrary to their rights under federal labor policy, conflicts with NLRA policies and is preempted. "The inference is inescapable that the [State] is trying to substitute its own labor-management philosophy for that of the National Labor Relations Act." *Milwaukee*, 2005 WL 3275787 at *4.[12]

---

[9] *NLRB v. Meyer Label Co*, 597 F.2d 18 (2d Cir. 1979).

[10] *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 711-12 (2001); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

[11] *E.g., NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

[12] New York's argument (Br.22) that affected employers are free to use their own money to voice their opinion provides no justification for Section 211-a's viewpoint-discriminatory funding scheme that permits payment for asserting the

### b. Section 211-a regulates matters deliberately left unregulated for reasons of federal labor policy

By using its purchasing power to pressure employers within the NLRA's jurisdiction to remain neutral during organizing campaigns, New York has also intruded in the area of bargaining between unions and employers that Congress left "'to be controlled by the free play of economic forces.'" *Machinists*, 427 U.S. at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971); *see also Boston Harbor*, 507 U.S. at 226-227 ("the NLRA prevents a State from regulating within a … zone protected and reserved for market freedom"). Under national labor policy, the freedom to become informed and to give voice to opinions regarding representation choices in a non-coercive manner is lodged in the parties. *Linn*, 383 U.S. at 62 (Section 8(c) manifests Congress' intent to protect free, vigorous debate from regulation, even by states); *Trent Tube Co.*, 147 NLRB 538, 541 (1964) (absent threats, the Board "will not restrict the right of any party to inform employees of 'the advantages and disadvantages of unions and of joining them.'")

---

employer's rights under the ADA, Title VII, and other federal statutes, but not the NLRA. As stated above, states ordinarily cannot withhold benefits from persons in commerce solely because they engaged in conduct regulated by the NLRA, *Gould*, 475 U.S. at 286, or left unregulated for federal policy reasons, *Golden State II*, 493 U.S. at 109. In addition, these employers' "freedom" to spend their own money is considerably qualified by the litigation risks discussed above, p.17.

(citations omitted). To the extent such liberty may be validly waived,[13] that decision must be bargained for voluntarily. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (*Golden State I*). Thus, Section 211-a would upset "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests" through non-coercive speech. *See Boston Harbor*, 507 U.S. at 226.

**c. Section 211-a conflicts with Congress' objectives in authorizing the NLRB's regulation of organizing campaigns and representation elections**

Congress crafted the NLRA's Section 9 representation election process as the preferred method for resolving representational disputes, because it best ensures free and informed employee choice. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969). New York's efforts to inhibit employers from obtaining professional representation, advice, or training for the purpose of influencing unionization frustrate Congress' objectives in several ways.

1. Section 211-a's restrictions improperly conflict with the Board's regulation of employer speech. In administering the unfair labor practice provisions bearing on employees' rights to join or refrain from joining a union, the

[13] *See NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974) (invalidating union's contractual waiver of its right to campaign in the workplace as interference with employees' right to be informed).

Board has the responsibility to decide in the first instance what employer conduct interferes with employee rights. *Gissel*, 395 U.S. at 620. Likewise, in conducting elections under Section 9 the Board has primary jurisdiction to determine whether employer communication, even if lawful under Section 8, is so prejudicial to a fair election to be grounds to set it aside. *See General Shoe*, 77 NLRB at 127. For example, in the interest of free and fair elections, the Board has long administered various "time, place, and manner" rules that bar certain kinds of employer and union campaign activities in the polls' vicinity or during the final 24 hours before the election. *Milchem, Inc.*, 170 NLRB 362, 362-63 (1968); *Peerless Plywood Co.*, 107 NLRB 427, 429-30 (1953).

As noted by Plaintiffs/Appellees (Br.54), Section 211-a is preempted because it regulates the same partisan employer speech-informing activities that Congress regulated under the NLRA and it does so using different standards and sanctions. *See Lockyer II*, 422 F3d at 987. Under the uniform federal standard, partisan employer speech that reasonably tends to coerce employees is regulated either as an unfair labor practice or election objection. *E.g., NLRB v. Monroe Tube Co.*, 545 F.2d 1320, 1323-24 (2d Cir. 1976). Under Section 211-a, by contrast, certain partisan employer speech-informing activities are regulated if, in the State's view, the activities "have the purpose of encouraging or discouraging union organization," on the theory, discussed above, that such activities are a purported

"misuse of the public funds." Sanctions for NLRA violations are entirely remedial, including re-running the tainted election, directing the employer to cease and desist from the unfair labor practice found, and posting appropriate remedial notices. *See, e.g., NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2d Cir. 1980). Sanctions for Section 211-a violations, by contrast, can be punitive, including, in some circumstances, treble fines or criminal penalties. Such "[p]unitive sanctions are inconsistent … with the remedial philosophy of the NLRA." *See Gould*, 475 U.S. at 288 n.5.

Congress chose the Board to regulate partisan activity, including employer speech, in the representation and unfair labor practice areas. These activities cannot, under the Congressional scheme, also be regulated by New York. Otherwise, a Board election in New York would be conducted differently than an election in another state that does not regulate this conduct. Section 211-a presents a conflict of "two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and different remedial schemes," *Garmon*, 359 U.S. at 242, and should therefore be found preempted.[14]

[14] New York's assertion (Br. 43-44) that a material factual dispute exists whether Section 211-a significantly interferes with NLRA-regulated activities misses the point. Preemption analysis is concerned "with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." *Garmon*, 359 U.S. at 242. Courts are "preclude[d]" from conducting "an ad hoc

2. Section 211-a's purpose and effect of deterring partisan employer speech concerning representation issues frustrate Congress' objective in entrusting "to the Board alone" (*NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940)) the determination of the steps necessary to conduct a fair election. Relying on the NLRA's policy of encouraging vigorous campaigning by the parties, the Board has crafted uniform election rules that obviate the need to regulate certain subjects that, if regulated, would lead to additional litigation and delay in resolving representation disputes.

As noted by Plaintiffs/Appellees (Br.50-51), the Board has refused to disqualify unions from Board elections because of civil or criminal law violations. *Alto Plastics*, 136 NLRB at 851. The Board decided instead to rely on the voters' informed decision whether to elect such a union. *Id.* After debate and experiment, the Board also concluded that its attempts to regulate alleged campaign misrepresentations were a source of delay in resolving election cases and that, on balance, it would be better to encourage parties to speak out if they wished to make known to employees their record on particular issues. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 131-33 (1982); *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983)(adopting *Midland*). Section 211-a, by discouraging

---

inquiry" as to effects of state regulation in a particular factual situation, because "[o]ur task is confined to dealing with classes of situations." *Id.*

employers from actively campaigning, impairs the effectiveness of these Board election rules. Such state regulation obstructing the Board's accomplishment of Section 9's purposes "creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause." *Brown*, 468 U.S. at 501; *see also Pennsylvania Nurses Ass'n v. Penn. State Educ. Ass'n*, 90 F.3d 797, 802-03 (3d Cir. 1996).

3. Section 211-a's restrictions on employers' freedom of access to professional counsel or informed managerial staff also interfere with the procedural rights that Congress established for parties to Board elections and in so doing impede the Board's effective resolution of representation disputes. As previously noted, Congress enacted the NLRA so that representation issues are investigated in proceedings authorized by Section 9. If those proceedings result in a Board certification of a union as bargaining representative, the employer's avenue to court review is to refuse to bargain, thereby triggering an unfair labor practice proceeding under Section 10 of the NLRA. *See Boire*, 376 U.S. at 476-482. "Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937). If the Board's rulings in the representation and unfair labor practice case are upheld by the reviewing court, the Board's order

directing the employer to bargain with a certified union will be enforced. *Id.* Yet, only those issues raised by the parties to the Board's proceeding will ever be heard by the court.

In this setting, where legal error can delay or nullify a representation proceeding,[15] unhampered employer access to professional counsel and well-trained managerial staff facilitates prompt resolution of representation disputes. To the extent unit or supervisory issues can be raised and resolved at the threshold of a proceeding, an employer's efforts to contest the representation petition, i.e., "discourage … unionization," may avoid wasteful supplemental unfair labor practice proceedings and court review.[16] Additionally, well-counseled employer opposition to unionization may serve to bring forward evidence of unfair tactics of the petitioning union, thereby protecting employees' full freedom to join or refrain from unionization.[17] The advice of legal counsel or experienced staff may also

---

[15] *E.g., Burns Electronic Sec. Services, Inc. v. NLRB*, 624 F.2d 403, 410 (2d Cir. 1980) (remanding for further development of representation case record).

[16] *E.g., Bartlett Collins Co.*, 334 NLRB 484 (2001). Indeed, any argument that the employer fails to raise in the initial representation proceeding normally cannot be later raised before the Board or the courts in the unfair labor practice proceeding. 29 C.F.R. § 102.67(f); *see also Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 160-162 (1941).

[17] *E.g., Savair Mfg.*, 414 U.S. at 277; *ITT Lighting Fixtures, Div. of ITT Corp. v. NLRB*, 712 F.2d 40 (2d Cir. 1983). Because individual employees rarely file election petitions or are granted intervention, they normally have no standing to

assist an employer in expressing its opposition to unionization in a manner that will not generate election objections or unfair labor practice charges. And, if missteps are made in expressing such opposition, experienced advisors may bring about their prompt correction, thereby removing an obstacle to a free election.[18]

The parties' conduct and the Board's rulings are significantly shaped by the quality of the advocacy in each case. The Board, like any decision-making forum, greatly depends on the parties' gathering relevant evidence and making well-researched and developed arguments to enable reasoned decision-making.

The Supreme Court has emphasized legal representation's significance to the judicial process. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court struck down a federal prohibition on federally-funded attorneys challenging welfare laws. The Court explained (*id.* at 544-46):

> Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys .... [Government] may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.... An informed, independent judiciary presumes an informed, independent bar.

---

litigate election issues. *Clarence E. Clapp*, 279 NLRB 330, 330-31 & n.1 (1986). Thus, an employer's exercise of its right to "protection against arbitrary [administrative] action" (*Jones & Laughlin*, 301 U.S. at 47) is typically the means by which union conduct interfering with employee free choice is brought before the Board and reviewing courts.

[18] *E.g., Columbia Alaska Regional Hospital*, 327 NLRB 876, 877 (1999).

Similarly here, New York's viewpoint-discriminatory restriction on funding professional assistance for the purpose of influencing unionization distorts Board representation proceedings and is thereby preempted.

4. Finally, Section 211-a conflicts with Congress' purpose of having representation disputes expeditiously concluded, so that the election passions might be defused. *See NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330-332 (1946); *Handy Andy*, 228 NLRB 447, 454 (1977). As previously noted, Section 211-a invites unions disappointed with Board-certified election results to request the state Attorney General to initiate enforcement proceedings attacking that employer's spending on partisan activities. Such potential "aggressive use" of Section 211-a "to gain a special advantage in labor disputes (*Lockyer II*, 422 F.3d at 982) will inevitably aggravate and extend the heated emotions generated by representational disputes in a manner that frustrates federal policy.[19]

**5. <u>Neither First Amendment Cases Nor Certain Federal Statutes Prevent Section 211-a's Preemption</u>**

New York argues that its refusal to permit its funds to be used to subsidize professional partisan activities cannot, as a matter of law, be deemed an interference with private employers' right to speak out on labor issues with their

[19] Last year, the Board's median time from election petition to certification was just 53 days. FY 2005 Performance and Accountability Report, p. 17.

own funds, primarily relying on *Rust v. Sullivan*, 500 U.S. 173 (1991). That case is inapposite.

In *Rust*, a First Amendment viewpoint discrimination case, the Supreme Court rejected a constitutional attack on federal regulations that subsidized family planning services, but barred the use of appropriated funds to provide information about abortion as a family planning method. *Rust* relied on the Court's earlier *Maher v. Roe*, 432 U.S. 464 (1977) decision, which reasoned that the liberty to have an abortion is not unqualified, *id.* at 473, and that the state has a "'strong and legitimate interest in encouraging normal childbirth,'" *id.* at 478. The Court in *Rust* summarized its controlling principle as follows:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. [A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.

500 U.S. at 193 (quotation omitted).

New York's *Rust*-based defense assumes that New York is likewise free to establish a policy-based spending program reflecting its value judgment that employer neutrality and non-NLRA labor law compliance are worthy of subsidization, but professional advice about partisan speech must be independently funded by the speaker . That argument overlooks that in *Rust*, the Court explicitly

acknowledged states' substantial, legitimate interest in establishing programs promoting childbirth. New York lacks any comparable legitimate interest in promoting a labor policy inconsistent with the express Congressional policy of free and robust debate. Congress enacted the NLRA to obtain uniform application of national labor policy and to avoid conflicts likely to result from a variety of local laws or procedures. *Garner v. Teamsters, Local 776*, 346 U.S. 485, 490-91 (1953). The NLRA precludes New York from imposing on private employers a local value judgment that professional or informed partisan employer speech is a misuse of state funds, and therefore should not be subsidized. Congress has already determined, as a matter of national labor policy, that informed employer speech serves employee free choice.

Moreover, in cases since *Rust*, the Supreme Court has been careful to limit speech restrictions to instances in which the government itself is the speaker, or instances, like *Rust*, in which the government "used private speakers to transmit specific information pertaining to its own program." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). "Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S. at 542, 549 (declaring "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech …."). In the instant

case, Section 211-a-regulated employers seek to speak on their own behalf, not for the government.

Section 211-a's prohibition on the use of governmental funds for hiring attorneys to influence unionization, is strikingly similar to those found unconstitutional in *Velazquez* that prevented attorneys from "present[ing] all the reasonable and well-grounded arguments necessary for proper resolution of the case." 531 U.S. at 545. Like the limitation struck down in *Velazquez*, Section 211-a would create real harms for the Board's conduct of representation proceedings, and should be found preempted.

Finally, Congress' spending restrictions on a limited group of grantees participating in discrete federal health and social welfare programs are not inconsistent with finding Section 211-a preempted. Congress alone has authority to amend the NLRA directly or by writing exemptions into other laws. *Lockyer II*, 422 F.3d at 994. It does not follow at all that states can enact sweeping statutes covering the entirety of state funds and rewrite the NLRA, in the manner of Section 211-a.

## CONCLUSION

For these reasons, the Board respectfully requests that this Court uphold the District Court's decision finding N.Y. Labor Law Section 211-a preempted by the NLRA.

Respectfully submitted,

_/s/ Abby Propis Simms_____
ABBY PROPIS SIMMS
*Deputy Assistant General Counsel*

__/s/ Dawn L. Goldstein_____
DAWN L. GOLDSTEIN
*Senior Attorney*
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2930

ARTHUR F. ROSENFELD
*Acting General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

JOHN H. FERGUSON
*Associate General Counsel*

ERIC G. MOSKOWITZ
*Assistant General Counsel*

National Labor Relations Board
December 8, 2005

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 6,897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2003 in Times New Roman 14 point.

December 8, 2005 — Date

/s/ Dawn L. Goldstein — Attorney for National Labor Relations Board

# STATUTORY ADDENDUM

# STATUTORY ADDENDUM

## Relevant sections of New York Statutes

**Labor Law Section 211-a.** Prohibition against use of funds

1. The legislature hereby finds and declares that sound fiscal management requires vigilance to ensure that funds appropriated by the legislature for the purchase of goods and provision of needed services are ultimately expended solely for the purpose for which they were appropriated. The legislature finds and declares that when 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 this 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 public resources, which should be utilized solely for the public purpose for which they were appropriated.

2. Notwithstanding any other provision of law, no monies appropriated by the state for any purpose shall be used or made available to employers to: (a) train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; (b) hire or pay attorneys, consultants or other contractors to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; or (c) hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive.

3. Any employer that utilizes funds appropriated by the state and engages in such activities shall maintain, for a period of not less than three years from the date of such activities, financial records, audited as to their validity and accuracy, sufficient to show that state funds were not used to pay for such activities. An employer shall make such financial records available to the state entity that provided such funds and the attorney general within ten business days of receipt of a request from such entity or the attorney general for such records.

4. The attorney general may apply in the name of the people of the state of New York for an order enjoining or restraining the commission or continuance of the alleged violation of this section. In any such proceeding, the court may order the return to the state of the unlawfully expended funds. Further, the court may impose a civil penalty not to exceed one thousand dollars where it has been shown that an employer engaged in a violation of subdivision two of this section; provided, however, that a court may impose a civil penalty not to exceed one thousand dollars or three times the amount of money unlawfully expended, whichever is greater, where it is shown that the employer knowingly engaged in a violation of subdivision two of this section or where the employer previously had been found to have violated subdivision two within the preceding two years. All monies collected pursuant to this section shall be deposited in the state general fund.

5. The commissioner shall promulgate regulations describing the form and content of the financial records required pursuant to this section, and the commissioner shall provide advice and guidance to state entities subject to the provisions of this section as to the implementation of contractual and administrative measures to enforce the purposes of this section.

**Labor Law Section 213.** Violations of provisions of labor law; the rules, regulations or orders of the industrial commissioner and the industrial board of appeals

Any person who violates or does not comply with any provision of the labor law, any rule, regulation or lawful order of the … commissioner [of labor] or the industrial board of appeals, and the officers and agents of any corporation who knowingly permit the corporation to violate such provisions, are guilty of a misdemeanor and upon conviction shall be punished, except as in this chapter or in the penal law otherwise provided, for a first offense by a fine of not more than one hundred dollars, provided, however, that if the first offense is a violation of a rule or provision for the protection of the safety or health of employees or persons lawfully frequenting a place to which this chapter applies, the punishment shall be a fine of not more than one hundred dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment; for a second offense by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than thirty days or by both such fine and imprisonment; for a subsequent offense by a fine of not less than three hundred dollars, or by imprisonment for not more than sixty days, or by both such fine and imprisonment. This section shall not apply to any person covered by section twenty-seven-a of

this chapter.

**NY LEGIS LEG. MEMO 601 (2002)**
**2002 Sess. Law News of N.Y. Legis. Memo Ch. 601 (McKINNEY'S)**
**McKINNEY'S 2002 SESSION LAW NEWS OF NEW YORK**

**Legislative Memorandum relating to Ch. 601**
**LABOR--UNION ORGANIZATION--STATE FUNDS AND FACILITIES**
**Memorandum in Support, New York State Assembly**

BILL NUMBER: A11784A

TITLE OF BILL: An act to amend the labor law, in relation to prohibiting state funding to encourage or discourage union organizing and to provide mechanisms for record-keeping and enforcement thereof

PURPOSE OR GENERAL IDEA OF BILL:

Prohibits the use of state funds and facilities to assist, promote or deter union organizing.

SUMMARY OF SPECIFIC PROVISIONS:

Section one of the bill amends § 211-a of the labor law to establish a legislative finding regarding the proprietary interest of the state in ensuring that scarce public resources are utilized solely for the public purpose for which they were appropriated;

§ 1 part 2 of the bill expands the current provisions regarding a ban on the use of state funds to train supervisors to prohibit practices such as the hiring or paying of attorneys, consultants or others to encourage or discourage an employee from participating in a union organizing drive; hiring employees or paying the salary of those whose principal job duties include encouraging or discouraging employees from participating in union organizing;

§ 1 part 3 requires employers to keep records of the expenditures of state funds sufficient to show that state funds have not been utilized in a prohibited manner;

§ 1 part 4 of the bill provides that the attorney general is empowered to apply in the name of the people of the state of New York for a restraining order relevant to the prohibited behavior. It also provides that the court may impose a civil penalty of not more than $1,000 or three times the amount illegally expended, if shown that the behavior was knowingly, or for subsequent violations.

§ 1 part 5 provides the commissioner of labor with a directive to issue regulations regarding form and content of the record keeping required.

§ 2 provides that the act shall take effect on the 90th day.

EFFECTS OF PRESENT LAW WHICH THIS BILL WOULD ALTER:

Present law provides that no state funds shall be used to train supervisors or managers in techniques to discourage union organization.

JUSTIFICATION:

The present law has not proven effective in ensuring that funds are utilized for the programmatic purpose contemplated. At a legislative hearing regarding the utility of the labor law provisions, testimony was received from highly skilled health care workers forced to attend several mandatory anti-union meetings on company time, and against their will, while their patients were attended to by untrained personnel. It is clearly in the proprietary interests of the state to ensure that the public funds are not misdirected.

PRIOR LEGISLATIVE HISTORY:

New bill:

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:
Should result in better utilization of state funds for the appropriated purpose.

EFFECTIVE DATE: Ninety days after it becomes a law.

NY LEGIS LEG. MEMO 601 (2002)

**********

**Relevant sections of the National Labor Relations Act (NLRA)**

**Section 7, 29 U.S.C. § 157**. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

**Section 8, 29 U.S.C § 158**. Unfair labor practices

§ 158(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

**(**1**)** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

**Section 8(c), 29 U.S.C. § 158(c)**. Expression of views without threat of reprisal or force or promise of benefit

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 subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

**Section 9, 29 U.S.C. § 159**. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | | |
|---|---|---|
| HEALTHCARE ASSOCIATION OF NEW YORK STATE, INC., NEW YORK STATE ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, INC., NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., NYSARC, INC. and UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK,<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK and LINDA ANGELLO, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK,<br><br>Defendants-Appellants, | ) | Court No. 05-2570 |

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of the National Labor Relations Board's Brief as Amicus Curiae has this day been served by first class mail and electronic mail upon the following persons listed below:

Jeffrey J. Sherrin
James A. Shannon
Cornelius D. Murray
O'Connell, Aronowitz
54 State Street, 9th Floor
Albany, NY12207-2501

*Attorneys for Plaintiff-Appellees*

Eliot Spitzer
Michelle Aronowitz
M. Patricia Smith
Seth Kupferberg
Office of Attorney General of the State of New York
120 Broadway, 26th Floor
New York, NY 10271

*Attorneys for Defendants-Appellants*

Willis J. Goldsmith
Jones, Day
51 Louisiana Avenue, NW
Washington, DC 20005-2088

*Attorneys for Amicus Curiae*

Joel L. Hodes
Whitman, Osterman
One Commerce Plaza, Suite 1900
Albany, NY 12260

*Attorneys for Amicus Curiae*

Paul K. Sonn
David S. Udell
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013-1205

*Attorneys for Amici Curiae*

James Reif
Gladstein, Reif & Meginniss
817 Broadway, Sixth Floor
New York, NY 10003

*Attorneys for Amici Curiae*

Glenn M. Taubman
c/o National Right to Work legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160

*Attorneys for Amicus Curiae*

/s/ Dawn L. Goldstein

DAWN L. GOLDSTEIN
Senior Attorney,
Special Litigation Branch
Washington, DC 20570
(202) 273-2936

Dated: December 8, 2005
Washington, DC