

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHAMBER OF COMMERCE OF :

4 THE UNITED STATES, ET AL., :

5 Petitioners :

6 v. : No. 06-939

7 EDMUND G. BROWN, JR., :

8 ATTORNEY GENERAL OF :

9 CALIFORNIA, ET AL. :

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11 Washington, D.C.

12 Wednesday, March 19, 2008

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:07 a.m.

17 APPEARANCES:

18 WILLIS J. GOLDSMITH, ESQ., New York, N.Y.; on behalf
19 of the Petitioners.

20 THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 the United States, as amicus curiae, supporting the
23 Petitioners.

24 MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf
25 of the Respondents.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-939, Chamber of Commerce versus Brown.

Mr. Goldsmith.

ORAL ARGUMENT OF WILLIS J. GOLDSMITH

ON BEHALF OF THE PETITIONERS

MR. GOLDSMITH: Mr. Chief Justice, and may it please the Court:

In AB 1889, California defunded employer speech about union organizing because the State's labor policy is that such speech interferes with employee free choice. The Federal policy is that employer speech enhances employee free choice. California's labor policy is designed to discourage exactly what the NLRA promotes. The fact that California implemented its labor policy as an exercise of its spending authority is irrelevant under Gould. If the --

JUSTICE SCALIA: Why do you say the labor policy promotes it? It certainly permits it, but what -- what --

MR. GOLDSMITH: Well, Your Honor, I think that if you look at the exceptions to the policy, in particular those that allow State funds to be spent for things that clearly facilitate union organizing, for

1 example, that it's not prohibited under AB 1889 --

2 JUSTICE SCALIA: No, I'm talking about the
3 -- the Federal policy. You say the Federal policy
4 promotes this employer speech. Why do you say it
5 promotes it? It clearly permits it. It clearly does
6 not discourage it, but is that the same as promoting it?

7 MR. GOLDSMITH: I think -- I think it is,
8 Your Honor. I think that the cases of this Court and
9 the cases of the NLRB have made clear that free, open,
10 robust debate is important on all matters having to do
11 with the union/employer relationship. That was
12 certainly what the Court noted in Linn.

13 The fact that employer speech is, I think,
14 absolutely critical to an employee being well-enough
15 informed to make an informed judgment about whether to
16 say yes or no to a union, further underscores the point.

17 A union election or any situation involving
18 a contest of any sort between a union and an employer is
19 something on which both parties should have the right to
20 speak, and to speak in a noncoercive way. And I think
21 that clearly the National Labor Relations Act promotes
22 that.

23 JUSTICE GINSBURG: Then why did Congress in
24 several statutes have a provision from which California
25 copied when it enacted this measure? In several

1 statutes, the Congress has said this Federal money will
2 go to the grantee, if the grantee says it will not use
3 any money that we give them to assist, promote, or deter
4 union organizing.

5 MR. GOLDSMITH: Your Honor, those are three
6 statutes that the court below and Respondents rely on
7 heavily. Those statutes, first of all, I don't think in
8 any way reflect the meaning or the sense of Congress
9 that employer speech is to be inhibited in connection
10 with union organizing. Those in no way, I think,
11 reflect the overall intent of Congress. Moreover,
12 nothing in those statutes, in any way, undercuts the
13 basic principles of the --

14 JUSTICE GINSBURG: But they run against that
15 principle because they say at least under these programs
16 -- I think there were more than three. Wasn't Medicare
17 --

18 MR. GOLDSMITH: Medicare was the fourth, I
19 believe. It was a regulation, not a statute. But
20 certainly in doing that, Congress didn't in any way
21 modify the NLRA. There's nothing in the legislative
22 history of those statutes that suggests that this
23 Court's principles, as laid down in Machinists and
24 Garmon, were in any way to be inhibited. And, moreover,
25 what Congress can do certainly doesn't mean that the

1 States have the same right. The --

2 JUSTICE GINSBURG: Well, those -- those
3 grantees would be subject to the NLRA. So, as to them,
4 it is modified.

5 MR. GOLDSMITH: Well, it's not modified in
6 the same way that AB 1889 modifies it, Your Honor.
7 First of all, under those statutes there is no
8 requirement that funds be segregated. There is no
9 possibility of litigation, treble damages to follow.
10 There is no possibility of attorney's fees to the
11 prevailing party. So those statutes are, I think,
12 really unique and don't in any way change the basic
13 principle that I think all labor lawyers would agree,
14 and that is that, under the National Labor Relations
15 Act, all parties to a union election or any issue
16 between a union and an employer have the right to speak
17 in a noncoercive way.

18 JUSTICE BREYER: They say: Speak, go ahead,
19 speak, speak. Just not on our nickel.

20 MR. GOLDSMITH: Well, I think that's clearly
21 what they say, but it's not that simple given the way
22 this statute operates, Your Honor.

23 JUSTICE BREYER: And they also say -- by the
24 way, as you answer this, I'd keep this in mind -- you
25 may be right about it being too much of an

1 administrative burden, the treble damages et cetera, but
2 they've made major concessions here, and they say that's
3 a matter to be worked out on remand. And it may be that
4 they have to be very careful about inhibiting your
5 speech.

6 So let's go back over those administrative
7 provisions one by one. They are suggesting to us, as I
8 read it, don't do that now.

9 MR. GOLDSMITH: If I may respond to both
10 questions, Your Honor. First of all the notion that one
11 can use your own money, to use the vernacular, and use
12 it to speak, doesn't answer the most basic question that
13 the statute presents, and that is that whether you can
14 or you can't -- and I'll get to that in a moment -- the
15 fact is that California has regulated, used its spending
16 power to make labor policy, something that this Court
17 has made clear, in Gould and various other cases, it
18 cannot do. But even getting past that, which I think is
19 the end of the case, there are certain employers,
20 certain Petitioners here who are a hundred percent
21 funded by the State. They have no ability, as a result
22 -- when I say "funded by the State" I mean they depend
23 for their income on State programs, let's say -- they
24 have no ability, none, to speak to employees.

25 CHIEF JUSTICE ROBERTS: Well --

1 MR. GOLDSMITH: The State has effectively --

2 CHIEF JUSTICE ROBERTS: That's not the
3 State's fault.

4 MR. GOLDSMITH: Well, the State's argument
5 to that, Mr. Chief Justice, is that that's a free-market
6 choice. They can either do business in California or
7 not. And I would refer the Court --

8 CHIEF JUSTICE ROBERTS: Or they can do
9 business with other entities beside the State.

10 MR. GOLDSMITH: They can, Your Honor, that's
11 true, but that doesn't answer the question for
12 those that -- because of the service that they provide,
13 such as under Medi-Cal, they have chosen to be in
14 business with the State. They are being forced to make
15 an election between doing business with the State or
16 giving up an NLRA-protected right. That is --

17 JUSTICE BREYER: If you have -- you have a
18 park service of the State and you have a hotdog stand
19 there, it runs the hotdogs, it's private, but the State
20 pays for everything. The State pays for everything.
21 And it happens that, in the grant, they have no place
22 for talking about the union. You're saying they are
23 required to add to the legislation, a special grant, so
24 that the employer can speak of the union?

25 MR. GOLDSMITH: Well, a grant presents a

1 slightly different problem.

2 JUSTICE BREYER: Why? Why? Because they
3 say here we are talking about 100 percent money that
4 comes out of the State treasury and all we are saying is
5 use that money for the State purposes, and those
6 purposes do not include talking one way or the other
7 about the union.

8 MR. GOLDSMITH: Well, that may be the case
9 for a particular program or a particular grant, but
10 that's not what AB 1889 does, Your Honor. AB 1889
11 affects on an across-the-board basis every single
12 contractor, every single employer doing business with
13 the State of California. So if -- if the State could
14 show that it were making that -- it was making that
15 policy decision for some fiscal purpose, then there
16 might be an argument. But that's concededly not the
17 case here. There is no --

18 JUSTICE GINSBURG: I don't -- I thought you
19 -- you are bringing a facial challenge, and I thought
20 that you must show, not that the State must show, and the
21 State -- the simple argument is: Look, we are paying for
22 certain things, and we want to get what we paid for.
23 There are a lot of other things that we could have paid
24 for, but we -- we want to get, say, a training program
25 for elementary school teachers. Now that has nothing to

1 do with union organizing. We don't want to pay for union
2 organizing.

3 MR. GOLDSMITH: That might be an argument
4 that the State could advance credibly if in fact this
5 statute had anything to do with saving money. It
6 doesn't. The court below unanimously concluded that
7 this was not anything that had anything to do with the
8 fiscal issues; it had solely to do with making labor
9 policy. And as far as a facial challenge is concerned,
10 Your Honor, the fact is that this statute was applied to
11 the Petitioners. The Petitioners --

12 JUSTICE GINSBURG: Where did the lower court
13 say it has nothing to do with the State getting what it
14 is paying for and not paying for things it doesn't want
15 to pay for?

16 MR. GOLDSMITH: Well, Your Honor, that's, of
17 course, my vernacular for --

18 JUSTICE GINSBURG: Not in the --

19 MR. GOLDSMITH: -- what the court said, but
20 what the court did say was that the State passed --
21 legislature passed and the governor signed AB 1889
22 solely for labor policy purposes, and that's clear from
23 the preamble to the statute. The preamble to the
24 statute says, it is the policy of the State of
25 California -- in so many words -- that employer speech

1 interferes with employee free choice. There's nothing
2 in the record. There's no attempt at all to suggest
3 that anything achieved by 1889 saves the State a dime.
4 That's an argument --

5 JUSTICE GINSBURG: So it would come out --
6 it would come out differently if the statute has said,
7 we want to get what we pay for and we don't -- we choose
8 not to pay for labor relations?

9 MR. GOLDSMITH: Well, if the State could
10 establish that it was acting as a proprietor, within
11 meaning of this Court's decision in Boston Harbor, and
12 establish as a proprietor that it was doing something to
13 advance a fiscal purpose, then perhaps a statute so
14 worded would survive the preemption challenge. But
15 that is clearly not what happened here. There's no
16 evidence that that happened, and that is not the purpose
17 or the effect of AB 1889.

18 And as to the facial challenge issue, if I
19 could answer both Justice Breyer and Your Honor, the
20 fact is that this statute was applied to the
21 Petitioners. The Petitioners went into district court
22 and they said, this applies to us, it's burden some for
23 us to do -- to do what the statute purports to require
24 us to do. The district court granted an injunction and
25 so on.

1 But whether it's a facial challenge or an
2 as-applied challenge I think really makes no difference
3 here. The Ninth Circuit found that AB 1889 was not
4 preempted as a matter of law. Our position is that AB
5 1889 is preempted as a matter of law. The purpose and
6 effect are clear. Sending this back to remand to
7 develop facts or trying to sort this out and whether
8 it's a facial or as-applied challenge really doesn't
9 change the basic fact that the court below, as I said,
10 decided this as a matter of law and NLRA preemption
11 generally raises purely legal issues.

12 The legal issue is whether or not the
13 Federal scheme has been interfered with, and I think
14 that any fair reading of this statute makes it
15 abundantly clear that that's exactly what happened.
16 California was very open about it. The preamble says
17 precisely that: We believe that employer speech
18 interferes with employee free choice. So they
19 passed a statute that is designed to and does severely
20 inhibit an employer's ability to speak. That's what
21 they wanted to do; that's what they did; and that
22 interferes with the Federal policy.

23 JUSTICE GINSBURG: Did they say something
24 different from what Congress said in those three or four
25 statutes that were mentioned earlier?

1 MR. GOLDSMITH: In terms of using the words
2 "assist, promote or deter," those words appear in those
3 statutes in that Medicare regulation, or statute,
4 component of the Medicare statute, and those appear also
5 in -- in AB 1889.

6 But, you know, again, Your Honor, from my
7 perspective I think, you know, it's clear that nothing
8 in those statutes changed the fundamental policy that
9 speech, free speech, for both employers and for unions
10 is something to be encouraged in the context of a union
11 organizing drive for a number of reasons, not the least
12 of which employees are allowed and entitled to hear both
13 sides of the picture before being put in a position
14 where they have to make a choice. California believes
15 that employer speech is a bad thing. AB 1889 is a
16 reflection of that. They believe it's bad because it
17 interferes with employee free choice.

18 JUSTICE ALITO: If you take the example of a
19 nursing home that participates in the Medi-Cal program,
20 what does this require? They have to segregate the
21 funds that they get from the State, and they can't use
22 -- is it the case they can't use any of those funds for
23 union-related speech or just the portion that does not
24 represent profits?

25 MR. GOLDSMITH: They can't use any of those

1 funds. The notion that profits -- the statute doesn't
2 say a word about profits, and, of course, if the statute
3 were to say something about profits, it would make the
4 segregation-of-accounts problem in the statute even
5 worse than it already is.

6 But what a nursing home has to do is to
7 track every single possible circumstance under which an
8 employee of the nursing home engaged in speech that was
9 designed to assist -- which won't happen very often,
10 presumably -- promote or deter union organizing.

11 And let me try to bring it down to what
12 really happens in the union organizing campaign. This
13 is, by and large, a seven-day-a-week, 24-hour a day
14 operation. There are any number of encounters during
15 the course of the union organizing drive that the
16 employer responsible for complying with AB 1889 may
17 never even know about.

18 So, for example, if an employee goes to his
19 supervisor and says union X is trying to organize
20 nursing home, what do you know about union X? And the
21 supervisor says, well, the only thing I know about union
22 X is they used to represent the nursing home across the
23 street, and then that nursing home is now closed.

24 Now, that may be a purely factual statement,
25 purely true statement. That's certainly what the

1 employer would argue. What the union might argue is
2 that no, no. You have to put that in context, and that
3 was a statement designed to deter the employee from
4 voting for union X.

5 Now, if the employer guesses wrong on that
6 issue, that is the employer says, well, this is factual,
7 it's not something designed to deter union organizing,
8 he is subject under the statute to litigation for not
9 having segregated -- and I don't know what he would
10 really segregate; the statute is unclear. Do you
11 segregate the time? Do you account for the time that
12 the employer spent talking -- the supervisor spent
13 talking?

14 JUSTICE SCALIA: Even if he guesses right,
15 he is subject to the litigation.

16 MR. GOLDSMITH: I'm sorry.

17 JUSTICE SCALIA: You said if he guesses
18 wrong, he is subject to the litigation. He is subject to
19 litigation even if he guesses right.

20 MR. GOLDSMITH: That's correct, Your Honor,
21 and unlike the prevailing party as the defendant, or the
22 prevailing party will of course -- the prevailing
23 plaintiff and the prevailing intervenors will recover
24 reasonable costs of attorney's fees, the prevailing
25 defendant under this statute does not. There is --

1 there is no question that it's even impossible for an
2 employer under the situation that I described to
3 effectively account for that encounter that I describe
4 between an employer and employee.

5 Do you take the 30 seconds that it took and
6 allocate 30 seconds of the salary? Do you take the
7 overtime for the week that the supervisor might have
8 worked? There is really no way that the statute allows
9 for that to happen, and it, I think, underscores the
10 degree to which this statute interferes dramatically
11 with NLRA protected rights.

12 If there are no further questions, I'd like
13 to reserve the rest of my time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 You've got a friend on the other side still.

16 MR. GOTTESMAN: Oh, I'm sorry, Your Honor. I
17 forgot about that.

18 CHIEF JUSTICE ROBERTS: Mr. Hungar.

19 ORAL ARGUMENT OF THOMAS G. HUNGAR

20 ON BEHALF OF THE UNITED STATES,

21 AS AMICUS CURIAE,

22 SUPPORTING THE PETITIONERS

23 MR. HUNGAR: Thank you, Mr. Chief Justice,
24 and may it please the Court:

25 The National Labor Relations Act manifests

1 congressional intent to encourage free debate on issues
2 dividing labor and management. State laws that restrict
3 speech regarding unionization frustrate that fundamental
4 national policy and are therefore preempted, as this
5 Court held in Linn.

6 CHIEF JUSTICE ROBERTS: What about the
7 spending clause question? You -- the Federal Government
8 has a lot of programs where they use their own money and
9 they come with a lot of conditions, and you -- your
10 office frequently argues that those are justified under
11 the spending clause. Why isn't what California is doing
12 here similarly justified?

13 MR. HUNGAR: Well, first of all, obviously,
14 Your Honor, the National Labor Relations Act does not
15 constrain Congress's ability to impose particular
16 restrictions. It does constrain the State's ability to
17 use their spending power to regulate, as this Court held
18 in Gould and in Nash.

19 CHIEF JUSTICE ROBERTS: Well, how do we tell
20 whether they are using their spending power to regulate
21 as opposed to simply attaching conditions to what's done
22 with State funds?

23 MR. HUNGAR: The Court has identified
24 several factors that it has used to distinguish
25 regulatory from proprietary conduct, first and foremost,

1 as this Court said in Boston Harbor. It looks to
2 whether the State is acting in order to effectuate
3 policy or is instead seeking to achieve cost savings
4 program efficiency and the like. In addition, the Court
5 looks to whether the measure --

6 CHIEF JUSTICE ROBERTS: Well, in a case like
7 Rust versus Sullivan, is the Federal Government acting to
8 promote policy, or is it simply acting in a proprietary
9 capacity?

10 MR. HUNGAR: Well, of course, that question
11 did not come up in Rust against Sullivan because there
12 was no NLRA preemption issue there, and the question --
13 but the State was --

14 CHIEF JUSTICE ROBERTS: No, I'm talking about
15 spending power versus regulatory power in general.

16 MR. HUNGAR: But what the Court did say in
17 Rust is that the government has a legitimate policy
18 interest in advancing its preference for life, in that
19 case, that the Congress was entitled to advance. The
20 problem here is that the policy interest that the State
21 is advancing, a policy interest that says employer
22 speech regarding unionization interferes with employee
23 free choice, is a policy that is directly contrary to
24 the Federal policy under the Act as Congress and the
25 Board have repeatedly recognized, and that this Court

1 has repeatedly recognized.

2 So, there is no legitimate interest
3 supporting what the State is doing here; it's an
4 interest directly contrary to Federal policy, unlike in
5 Rust and the other First Amendment cases.

6 CHIEF JUSTICE ROBERTS: Well, give me an
7 example of a spending clause provision that would be
8 acceptable, not necessarily in this context, but in
9 general, because you would say, well, that's not trying
10 to implement a policy at all.

11 MR. HUNGAR: Well, if the -- one of the
12 amicus briefs in this case points to a rule that the
13 State has adopted recently apparently in the Medi-Cal
14 context, which says that they will only reimburse
15 administrative costs of hospitals up to the 50th
16 percentile of costs incurred by similar facilities.

17 That's obviously not attempting to regulate
18 any particular labor speech or any other type of
19 conduct. It's simply saying we are only going to
20 regulate this category, this broad general category of
21 costs to a certain level. It's not targeted at a
22 specific category of disfavored speech because the State
23 disfavors that speech. It's simply attempting to save
24 money.

25 That clearly would not be preempted, even

1 though it might have a disproportionate impact on a
2 particular hospital that's engaged in a costly
3 anti-unionization --

4 JUSTICE BREYER: Would your answer be the
5 same if -- if -- and I hide contrary to fact, perhaps,
6 that a magic administrative scheme were invented so
7 there was no administrative problem, we could identify
8 with the greatest of ease each penny that came from the
9 State and which did not? And then the State said, you
10 know, we do have a policy here. We actually favor labor
11 unions in our State, and some other State might have a
12 different policy. But we think it best that the State
13 officials involved when their company -- when their
14 department is being organized, to say nothing. We think
15 it best that the employers that we pay a hundred percent
16 to, given their -- their strong funding by the State,
17 that they got to find some money elsewhere, and those we
18 pay 50 percent to better use the private money to speak,
19 not use our money.

20 Now, no administrative burden whatsoever,
21 but that's the policy. Now, is there some rule or
22 statute that would make that unlawful or preempted that
23 policy?

24 MR. HUNGAR: Justice Breyer, I think -- I'm
25 assuming in your hypothetical that this hypothetical

1 law, in addition to posing no administrative burdens
2 also doesn't have the strict liability of treble
3 damages.

4 JUSTICE BREYER: No, no. All these things
5 which I think they are asking us on the other side to
6 leave for another day, none of them exist. They all
7 work perfectly. It's only the magic system has been
8 developed to, without any extraneous burden, segregate
9 the State money from the non-State money. And the only
10 rule is don't use the State money when you speak.
11 That's the only rule.

12 MR. HUNGAR: Justice Breyer --

13 JUSTICE BREYER: By the way, other States
14 have exactly opposite rules, they are right-to-work
15 States. They give you extra State money. So -- but one
16 State has this rule and --

17 MR. HUNGAR: Obviously that would be a very
18 different case and a closer case than --

19 JUSTICE BREYER: Ah, well, if it's a very
20 different case, then why aren't they right to say this
21 is a facial challenge, leave that very different case
22 which raises all the issues to be worked out when we
23 discover whether this is --

24 JUSTICE SCALIA: Why do you say it's a very
25 different case, Mr. Hungar? I don't really understand

1 it.

2 MR. HUNGAR: It's a very different case in
3 the sense that in this case it's -- from every one of
4 the factors that this Court has looked to, to determine
5 regulatory versus proprietary -- and this case cuts
6 clearly in favor of the conclusion of the unanimous court
7 of appeals, all 15 judges, that this is regulatory.
8 It's punitive; it's government-wide; it's not program-
9 or contract-specific; it's not the kind of conduct that
10 private entities engage in. All of the factors -- and
11 it's expressly as well as obviously, in effect, intended
12 to disfavor a particular kind of speech that Congress
13 favors.

14 So everything cuts in favor of it being
15 regulatory; whereas, in your hypothetical, most of those
16 considerations would not. However, I think it is still
17 the case that in that hypothetical, what the State is
18 doing is regulating -- for labor policy reasons it's
19 disfavoring a particular type of speech. The State does
20 not have any obligation under the Act to fund
21 unionization speech, but what it can't do under the Act
22 is deny a government benefit because of a -- a labor
23 policy. That's what this Court held in Nash.

24 JUSTICE BREYER: Is my right-to-work example
25 equally -- equally preempted?

1 MR. HUNGAR: Yes, I think it would be. But,
2 again, this Court doesn't have to answer that question.

3 JUSTICE BREYER: So, they could not say in
4 Utah, to take a State at random, the -- here we have
5 government grants and there's overhead, and we would
6 like you to spend this overhead; indeed, you're
7 certainly free to spend this overhead in speaking as
8 much as you want, should there be an organizing
9 campaign. Don't worry about spending the government
10 part. Can they do that? You say no, they couldn't?

11 MR. HUNGAR: Well -- I took your -- the Utah
12 example to be one where the State was somehow mandating
13 this particular expenditure.

14 JUSTICE BREYER: No.

15 MR. HUNGAR: If the State is simply -- is
16 not taking -- is taking a hands-off approach, it's hard
17 to characterize it as regulation. But what this Court
18 held in Nash, what this Court held in Gould, what this
19 Court held in Livadas is, when the State is denying
20 benefits -- even though there might be plenty of
21 legitimate reasons that might enable it to deny benefits
22 -- if it's denying benefits for the purpose of advancing
23 labor policy in an area where Congress has said there is
24 to be no regulation, that's preempted, and that's --
25 it's doubly preempted here where the labor policy that

1 the State is advancing is directly contrary to the
2 Federal labor policy that Congress and the Board have
3 enunciated.

4 And with respect to the facial versus
5 as-applied or the suggestion that somehow because you
6 might be able to craft a statute that would achieve some
7 of the effects of this statute in a non-preempted way,
8 that doesn't make this statute not facially preempted.
9 This statute has the punitive provisions with the strict
10 liability, treble damages, the segregation requirement
11 that's virtually impossible to apply in practice, the
12 clear expressive mission of a regulatory policy that's
13 contrary to Federal policy.

14 This is the statute that is in front of the
15 Court. This is the statute that is facially
16 unconstitutional, and that's the issue that the Court
17 should decide in order to correct the Ninth Circuit's
18 error, which said it's both facially and as applied
19 immune from preemption challenge, which we think is
20 wrong.

21 JUSTICE GINSBURG: What policy was Congress
22 implementing in the Federal funding statute that
23 California copied?

24 MR. HUNGAR: Your Honor, California did not
25 copy any Federal statutes. None of the Federal statutes

1 has a segregation requirement; none of them imposes
2 strict liability, punitive damages.

3 JUSTICE GINSBURG: But they do say that the
4 money is not to be spent to assist, promote, or deter
5 union organizing.

6 MR. HUNGAR: Yes, there are three Federal
7 statutes that impose use restrictions.

8 JUSTICE GINSBURG: And why do they do that?

9 MR. HUNGAR: It's not clear why they did
10 that, other than obviously they were choosing not to
11 compensate those particular kinds of costs as well as
12 others. Congress is entitled to carve out
13 particular exceptions to the general nonregulatory
14 provisions of the Act, just as it has done in section
15 8(c), where they have carved out coercive employer and
16 union speech for regulation, even though other speech is
17 to be unregulated.

18 It's important to understand also that the
19 general policy in Federal grant programs is to the
20 contrary. There is no such restriction in the vast
21 majority of Federal grant programs involving the vast
22 majority of Federal grant money.

23 JUSTICE GINSBURG: But you don't -- there's
24 no reason, rhyme or reason to why they would have done
25 in these three statutes what you say is flatly contrary

1 to national labor relations policy?

2 MR. HUNGAR: Well, it's not contrary to
3 national labor relations policy, because Congress has
4 chosen to create an exception, and it has the right to
5 do so; the State does not.

6 JUSTICE SCALIA: It was labor policy. I
7 mean, you have to acknowledge it was labor policy in
8 these other cases, just a different labor policy that
9 the Federal Government wanted, right?

10 MR. HUNGAR: In -- in a specific program --

11 JUSTICE SCALIA: Right.

12 MR. HUNGAR: -- which obviously the State's
13 law does not apply to those programs; it applies to
14 State spending across the board.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Hungar.

18 Mr. Gottesman.

19 ORAL ARGUMENT OF MICHAEL GOTTESMAN

20 ON BEHALF OF THE RESPONDENTS

21 MR. GOTTESMAN: Mr. Chief Justice, may
22 it please the Court:

23 Until this statute was enacted, California
24 was in the anomalous position that it was financing
25 speech on one side of union organizing campaigns but not

1 on the other, because most grants, programs, contracts
2 include employment costs as an allowable cost.

3 CHIEF JUSTICE ROBERTS: Well, so was anyone
4 who hired a company to do any kind of work, right?
5 Because the Federal policy meant that they couldn't try
6 to restrict what activities the company engaged in with
7 respect to union organizing.

8 MR. GOTTESMAN: Yes. I mean, a private
9 employer could have said the same things that the State
10 said: Don't use our money to do this. And they would
11 not have violated anything by doing that.

12 JUSTICE SOUTER: I'm not sure why you
13 characterize California as financing one side of a
14 debate, because -- and this I think is sort of the nub
15 of the disagreement between the two sides here -- their
16 argument is that a State can determine what it wants to
17 buy with its money, but what California is doing is
18 telling its contractor what it can do with the money
19 after the State has got what it paid for.

20 MR. GOTTESMAN: That's not correct, Your
21 Honor.

22 JUSTICE SOUTER: And that's the --

23 MR. GOTTESMAN: That's what they claim.

24 JUSTICE SOUTER: I understand that is the
25 basic distinction between a case like Rust and a case

1 like this.

2 MR. GOTTESMAN: Right.

3 JUSTICE SOUTER: They're trying to control
4 their profits as opposed to determining what they get --
5 what you get for your money. And how do you respond to
6 that?

7 MR. GOTTESMAN: Well, that's true if it were
8 the case that the State's statute said: Even after you
9 have earned this money by performing all the service we
10 asked, you still can't -- it's therefore now your money;
11 you can't use it. That is not what the statute means.
12 That is -- the State has been very clear about that.

13 JUSTICE SOUTER: Well, is there any case in
14 which California claims that it has not gotten the
15 service that it paid for as a result of a position
16 which an employer -- a grantee employer took on -- on a
17 unionization issue?

18 MR. GOTTESMAN: Well, there haven't been any
19 cases decided under this statute, but what the court of
20 appeals pointed out is that the Petitioners did not move
21 for summary judgment on the ground that you're
22 forbidding us from using our money. They moved for
23 summary judgment solely on the ground that it was the
24 obligation of the State to give them money that they
25 could use for these purposes. And that it was wrong --

1 CHIEF JUSTICE ROBERTS: No, that's not quite
2 accurate. They moved for summary judgment on the ground
3 that what the State was doing was in effect regulating
4 labor relations --

5 MR. GOTTESMAN: Right.

6 CHIEF JUSTICE ROBERTS: -- and that that
7 activity was preempted.

8 MR. GOTTESMAN: Right. Well, yes, on that
9 core issue, they said to -- to tell us that we cannot
10 use State funds for this purpose -- well, they are still
11 State funds -- is to regulate us. And we submit that
12 that is wrong. This is --

13 JUSTICE SOUTER: Why do you say "while they
14 are still State funds"? The -- the money that the --
15 that any employer is using, I presume, to the extent
16 that it can be identified, is money in the employer's
17 pocket. And the only claim that California would have,
18 it seems to me from the preemption argument, is that in
19 fact we are buying a form of speech or a form of
20 promotion of labor policy when we contract with social
21 service agencies or whatnot. But I don't understand
22 that to be California's argument at all.

23 MR. GOTTESMAN: No. Our argument -- let's
24 take one of the two provisions that the district court
25 struck down, and that Petitioners argue properly struck

1 down. It said that when we give you grant money, don't
2 use that money for this purpose. Now, the State gives
3 them the money up front, before they have provided the
4 services. And that's true universally.

5 JUSTICE SOUTER: Yes, but they give them
6 grant money -- let's say it's a grant rather than a
7 contract, and I assume that's, you know, the point
8 you're making. When they give them grant money, I
9 assume they're giving them grant money in order to do or
10 to perform whatever kind of service or function the
11 agency is devoted to performing.

12 MR. GOTTESMAN: Correct.

13 JUSTICE SOUTER: Not to -- not to enforce
14 labor policy of one sort or another, but to promote the
15 arts or conservation or whatever the organization does.
16 And there's no argument here that the organization is --
17 is failing to promote conservation or the arts or
18 whatever, and for that reason California isn't
19 getting what it's paying for. The argument is that
20 whatever California has to -- I'm sorry, whatever the
21 organization has to spend, say, on its labor relations,
22 which is something that is left over from its promotion
23 of the arts, cannot be spent except in accordance with
24 California policy.

25 MR. GOTTESMAN: Well, first, if they don't

1 spend all the grant money on the prescribed purposes,
2 they have to give it back to the State because grants
3 aren't profit --

4 JUSTICE SOUTER: Yes, but doesn't the State
5 assume that they are entitled to some overhead cost which
6 would include the cost of their employee-related --
7 managing employee relations?

8 MR. GOTTESMAN: Right. And that's --

9 JUSTICE SOUTER: So that wouldn't be money
10 left over. That would --

11 MR. GOTTESMAN: Right, but that, Your Honor,
12 is where the concern that the State was addressing comes
13 in.

14 Traditionally, when the State gave grant
15 money, one of the permissible uses of that money was for
16 the costs of employees who had to perform the grant, and
17 without this limitation, that would have included the
18 employer spending the money to combat unions. That
19 would be -- could arguably be a legitimate cost.

20 JUSTICE SOUTER: So, is the argument that
21 the employer in fact -- that the employer is in fact
22 devoting less of the grant money to the purpose of the
23 grant, so that it falls within Rust?

24 MR. GOTTESMAN: Well -- yes. Well, our
25 position is certainly Rust. That is, the State is

1 entitled to prescribe what it is prepared to pay for in
2 a grant and what not, and it is not required to
3 subsidize the employer's campaign --

4 JUSTICE SCALIA: But the --

5 MR. GOTTESMAN: -- against a union or for a
6 union, for that matter.

7 JUSTICE SCALIA: The difference between this
8 and Rust is that the Federal Government in Rust was
9 assuredly following a Federal policy.

10 MR. GOTTESMAN: Right.

11 JUSTICE SCALIA: But it was a Federal policy
12 that the Federal Government had every right to
13 implement. We do not want to support abortions.

14 MR. GOTTESMAN: Right.

15 JUSTICE SCALIA: The issue here is whether
16 the policy that California is trying to implement --
17 namely, we do not want the employer to -- in its view --
18 disrupt the -- the labor management relations by -- by
19 opposing union -- unionization.

20 MR. GOTTESMAN: That --

21 JUSTICE SCALIA: That -- that is the issue,
22 whether that is a policy that California can -- can
23 implement.

24 MR. GOTTESMAN: That is not the State's
25 policy, and the preamble to the statute does not say:

1 the State disapproves of employers spending money. What
2 it says --

3 CHIEF JUSTICE ROBERTS: Well, the policy
4 -- the policy is they don't want employers to talk about
5 unionization.

6 MR. GOTTESMAN: No. They don't want them to
7 spend the employer's money -- the State's money to
8 talk about unionization.

9 JUSTICE SCALIA: Why? Because it's wasting
10 the money or because that is their --

11 MR. GOTTESMAN: Because the State wants --

12 JUSTICE SCALIA: -- their labor policy?

13 MR. GOTTESMAN: Because the State wants to
14 be neutral, and that -- the right --

15 JUSTICE SOUTER: Then that -- then that, it
16 seems to me, cuts the feet off your argument of a moment
17 ago, that in fact the State's concern is that it's
18 getting less of what it thought it was getting for with
19 its grant, because more is being spent on labor policy.
20 And now, it seems to me, you're saying no, that's not
21 the case. It is simply the fact that the time that the
22 employer spends in talking with employees, whatever the
23 subject is, involves a policy that California does not
24 want to support, and, therefore, California prohibits
25 them spending that time for purely policy reasons.

1 MR. GOTTESMAN: Well, it prohibits them from
2 using the State's money to do it. Of course they can
3 use their own money to do it.

4 JUSTICE SOUTER: No, but your argument a
5 moment ago is that they were using the State's money
6 because in fact they were providing less of the service
7 that the grant was for and spending that in -- in
8 conversation with employees about labor unions. And it
9 seems to me your answer to Justice Scalia was
10 inconsistent with that. Your answer to Justice Scalia,
11 as I understood it, was it is simply that they do not
12 want that policy being implemented by anyone who gets
13 any money from the State within that State.

14 MR. GOTTESMAN: I don't think I said
15 "inconsistently." What I said was, previously it was
16 within the permissible scope of a grant to spend money
17 in an organizing campaign, either assisting, promoting,
18 or deterring unionization. The State is now saying that
19 will no longer be. We don't really want to spend grant
20 money on that, and our reason is that we think we -- the
21 State's money should not be used by either side in that
22 union organizing --

23 CHIEF JUSTICE ROBERTS: How is that -- how
24 is that different from saying there's a Federal rule, an
25 OSHA requirement you've got to have certain protective

1 devices or whatever, and the State says, well, we want
2 to get the most out of our money, so our money cannot be
3 used to put in these federally required safety devices;
4 you can use somebody else's money for that. Why isn't
5 that the same thing here? They're saying there's a
6 Federal labor policy that allows this, and we don't want
7 our money to be spent implementing that policy or
8 pursuant to that policy.

9 MR. GOTTESMAN: Because there is no Federal
10 labor policy that requires States to use State treasury
11 money to finance a party who is engaged in this debate.
12 That's why this is just like Rust.

13 JUSTICE SCALIA: That's why it's like Gould.
14 I mean, there was a case where a State used State money,
15 no contracting with any -- with any company that's been
16 convicted of unfair labor practices three times.
17 Strictly State contracting policy, we just don't want to
18 spend our money dealing with such a person.

19 MR. GOTTESMAN: Right, but there we're
20 saying we won't deal with you. That's -- that would
21 classically -- if the State in this case said, no
22 employer who opposes unions can have a State contract,
23 that would be Gould. It would also be a violation of
24 the First Amendment.

25 JUSTICE SCALIA: Why wouldn't that be the

1 State's managing its own money? It's our money.

2 MR. GOTTESMAN: Well, but it is not --

3 JUSTICE SCALIA: We just don't want to deal
4 with people who oppose unions.

5 MR. GOTTESMAN: No, there's a huge
6 difference between saying, don't use our money to do
7 something, and saying, we won't deal with you even when
8 you use your own money to do it. The implication that
9 this is preemptive --

10 JUSTICE SOUTER: But on your argument, there
11 is no "your own money." You're saying that everything
12 that the grantee gets in a grant situation is the
13 government's money.

14 MR. GOTTESMAN: Correct.

15 JUSTICE SOUTER: So that distinction that
16 you just made in answer to Justice Scalia could not be
17 drawn.

18 MR. GOTTESMAN: Well, if they have their own
19 money, they can spend it on that. They just can't use
20 the State's money.

21 JUSTICE SOUTER: No, but the hypothesis of
22 this whole argument is that we are talking with a grantee
23 who was fully funded by -- I thought fully funded by the
24 State, and I thought that was your strongest argument.
25 So that this alternative -- well, you can use your own

1 money -- is an alternative which, you know, by the very
2 hypothesis that we are arguing on, will never exist.

3 MR. GOTTESMAN: Well, if we have a grantee
4 who has no other money, that doesn't mean the State has
5 an obligation to provide them money to oppose
6 unionization. It would be very odd to believe -- and
7 this is, after all, implied preemption -- that it was
8 Congress's intent without mentioning it to say that it
9 is the obligation of States to provide funding to
10 employers to do this.

11 JUSTICE STEVENS: Mr. Gottesman, can I ask
12 sort of a background question to be sure I understand
13 your position?

14 Am I correct in assuming that if the State
15 of California had its labor relations agency make it an
16 unfair labor practice to engage in this employer speech
17 described here, that that would be preempted?

18 MR. GOTTESMAN: Employer speech with its own
19 money?

20 JUSTICE STEVENS: Yes.

21 MR. GOTTESMAN: Of course that would be
22 preempted, absolutely preempted.

23 JUSTICE STEVENS: Okay.

24 MR. GOTTESMAN: If not preempted, it would
25 certainly be a violation of the First Amendment as well,

1 to punish them for engaging in speech.

2 JUSTICE STEVENS: Well, if they adopted the
3 rule that the Federal labor board applied prior to the
4 Taft-Hartley Act.

5 MR. GOTTESMAN: Exactly.

6 JUSTICE STEVENS: That's what I'm asking.

7 MR. GOTTESMAN: Exactly. Yes.

8 JUSTICE STEVENS: That would be preempted?

9 MR. GOTTESMAN: Of course that would be
10 preempted.

11 JUSTICE STEVENS: I want to be sure.

12 MR. GOTTESMAN: Our position, however, is
13 that it's quite different to say that the National Labor
14 Relations Act requires the State to pay for these
15 activities. And --

16 JUSTICE SOUTER: Why is --

17 JUSTICE STEVENS: No, but it does require
18 that this -- it arguably requires that this area of
19 combat between labor and management be unregulated.

20 MR. GOTTESMAN: Right. And this is not
21 regulation, for the very reasons that this Court in
22 Regan and Rust and in a whole line of cases had said
23 that it is not regulation to simply say, we the
24 government are not going to pay for this activity.

25 That's all that California is saying in this

1 case: We are not going to pay for it. It's the policy
2 of the State not to interfere in these union organizing
3 drives; therefore -- and this is the precise words of
4 the preamble -- "for this reason, the State should not
5 subsidize."

6 JUSTICE SCALIA: Well, I think if your reason
7 for not paying for this activity is that you don't like
8 this activity --

9 MR. GOTTESMAN: That's not true.

10 JUSTICE SCALIA: -- I call that -- I call
11 that regulating the activity.

12 MR. GOTTESMAN: That is not at all the case,
13 Your Honor. There's nothing in this preamble -- the
14 other side keeps characterizing the preamble, which they
15 don't include in their statutory appendix, as saying, we
16 don't like the employer doing it. That's not what it
17 says; it's on page 3.

18 JUSTICE SCALIA: Would you allow the
19 employer to engage in all other employee relations, and
20 you're willing -- that can be done without -- the one
21 thing the employer can't do is speak out against the
22 union. This isn't because you don't --

23 MR. GOTTESMAN: This is -- speak up for or
24 against. This is content discrimination, not viewpoint
25 discrimination; and it is content discrimination whose

1 purpose is to keep the State's funds out of this area of
2 context. The taxpayers' money should not be spent
3 supporting one side and not the other in these disputes.

4 This Court in the Linn case -- and I want to
5 quote this sentence, because this is the key to why a
6 policy of neutrality with respect to the use of the
7 State's money is not, you know, regulated. We -- this
8 was a case in which, to be sure, it was the Federal
9 Government was denying food stamps to strikers. And the
10 claim was that was a violation of their associational
11 rights under the First Amendment. Everybody else who
12 satisfies the test for food stamps is entitled to them,
13 but we are not going to give them to strikers.

14 And when the Federal Government is asked why
15 is that, they said, well, we don't want to get involved.
16 To be sure if we gave them the money, that would make it
17 likely the strike would go on longer. But we are not
18 being anti-union. We just want to be hands off. We
19 want to be -- we don't want Federal money spent to help
20 one side or the other in this labor dispute.

21 And what this Court said was, we have little
22 trouble in concluding that that provision is rationally
23 related to the legitimate governmental objective of
24 avoiding undue favoritism to one side or the other in
25 private labor disputes.

1 Now, that's the core of what this statute is
2 about. The labor union --

3 CHIEF JUSTICE ROBERTS: So, you're saying it
4 doesn't give favoritism to one side or another?

5 MR. GOTTESMAN: It just takes the State's
6 money out.

7 CHIEF JUSTICE ROBERTS: So that depends, as
8 a practical matter, on the view that there are at least
9 some employers who would be arguing in favor of
10 unionization?

11 MR. GOTTESMAN: Well, it wouldn't matter if
12 they were arguing for or against. The point is that --

13 CHIEF JUSTICE ROBERTS: Yes, but my point is
14 that there are precious few who argue in favor of it.

15 MR. GOTTESMAN: Right. Well, that may well
16 be true, but the point is when they are arguing against
17 the union, until this statute State money was being used
18 to argue against the union, the union was not getting
19 any State money to respond. The State was funding one
20 side of this dispute. And the notion that it was an
21 implied purpose of Congress in the National Labor
22 Relations Act to compel States to fund one side of a
23 dispute with a subsidy is -- would be remarkable.

24 JUSTICE ALITO: Well, when the State pays a
25 program participant -- let's again take the case of a

1 nursing home -- for providing services to patients who
2 are covered by Medi-Cal, when money is paid to the
3 nursing home, it's your position that remains the State's
4 money?

5 MR. GOTTESMAN: If this -- if the nursing
6 home -- there are a number of different ways in which
7 this money is paid to the State. If the situation is
8 the nursing home first provides the services and when
9 they have done so billed the State for the money, that's
10 not State funds. Once they receive the money, since
11 they put the money up in front to provide the service,
12 they are being reimbursed for it, that's not the State's
13 funds. It's the State's funds if the State gives them
14 the money up front.

15 As is true universally with respect to
16 grants. We give you this money. This money, now because
17 of this statute, its purposes are limited so that they do
18 not include engaging in -- one side or the other in
19 union organizing. If you have your own money, feel free
20 to spend your own money on that, but we are not giving
21 you this money for that purpose.

22 JUSTICE KENNEDY: Let me just be clear. The
23 statute with reference to State contractors, which is
24 the \$50,000 statute, and the statute with reference to
25 private employers, which is the \$10,000 statute, in all

1 of those cases, the law is applicable only if the money
2 is paid before all the work is done?

3 MR. GOTTESMAN: Yes. If you look at the
4 contract one, which is not actually before the Court
5 because nobody had standing -- the district court ruled
6 to raise it -- it says the State funds to assist,
7 promote or defer -- deter union organizing during the
8 life of the contract are not to be spent on this.

9 So once the contract is done, that is --

10 JUSTICE SOUTER: But what if you have a
11 contract --

12 JUSTICE SCALIA: Well, the question of when
13 the contract is done is different from the question of
14 when the money is paid.

15 JUSTICE KENNEDY: Of course.

16 MR. GOTTESMAN: Right. But what if you --
17 what if you --

18 JUSTICE SCALIA: He is asking about when the
19 money is paid.

20 MR. GOTTESMAN: So if you pay the money up
21 front and you say here is your money to do the
22 contract --

23 JUSTICE SOUTER: Well, what about the
24 situation in which the contract runs for a year and you
25 bill monthly? On your theory the contract is still

1 going on and yet there is no prepayment. And yet I
2 assume on your argument they would be just as bound by
3 the California policy as if they got a hundred percent
4 payment up front.

5 MR. GOTTESMAN: Well, that's -- that's a
6 question about the meaning of a provision that isn't at
7 this issue in this case. The ones that are at issue in
8 this case --

9 JUSTICE SOUTER: Well, do you concede that
10 if they -- if all they did under a 12-month contract
11 was -- was bill for services rendered every past 30
12 days, that there would be either no application of the
13 California law or that the application would be
14 preempted?

15 MR. GOTTESMAN: That might well be the case.
16 But we don't have an interpretation of that provision of
17 the California law.

18 CHIEF JUSTICE ROBERTS: I'm sorry. That was
19 an either/or, I thought.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: Which might be the
22 case?

23 MR. GOTTESMAN: Oh. I say it might be the
24 case.

25 JUSTICE SOUTER: It's like saying yes.

1 MR. GOTTESMAN: Yes.

2 (Laughter.)

3 MR. GOTTESMAN: But again, that issue isn't
4 here. What we've got here are programs, some of which
5 the State advances the money, and some of which it pays
6 after the services have been completed.

7 JUSTICE BREYER: Is this conceded on that
8 point that on page 27 and 25 and 29 of the AFL-CIO brief,
9 I took the statements there, where it says
10 "organizations," namely organizations, even those that
11 receive a hundred percent of their money from the State,
12 are free to use their profits?

13 MR. GOTTESMAN: Right.

14 JUSTICE BREYER: Or if there are any. Or any
15 other non-State moneys they had?

16 MR. GOTTESMAN: And we the State Respondent
17 say the same thing in our brief. We say it at pages 26
18 to 27: "The State maintains a legitimate interest in
19 program funds until such time as the program participant
20 has provided the State with a service the State has
21 funded."

22 JUSTICE BREYER: So if you sell them tables
23 and they write you a check, the State, for the tables,
24 at that point the check is yours?

25 MR. GOTTESMAN: Of course.

1 JUSTICE BREYER: All right.

2 MR. GOTTESMAN: There is no question about
3 that, because in that case, that would be covered by the
4 contract provision that isn't here. But it says once
5 the contract is completed, it's your money.

6 So the concern here only is that they not
7 use our money. The State's brief also says --

8 CHIEF JUSTICE ROBERTS: What if there is a
9 warranty for another year, say if these tables break you
10 have to replace them?

11 MR. GOTTESMAN: Well, that's a question
12 of -- remember, neither of the lower courts has
13 interpreted this statute. This statute has never been
14 interpreted. That's -- and what the court of appeals
15 said is that's because the argument that you all have
16 been asking me about was not raised in summary judgment
17 by the Petitioners. Their core argument is the State
18 has an obligation to subsidize our speech. And that's
19 the only issue they brought up on summary judgment.
20 Because Judge Beezer in a panel decision said, oh,
21 look at all these, quote, as he called them, horrors
22 that will come from this, Judge Beezer got into all
23 these issues: The accounting would be burdensome, that
24 it's going to be the employer's own money.

25 And what the majority said is, number one,

1 that's not here. And number two, they said this -- I
2 believe it's on page 34 of the appendix but I'm not
3 certain of the -- wait a minute, I can tell you the
4 exact page. Yes, it's page 34a: "The dissent's parade
5 of horrors goes far beyond the scope of plaintiff's
6 facial challenge" -- that is the challenge they brought
7 on summary judgment. "The district court made no
8 findings nor is there evidence that this statute," quote,
9 "co-opts the payments for goods and services and profits
10 realized under a contract."

11 JUSTICE BREYER: What is your recommendation
12 as to -- we've heard today, too, in the briefs it's
13 there, I put the thing that I've heard as -- well, the
14 example with the tables is an example of it. When does
15 the profit actually accrue? Is there a treble damage
16 provision that makes this much worse? Are there
17 administrative requirements that in practice make it
18 impossible? Is it administered in such a way that the
19 employee we heard about would just not know what to say,
20 the employer's representative?

21 All those things could be problems, and you
22 say, well, they haven't been dealt with yet. And your
23 recommendation as to what we should do is what?

24 MR. GOTTESMAN: Is affirm, because all the
25 court has said is the motion for summary judgment was

1 improperly granted.

2 JUSTICE BREYER: And if we did that, how
3 would all these problems be worked out? I mean, how
4 would the arguments that you -- they think are far too
5 burdensome, you think they are not and can be done
6 properly, how does that get worked out?

7 MR. GOTTESMAN: Well, first of all, let's
8 talk about the burdens, the accounting burdens, which
9 are actually quite minimal under Medicaid, because they
10 already have to do this because the Federal Medicaid
11 requires them to -- to account for which were allowable
12 expenditures and which were not in a very detailed
13 accounting form. And of course, the Federal Medicaid
14 says that this is not an allowable expenditure, so they
15 have to do this anyway; half this money is Federal and
16 half State.

17 JUSTICE SCALIA: You're not going to go
18 through all of these one by one, are you?

19 MR. GOTTESMAN: Pardon? No. I just wanted
20 to give an example of that.

21 But with respect to each of these, we need
22 to have a record. For example, on the burdens there is
23 an affidavit from an accounting firm submitted by the
24 defendants that says this is really not burdensome at
25 all. And they have --

1 JUSTICE SCALIA: Let me ask a basic
2 question that doesn't require you to get into one by
3 one. Suppose you have a State that doesn't want to have
4 its money used to assist unions. This is an anti-union
5 State and it adopts the same kind of law that you have.
6 And it simply says, none of -- none of this State's --
7 yes, you can recognize unions if you like, but none of
8 the money that we give you --

9 MR. GOTTESMAN: Give who?

10 JUSTICE SCALIA: -- shall be used -- shall
11 be used for collective bargaining or for any -- any
12 activities involving unions. Would that be --

13 MR. GOTTESMAN: None of the moneys -- none
14 of the moneys we give to the employer?

15 JUSTICE SCALIA: Same. Yes.

16 MR. GOTTESMAN: I'm not sure which question
17 you're asking.

18 JUSTICE SCALIA: To the employer. No
19 employer getting money from the State can expend any of
20 our money -- the same way yours is -- in collective
21 bargaining with unions or in anything else. Now, we are
22 not stopping employers from doing that. We just don't
23 like unions, and it's our money and we don't want this
24 employer to use it for unions. Would that be all right?

25 MR. GOTTESMAN: I think that would be

1 problematic but only for this reason. If the employer
2 is allowed to spend the State's money to bargain
3 with nonunion employees and you know medical
4 researchers, whatever, negotiate contracts with them,
5 but the State says you can't do it for collective
6 bargaining, then that is exactly the Livadas case. That
7 is a case in which the State is saying your
8 entitlement to a State benefit turns on whether you are
9 unionized or not. In this case we'll let the employer
10 do this with nonunion employees, but not with unionized
11 employees. But if the State said we don't want to pay
12 for the costs of negotiating with any kind --

13 JUSTICE SCALIA: Why does that -- why does
14 that make a difference? If it violates Federal policy,
15 it violates Federal policy. Livadas said you can't do
16 it because it violates Federal policy, which is to favor
17 unionization, and not to deter.

18 MR. GOTTESMAN: Right. But this statute
19 neither favors nor deters. This statute simply says --

20 JUSTICE SCALIA: You could say the same
21 about that other one.

22 MR. GOTTESMAN: This statute simply says we
23 don't want to subsidize either party, and as a practical
24 matter we are only subsidizing one party in union
25 organizing.

1 JUSTICE SCALIA: So does the statute I
2 posited. Just don't use State money. You can use all of
3 your own money to deal with unions; just we don't want
4 our money used for it.

5 MR. GOTTESMAN: Well, but --

6 JUSTICE SCALIA: That clearly would be
7 banned and I don't see why yours is any different.

8 MR. GOTTESMAN: Well because -- it would not
9 be banned if the State had said we don't want you to use
10 State money to negotiate contracts with any of your
11 employees; that would not be banned. It would be banned
12 if they singled out only unionized employees that you're
13 not allowed to use it with. You're allowed to use it
14 with nonunion employees.

15 CHIEF JUSTICE ROBERTS: Counsel, to get back
16 to your responses on the procedural posture of the case,
17 you said we don't know what the regulatory burden would
18 be with respect to the accounting rules.

19 MR. GOTTESMAN: Right. And, in fact, there
20 is a dispute of facts in the district court on that.

21 CHIEF JUSTICE ROBERTS: Does it make any
22 difference if the argument is -- which is what I
23 understood it to be -- that you can't regulate at all?
24 It's not simply that you can't regulate so long as it's
25 not particularly burdensome, it's that you don't have the

1 authority to regulate in this area at all.

2 MR. GOTTESMAN: But our argument is this
3 is not regulation. To say that the State money is
4 not going to be spent for this is not regulation. Just
5 as Regan and Rust says --

6 CHIEF JUSTICE ROBERTS: Well, but that's a
7 separate answer. That gets to the spending clause
8 question. We're not -- I mean, we can address that
9 without deciding whether the regulations are
10 particularly burdensome. You were saying, well, the
11 accounting thing is not a big problem.

12 MR. GOTTESMAN: Yes.

13 CHIEF JUSTICE ROBERTS: But it doesn't mean
14 that it's necessarily spending as opposed to regulation.

15 MR. GOTTESMAN: Well, we are not regulating
16 whether the employer opposes unions. What we are
17 regulating is what they do with the State's money.
18 That's the only regulation that's here. We have said
19 don't use our money for this purpose. The only
20 regulation that's going on is to see whether you use the
21 State's money --

22 CHIEF JUSTICE ROBERTS: That doesn't seem to
23 me to be responsive to my question. Your point was
24 well, we don't know how burdensome a particular
25 regulation is. If you lose on the question of whether

1 it's spending or regulation, we don't have to wait to
2 see how burdensome it is if we think you're not entitled
3 to regulate at all.

4 MR. GOTTESMAN: Well, if you say that a
5 State's position, "we don't want our money to be
6 used" --

7 CHIEF JUSTICE ROBERTS: You're getting back
8 to the spending question.

9 MR. GOTTESMAN: -- is regulation --

10 CHIEF JUSTICE ROBERTS: I'm putting that
11 aside.

12 MR. GOTTESMAN: I'm having -- the problem
13 I'm having with Your Honor's question is presuming the
14 answer to something. The -- if this is regulation, then
15 there is a serious prospect of its being preempted,
16 but this is not regulation.

17 CHIEF JUSTICE ROBERTS: Regardless of
18 whether -- regardless of whether it's burdensome
19 regulation.

20 MR. GOTTESMAN: Right. If it's regulation.

21 CHIEF JUSTICE ROBERTS: Okay. So
22 why isn't that appropriate to deal with on summary
23 judgment? Not the spending question we have -- that's a
24 different issue. But if there is no difference with
25 respect to regulation whether it's burdensome or not, so

1 we don't have to have further proceedings on whether
2 it's burdensome.

3 MR. GOTTESMAN: Right. But the only issue
4 they raised on summary judgment is that to deny us your
5 money, the State's money, is regulation. And our
6 position is that to deny you the State's money is not
7 regulation, any more than it was in Regan, in Rust, in
8 this whole line of cases where the Court has said the
9 government's choice not to subsidize an activity is not
10 regulation.

11 JUSTICE KENNEDY: But on that point you're
12 in disagreement with the Ninth Circuit en banc opinion?

13 MR. GOTTESMAN: Yes, we are. The Ninth
14 Circuit misunderstood Boston Harbor. It thought Boston
15 Harbor created two boxes that represented the whole
16 world. You're either a market participant or you're a
17 regulator. That's not what Boston Harbor said. And if
18 you go back and look at it, what Boston Harbor said, if
19 you regulate you are vulnerable to preemption arguments;
20 if you are not regulating, then you are free of
21 preemption concerns.

22 JUSTICE KENNEDY: So the principal rationale
23 for the Ninth Circuit's opinion is incorrect in your
24 view?

25 MR. GOTTESMAN: Well, it's not -- no. The

1 Ninth Circuit also talked about the First Amendment and
2 got it right. It said -- when it talked about -- the
3 dissent had said what the State is doing violates the
4 First Amendment, and the Ninth Circuit's response was no,
5 that's not right. All this is is withholding a subsidy,
6 and the First Amendment cases are clear; that's not
7 regulation of speech.

8 What the Ninth Circuit thought erroneously
9 is that Boston Harbor had denied it the right to take
10 that same view, because it thought that Boston Harbor
11 said that everything is regulation unless it's market
12 participation, and that's not what Boston Harbor said,
13 and this is not regulation.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Goldsmith, you have four minutes
16 remaining.

17 REBUTTAL ARGUMENT OF WILLIS J. GOLDSMITH

18 ON BEHALF OF THE PETITIONERS

19 MR. GOLDSMITH: Thank you, Mr. Chief
20 Justice.

21 I'd just like to make a few comments in
22 rebuttal. First of all, the preamble of the statute
23 makes it absolutely clear as to what the State's purpose
24 is. It's at page 3a of the appendix of the petition.
25 It says: "It is the policy of the State not to interfere

1 with an employee's choice about whether to join or to be
2 represented by a labor union. For this reason the State
3 should not subsidize" -- and so on.

4 So clearly the State has a labor policy
5 position. It's a position as I said at the outset that
6 is completely contrary to that of the NLRA. The NLRA's
7 position is that employers just like unions ought to
8 have the right to speak in a noncoercive way to their
9 employees.

10 Secondly, it is not our position that the
11 NLRA requires the State to fund activities. It is our
12 position that the NLRA and the decisions of this Court
13 make it abundantly clear that the States are to stay out
14 of this area altogether, period. And that would be the
15 case whether it was the kind of statute that Justice
16 Scalia was posing a question about, whether it was in
17 effect anti-union or pro-union. It doesn't matter.
18 They are both preempted.

19 The State has no business making labor
20 policy. The decisions of this Court, the unanimous
21 decisions of this Court in several circumstances I think
22 make that very clear. And the Ninth Circuit did find
23 that for all practical purposes, the State was
24 regulating by making labor policy.

25 If I could make two points about neutrality.

1 First of all, the statute is anything but neutral.
2 First of all, the State's policy is not one of
3 neutrality. I just read from the preamble; they have
4 a position; the position is that noncoercive employer
5 speech interferes with employee free choice, and the
6 statute follows that position.

7 The decision to withdraw funds is not the
8 same thing as being neutral. Your Honor made a
9 reference, Justice Scalia, to the Hyde amendment. The
10 Hyde amendment, Congress withdrew funds from -- from
11 abortion practitioners. It was not neutral about
12 abortion. And California here has made a judgment about
13 noncoercive speech.

14 CHIEF JUSTICE ROBERTS: What about the Lyng
15 case that Mr. Gottesman cited in response to that
16 argument?

17 MR. GOLDSMITH: The Lyng case seems to me to
18 be completely off the point on this preemption issue.
19 Look, there is no question, Your Honor, Mr. Chief
20 Justice, that Congress can make judgments about what it
21 chooses to fund or not to fund. That did not open the
22 door to the States to do whatever they wanted to do by
23 way of funding or not funding. Lyng addressed a
24 constitutional --

25 CHIEF JUSTICE ROBERTS: Well, Lyng said that

1 the -- that Congress was being neutral, not that it was
2 making a choice about how to spend its funds. And I
3 understood Mr. Gottesman's point to be that so too,
4 here, California is being neutral.

5 MR. GOLDSMITH: But California is -- is not
6 being neutral, not just because of what the preamble
7 says but because of the add-ons to the statute if you
8 will. California has taken it much farther than simply
9 withdrawing a subsidy. California has taken it to the
10 point that you're exposed to treble damages, but then
11 you have minute tracking and segregation of fund
12 details, and California has taken it even one step
13 farther and said on the other hand, if you want to spend
14 State money to facilitate union organizing, that's
15 perfectly fine with us. You can spend money to give
16 access to union representatives to property. You can
17 use State money to -- to facilitate neutrality
18 agreements of one sort or another. Anything that would
19 help a union organize employees, that's fine by us.

20 So California is not neutral in the same way
21 that Lyng was neutral, but again I would suggest that,
22 Mr. Chief Justice, that Lyng didn't open the door, any
23 more than Rust or Regan opened the door to the States to
24 make labor policy by granting or withholding moneys in
25 any way that they saw fit. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Goldsmith.

3 The case is submitted.

4 (Whereupon, at 12:08 p.m., the case in the
5 above-entitled matter was submitted.)

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