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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

**CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA RESTAURANT ASSOCIATION, and WESTERN GROWERS ASSOCIATION**

Plaintiffs,

**v.**

**ROBERT BONTA, in his official capacity as Attorney General of the State of California; LILIA GARCIA-BROWER, in her official capacity as the Labor Commissioner in the Division of Labor Standards Enforcement of the California Department of Industrial Relations; and DIVISION OF LABOR STANDARDS ENFORCEMENT OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,**

Defendants.

Case No. 2:24-cv-03798-DJC-SCR

**DEFENDANTS' OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION**

| | |
|---|---|
| Date: | May 15, 2025 |
| Time: | 1:30 p.m. |
| Dept: | 7 |
| Judge: | The Honorable Daniel J. Calabretta |
| Trial Date: | Not scheduled |
| Action Filed: | 12/31/2024 |

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## INTRODUCTION

In 2019, then-candidate Donald Trump held a rally at a petrochemical plant in Pennsylvania. Workers at the plant were given a choice: attend the rally, use their own paid leave not to attend, or have their pay docked for that day.[1] Workers who did not attend the rally would also lose out on the opportunity to receive the maximum overtime pay for the week.[2] Workers who did attend the rally were told they could not protest, yell, shout, or engage in any "resistance" behavior during the rally.[3] This 2019 rally at a petrochemical plant is just one of many examples of a "captive audience" meeting—a meeting an employer requires employees to attend at risk of losing their pay or even their jobs. For instance, an employee in Oregon was allegedly fired from his job for refusing to attend a weekly Bible study.[4] And in 2014, construction workers at an Alaska oil plant were called into an a purported safety meeting and instead lectured about how to vote on an upcoming ballot measure about tax cuts for the oil industry.[5]

These captive audience meetings raise concerns about the interests and expressive rights of employees. Employers exercise a great deal of power over their employees through their control over an employees' economic wellbeing—especially in "at will" employment situations where an employee can be fired for any reason. And employers can leverage this power to force employees to listen to them evangelize or lecture on political or religious matters—matters at the core of one's identity and one's beliefs. An employer's

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[1] *See, e.g.*, Sarah Westwood & Yon Pomrenze, *Workers Had 3 Options: Attend Trump's Speech, Use Paid Time Off or Receive No Pay*, CNN.com (Aug. 17, 2019), https://www.cnn.com/2019/08/17/politics/workers-trump-speech-attend-pto-no-pay/index.html (last accessed March 14, 2025); Serena Sonoma, *Shell Workers Forced to Attend Trump Rally or Lose Pay*, Out Magazine (Aug. 18, 2019), https://www.out.com/news/2019/8/18/shell-union-workers-forced-attend-trump-rally-or-lose-pay (last accessed March 14, 2025).

[2] *Id.*

[3] *Id.*

[4] Sasha Ingber, *Construction Worker Sues Company, Says He Was Fired for Not Attending Bible Study*, NPR.com (Aug. 30, 2018), https://www.npr.org/2018/08/30/643341736/construction-worker-sues-company-says-he-was-fired-for-not-attending-bible-study (last accessed March 14, 2025).

[5] Spencer Woodman, *Office Politics*, Slate (Oct. 15, 2014), https://slate.com/news-and-politics/2014/10/bipac-how-the-business-industry-political-action-committee-teaches-corporate-america-to-influence-how-its-employees-vote.html (last accessed March 14, 2025).

power over their employees thus creates real concerns about coercion when it comes to meetings regarding an employer's opinion on political and religious matters; employees may feel compelled to listen to or even voice agreement with their employer lest they otherwise lose their livelihood.

Given the concerns posed by captive audience meetings, the California Legislature enacted Senate Bill 399 (SB 399). The bill added a section to the California Labor Code that prohibits employers from subjecting or threatening to subject an employee to an adverse employment action because the employee declines to participate in a meeting or listen to communications intended to convey the employer's opinion on political or religious matters. At the same time, the bill expressly permits employers to communicate information necessary for employees to do their jobs. Employers who violate the law are subject to a civil penalty or damages to any harmed employee.

Plaintiffs California Chamber of Commerce, California Restaurant Association, and Western Growers Association are business groups that challenge SB 399 as a violation of the First and Fourteenth Amendments and as preempted by the National Labor Relations Act. They now seek a preliminary injunction of the Act. But plaintiffs are not likely to prevail on their claims. Although the First Amendment protects speech, it does not confer a right to compel an unwilling listener to hear one's speech. Because SB 399 is a regulation of conduct, not speech, it is permissible under the First Amendment. Nor is it preempted by the National Labor Relations Act. This Court should therefore deny plaintiffs' motion.

## BACKGROUND

### A. SB 399

The California Legislature enacted Senate Bill 399 (SB 399) in response to concerns about captive audience meetings—meetings that employers require employees to attend at risk of adverse employment action and then use to share their opinions on political or religious matters unrelated to the employees' job duties. As the author of the bill explained, "[i]n most workplaces, workers are 'at will' and can be fired at any time for almost any reason." Liska Decl., Ex. 1, p. 5. The "tremendous power" employers hold over their

employees raises concerns about employers "pressur[ing] workers to do what they say." *Id.*; *see also* Liska Decl., Ex. 4, p. 4 ("Due to their control over elements of the workplace such as an employee's pay and benefits, employers enjoy outsized influence on their employees' daily lives."); Liska Decl., Ex. 5, p. 3 ("The unequal power dynamic between an employer and its employees creates a setting ripe for intimidation. Some workers may feel compelled to adopt an employer's view on a political matter because 'people need their jobs.'" (citation omitted)). One example of employers exercising this influence over employees, the legislative history notes, is captive audience meetings that "are mandatory," where "workers are not permitted to leave or speak out." Liska Decl., Ex. 1, p. 5. "[S]ome employers" use such meetings to "attempt to coerce workers into voting for the employer's preferred candidate or adhering to their religious or political ideological beliefs." *Id.*

SB 399 was animated by the belief that "[no] worker should be subject to forced indoctrination by their employer on politics, religion, or for exercising their protected rights on the job." Liska Decl., Ex. 1, p. 5. The bill "promotes workers' rights, especially those of marginalized communities, by protecting their right to advocate for themselves and opt out of conversations about politics or religion that have nothing to do with their ability to properly execute their job duties." Liska Decl., Ex. 3, p. 4. Ensuring employees have "the choice to listen to the political or religious views of their employers" thus "ensur[es] that the most marginalized workers are not taken advantage of by their employers." *Id.*

Under SB 399, an employer "shall not subject, or threaten to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because the employee declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters." Cal. Labor Code § 1137(c). The statute defines "political matters" as "matters relating to elections for political office, political parties, legislation, regulation, and the decision to join or support any political party or political or labor

organization." *Id*. § 1137(b)(3). It defines "religious matters" as "matters relating to religious affiliation and practice or the decision to join or support any religious organization or association." *Id*. § 1137(b)(4).

This prohibition is subject to a handful of exceptions for situations that do not present the concerns about coercion that animated SB 399. First, SB 399 clarifies that it does not impede an employer from conveying information related to an employee's job duties. For instance, SB 399 does not prohibit an employer: (1) "communicating to its employees any information that the employer is required by law to communicate, but only to the extent of that legal requirement" or (2) "communicating to its employees any information that is necessary for those employees to perform their job duties." Cal. Labor Code § 1137(g)(1), (2). Nor does SB 399 prohibit "[a]n employer from requiring employees to undergo training to comply with the employer's legal obligations, including obligations under civil rights laws and occupational safety and health laws." *Id*. § 1137(h)(5). It also does not prohibit "[a]n institution of higher education . . . from meeting with or participating in any communications with its employees that are part of coursework, any symposia, or an academic program at that institution." *Id*. § 1137(g)(3). And it does not prohibit "[a]n employer that is a public entity from communicating to its employees any information related to a policy of the public entity or any law or regulation that the public entity is responsible for administering." *Id*. § 1137(g)(4).

Second, SB 399 includes exemptions that involve situations that do not implicate the Legislature's concerns over coercion that are present in the typical captive audience scenario. Specifically, SB 399 provides an exemption for: (1) religious entities exempt under Title VII requiring "employees who perform work connected with the activities undertaken by" the religious entity to attend a meeting involving the religious employer's "speech on religious matters," (2) "[a] political organization or party requiring its employees to attend an employer-sponsored meeting or to participate in any communications . . . the purpose of which is to communicate the employer's political tenants or purposes," (3) "[a]n educational institution requiring a student or instructor to attend lectures on political or

religious matters that are part of the regular coursework at the institution," (4) "[a] nonprofit, tax-exempt training program requiring a student or instructor to attend classroom instruction, complete fieldwork, or perform community service hours on political or religious matters as it relates to the mission of the training program or sponsor," and (5) "[a] public employer holding a new employee orientation" required under state law. Cal. Labor Code § 1137(h)(1)-(4), (h)(6).

The California Labor Commissioner is authorized to enforce SB 399, "including by investigating an alleged violation, and ordering appropriate temporary relief to mitigate a violation or maintain the status quo pending the completion of a full investigation or hearing." Cal. Labor Code § 1137(e). Additionally, "any employee who has suffered a violation" may bring a civil action for damages related to any adverse action taken in violation of SB 399. *Id.* § 1137(f)(1). Finally, SB 399 contains a severability clause. *Id.* § 1137(i).

**B. Procedural History**

Plaintiffs are three businesses associations: plaintiff California Chamber of Commerce is a nonprofit business association with approximately 13,000 members in California, Golombek Decl. ¶ 3; plaintiff California Restaurant Association is a nonprofit business association for those in the restaurant industry in California, Condie Decl. ¶ 3; and plaintiff Western Growers Association is a nonprofit business association representing nearly 2,400 farmers across California and other western states, Lunde Decl. ¶ 3. According to plaintiffs, their members will be "significantly impact[ed] by SB 399." Pls.' Mem. P. & A. at 7. They contend that in response to SB 399, "many employers will opt not to hold mandatory meetings to express the company's views on unionization" and will "be restricted from voicing [their] opinions on political issues facing our society such as immigration law compliance." *Id.*[6]

[6] While plaintiffs cite to declarations as evidentiary support for the proposition that SB 399 will "significantly impact" their members, they provide no citations to any evidentiary support for the other factual assertions regarding SB 399's impact on their members. *See* Pls.' Mem. P. & A. at 7-8.

At the end of December 2024, plaintiffs brought suit against Attorney General Rob Bonta and Labor Commissioner Lilia García-Bower, in their official capacities, as well as the California Division of Labor Standards Enforcement, challenging SB 399. First Am. Compl. ¶¶ 20-22. They contend that SB 399 violates their First Amendment rights, is unconstitutionally vague, and is preempted by the National Labor Relations Act (NLRA). *Id.* ¶¶ 34-67. They seek a declaration of SB 399's invalidity and a permanent injunction against enforcement. *Id.*, Prayer for Relief. After filing suit, plaintiffs filed the instant motion for a preliminary injunction of SB 399.

## LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The party seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Id.* at 20. With respect to cases arising under the First Amendment, showing a likelihood of success generally suffices to meet the remaining elements. *E.g.*, *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc).

## ARGUMENT

### I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THEIR CLAIMS

#### A. First Amendment

Plaintiffs contend that SB 399 violates the First Amendment as an unconstitutional infringement on their speech. They are wrong. SB 399 is a regulation of conduct, not speech, and therefore does not trigger First Amendment heightened scrutiny. Rather, it is subject only to rational basis review, a standard it easily meets.

The First Amendment provides that the government "shall make no law . . . abridging the freedom of speech." U.S. Const., amend. I. But this limitation on government authority is not triggered simply because a law has *some* impact on speech. *E.g.*, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-706 (1986). Courts "have not traditionally subjected every"

law "to 'least restrictive means' scrutiny simply because each particular [law] will have some effect on the First Amendment activities of those subject to sanction." *Id.* at 706. After all, "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." *Id.*

Instead, as the Ninth Circuit has emphasized, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019) (citation omitted). Thus, a court must begin its analysis by "determin[ing] whether the First Amendment applies" to the challenged statute. *Id.* To do so, the court first asks the "'threshold question'" of "'whether conduct with a significant expressive element drew the legal remedy'" or the law "'has the inevitable effect of singling out those engaged in expressive activity.'" *Id.* (citation omitted). If the law does neither, it is a regulation of conduct that does not implicate the First Amendment's heightened scrutiny. *Id.*

SB 399 is a classic regulation of conduct. Under SB 399, an employer "shall not subject, or threaten to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because the employee declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer . . . the purpose of which is to communicate the employer's opinions about religious or political matters." Cal. Labor Code § 1137(c). The action that triggers an employer's exposure to sanctions under SB 399 is "subject[ing] or threaten[ing] to subject an employee to discharge, discrimination, retaliation, or any other adverse action." *Id.* Imposing or threatening to impose adverse employment actions on an employee is conduct, not speech. Thus, SB 399 "affects what [employers] must [not] *do*"—sanction an employee—"not what they may or may not *say*." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006) (emphasis in original).

In no way does SB 399 expose an employer to liability for its communicative activities. SB 399 does not prohibit an employer from expressing its opinion to its employees. It nowhere says an employer may not hang fliers or posters, send out mailers, issue press

releases, distribute handouts, maintain websites, give interviews, purchase advertisements, email its employees, or hold meetings about its opinions on any topic, even religious or political matters. Indeed, the Legislature expressly disclaimed its intent to limit any speech by employers. The bill's author stated that under SB 399, "employers are still free to discuss their religious, political, and anti-union views with workers." Liska Decl., Ex. 2, p. 5. All that employers cannot do is "coerce or force [employees] to listen against their will." *Id.* The legislative history analysis similarly states that SB 399 "does not prohibit meetings where the employer's opinion about religious or political matters are expressed" and that an employer "would not be liable . . . under SB 399 until and unless the employer takes an adverse action against [an] employee for exercising their right to decline" to attend a meeting. Liska Decl., Ex. 2, p. 6; *see also* Liska Decl., Ex. 4, p. 6 ("Under the bill, an employer would still be able to host meetings, send email, post flyers, or otherwise utilize whichever forum they prefer to communicate their political or religious positions.").

Nonetheless, plaintiffs contend that SB 399 is a regulation of speech because it "operates as a content and viewpoint-based ban on only certain mandatory meetings in which an employer speaks on the prohibited 'political matters.'" Pls.' Mem. P. & A. at 9. This is so, plaintiffs say, because "what an employer says during a meeting—the topics addressed, and the viewpoints expressed—determines whether the employer may make the meetings mandatory." *Id.* Thus, they conclude, SB 399 is a "content and viewpoint-based restriction on employer speech." *Id.*

Not so. Plaintiffs' argument that SB 399 regulates speech collapses together two discrete employer actions into one. Specifically, plaintiffs merge together an employer *hosting a meeting* and an employer *sanctioning employees for not attending that meeting* into one single action they term a "mandatory meeting." But these are *two distinct acts*. Plaintiffs' attempt to collapse them together elides important differences between the two. Critical among those differences is the fact that SB 399 does not prohibit employers from holding meetings expressing their opinion about political or religious matters. The

legislative history is clear that SB 399 does not sanction an employer for holding a meeting or otherwise expressing its opinion on political or religious matters. *See supra* at 8. Plaintiffs thus err when they contend that SB 399 "prevents [employers] from effectively sharing their opinions on political matters of public concern." Pls.' Mem. P. & A. at 10; *see also id.* (claiming SB 399 "prevents employers from informing and sharing its opinions on newly enacted California laws" and "prevents employers from sharing its opinions related to the Trump administration").

Instead, employers are completely and entirely free under SB 399 to discuss issues such as "how the Company would respond to the passage of a new minimum wage increase" or "how the Company is responding to increased enforcement raids by ICE" or "how the company will be promoting cultural awareness of various holiday observances" or "an employer's viewpoint on the benefits of a union-free environment." Pls.' Mem. P. & A. at 10-11. An employer may send out or distribute newsletters to employees highlighting its views on new laws or unionization. It may post fliers about holiday observances or upcoming events. And it may organize meetings to discuss how it plans to respond to increased enforcement raids by ICE. In no way does SB 399 silence the employer's speech on any of these topics or prohibit it from communicating information or opinions about these topics to its employees in whatever manner it chooses to.

All that an employer may not do is impose an adverse employment action on an employee who deletes or refuses to accept a newsletter about its opinion on new laws or unionization, declines to read the poster on holiday observances, or elects not to attend the meeting about responding to increased enforcement raids by ICE. As the legislative history explains, an "employer would not be liable for damages under SB 399 *unless and until* the employer takes an adverse action against [an] employee for exercising their right to decline." Liska Decl., Ex. 2, p. 6 (emphasis added); *see also supra* at 8. No speech is prohibited, only coercive disciplinary actions by an employer that would force or compel an employee to listen to opinions that they do not wish to hear on matters unrelated to their job duties.

This distinction is critical because while holding a meeting to express an opinion is expressive activity, imposing an adverse employment action on an employee is not. Were it otherwise, the many state and federal laws that limit an employer's ability to impose adverse employment actions on an employee, such as anti-discrimination laws or protections for whistleblowers, would similarly regulate expressive activity. *See, e.g.*, 5 U.S.C. § 2302(b)(8) (public employer may not "take or fail to take, or threaten to take or fail to take, a personnel action" due to employee's whistleblowing activities); 18 U.S.C. § 1514A(a) (companies may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" due to whistleblowing activities); 42 U.S.C. § 2000e-2(a)(1) (unlawful for an employer "to fail or refuse to hire or to discharge an individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"). Plaintiffs cite no authority for the proposition that laws limiting an employer's ability to discipline an employee for protected activity implicate any expressive conduct or speech—and it is plaintiffs' burden to establish that SB 399 regulates expressive activity, not conduct.

Nor is it relevant that the adverse employment actions that SB 399 prohibits would have some nexus or connection with an employer's speech, for the First Amendment does not include the right to force a listener to hear one's speech. As the Supreme Court has stated, "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970). "While the freedom to communicate is substantial, 'the right of every person to be let alone must be placed in the scales with the right of others to communicate.'" *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quoting *Rowan*, 397 U.S. at 738). Indeed, rather than recognizing a right to force others to listen to one's own speech, the Supreme Court has "repeatedly recognized the interests of unwilling listeners" not to listen to unwanted communications. *Id.* at 716-717; *see also id.* at 716 ("The unwilling listener's interest in avoiding unwanted communication has been

repeatedly identified in our cases."). This freedom from unwanted communications is "an aspect of the broader 'right to be let alone' that one of our wisest Justices characterizes as 'the most comprehensive of rights and the right most valued by civilized men.'" *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

And this freedom from communication is especially important "in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure'" to the speech. *Hill*, 530 U.S. at 718. SB 399 addresses such a situation. As the legislative history explains, employers and their employees do not stand on equal footing. *See supra* at 2-3. By virtue of controlling their employees' economic livelihood—particularly in an at will employment situation—an employer exercises "outsized influence on their employees' daily lives." Liska Decl., Ex. 4, p. 4. An employer can leverage this influence to force an employee to listen to the employer's opinion on highly personal issues such as one's political beliefs or one's faith. Of course, as the Supreme Court has observed, "[w]e are a social people and . . . an offer by one to communicate and discuss information with a view to influence the other's action [is] not regarded as aggression or a violation of that other's rights." *Hill*, 530 U.S. at 717 (quoting *Am. Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921)). But if "the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free." *Id.* (quoting *Am. Steel Foundries*, 257 U.S. at 304). So, too, the employee who faces the choice to either listen to an unwanted opinion from their employer or suffer potentially dire economic consequences, like the loss of their livelihood. The First Amendment does not require that an employee "'undertake Herculean efforts to escape'" their employer's political or religious opinions. *Id.* at 716 (citation omitted).

At the end of the day, SB 399 is a regulation of conduct, not speech. It does not silence any employer's speech, but only restricts an employer's conduct in taking or

threatening to take adverse action against an employee who does not wish to listen to the employer's speech. That is conduct, and plaintiffs cite no case law holding otherwise.

Because SB 399 is a regulation of conduct, not speech, it is subject only to rational basis review. *See, e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1073 (9th Cir. 2022). Under rational basis review, SB 399 must be "'rationally related to a legitimate state interest.'" *Id.* at 1078 (citation omitted). SB 399 serves to protect employees from employers utilizing their economic power to coerce an employee on political or religious issues and to guarantee an employee's right to refuse to listen to an employer's opinion. The Supreme Court has recognized these are important state interests. *See supra* at 10-11. And SB 399 clearly furthers these interests in a rational way: by prohibiting employers from leveraging their power over employees by taking or threatening an adverse employment action to force an unwilling employee to listen to their speech. Since SB 399 is a regulation of conduct that meets the standard for rational basis review, plaintiffs are not likely to succeed on their First Amendment claim.

**B. Vagueness**

Plaintiffs further contend that SB 399 is unconstitutionally vague. Pls.' Mem. P. & A. at 11. Their arguments focus on the definitions of "political matters" or "religious matters." In so doing, they ignore the remainder of the statutory language that provides clarity and guidance on the scope of SB 399's regulation. When viewing the statutory language in its entirety, SB 399 is not unconstitutionally vague.

A statute is impermissibly vague when it "fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Arce v. Douglas*, 793 F.3d 968, 988 (9th Cir. 2015) (citation omitted). But this standard "does not require 'impossible standards of clarity.'" *Id.* (citation omitted). Rather, a statute must simply "give sufficient notice as to what conduct is prohibited." *Id.*

SB 399 meets this standard. The particular conduct that SB 399 regulates is an employer "subject[ing] or threaten[ing] to subject" an employee "to discharge, discrimination, retaliation, or any other adverse action." Cal. Labor Code § 1137(c). An

average employer clearly knows what it means to subject or threaten to subject an employee to discharge, discrimination, retaliation, or an adverse employment action. Indeed, the term "adverse action" is ubiquitous in the context of other anti-discrimination and anti-retaliation laws. *E.g., Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 970 (9th Cir. 2002) (Under Title VII, "[a]n 'adverse employment action' is 'any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in a protected activity." (citation omitted)).

And SB 399 is similarly clear about when an employer may not subject or threaten to subject an employee to adverse action: when the employee "declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters." Cal. Labor Code § 1137(c). For SB 399's prohibition to apply then, an employee must have (1) declined to attend a meeting or receive or listen to a communication, (2) the purpose of which was to communicate the employer's opinion, (3) about religious or political matters. A reasonable employer will know when it is holding a meeting or communicating its own opinion on political or religious matters, and it will know when it is threatening an employee with or subjecting an employee to adverse action because the employee has declined to participate in that meeting or listen to that communication. After all, SB 399 is predicated on an employer first organizing a meeting or communicating an opinion, and an employer will thus know when it has triggered its obligation under SB 399 not to penalize an unwilling listener. Critically, SB 399 only applies when the *purpose* of the communication is to convey an employer's opinion about religious or political matters. Any reasonable employer will know when a meeting or communication is meant to convey their opinion rather than some other concern or issue and thus when SB 399 will potentially limit their subsequent ability to sanction an employee for not listening.

Nor are the definitions of "political matters" or "religious matters" unconstitutionally vague. SB 399 defines "political matters" as "matters relating to elections for political

office, political parties, legislation, regulation, and the decision to join or support any political party or political or labor organization." Cal. Labor Code § 1137(b)(3). This is an exhaustive list of specific subjects, and it would be absurd for a reasonable person (or employer) not to know when they are sharing an opinion about these specific matters. So, too, with the definition of "religious matters." The statute defines "religious matters" as "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association." *Id.* § 1137(b)(4). Here, too, a reasonable person will know when they intend to share their opinion about these specific subjects and thus when SB 399's subsequent restriction on employee discipline will apply.

Of course, there may be cases at the margin that can be dreamed up or hypotheticals that are debatable. After all, "because we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'" *Hill*, 530 U.S. at 733 (2000) (citation omitted) (alterations in original). But a statute is not vague when it is "clear what the [statute] as a whole prohibits." *Id.* (citation omitted). SB 399 meets this standard and plaintiffs are unlikely to succeed on their vagueness challenge to the statute.

**C. National Labor Relations Act Preemption**

Plaintiffs further contend that SB 399 is invalid because it is preempted under the National Labor Relations Act (NLRA). Courts have recognized two special types of defensive preemption under the NLRA: *Garmon* preemption and *Machinists* preemption. *See, e.g.*, *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 951 (9th Cir. 2014). The first, *Garmon* preemption, "'is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.'" *Id.* (quoting *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008)). The second, *Machinists* preemption, "'forbids both the [National Labor Relations Board] and States to regulate conduct that Congress intended to be unregulated because left to be controlled by the free play of economic forces.'" *Id.* (quoting *Chamber of Commerce*, 554 U.S. at 65). Plaintiffs contend both doctrines preempt SB 399. Neither does.

**1. *Garmon* Preemption**

Plaintiffs first contend that SB 399 is preempted under *Garmon* preemption. This line of NLRA preemption "deals specifically with when a labor matter must be brought before the [National Labor Relations Board], a complicated doctrine known as primary jurisdiction." *Retail Prop. Tr.*, 768 F.3d at 951. In other words, *Garmon* preemption "'tells us not just what law applies (federal law, not state law), but who applies it (the National Labor Relations Board, not the state courts or federal district courts).'" *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union 174*, 598 U.S. 771, 777 (2023) (citation omitted). The party asserting *Garmon* preemption bears the burden of showing that the doctrine applies. *E.g.*, *id.* at 776. To so do, the party must establish "more than 'a conclusory assertion' that the NLRA arguably protects or prohibits conduct." *Id.* (citation omitted). Instead, the party must "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.'" *Id.* (citation omitted).

The Supreme Court has also recognized three exceptions to *Garmon* preemption. *Glacier Nw.*, 598 U.S. at 777 n.1. The first "allows a court to resolve a claim if the party raising it lacks a 'reasonable opportunity' to secure a Board decision on the legal status of the conduct at issue." *Id.* (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 201 (1978)). The second "applies if the conduct in question is 'a merely peripheral concern' of the NLRA." *Id.* (citation omitted). The third "covers situations 'where the regulated conduct touche[s] an interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,' a court cannot conclude that Congress 'deprived the States of the power to act.'" *Id.* (citation omitted) (alteration in original).

As an initial matter, it is unclear that plaintiffs have carried their burden to invoke *Garmon* preemption. *Garmon* preemption applies to conduct that is arguably protected by section 7 of the NLRA or arguably prohibited by section 8 of the NLRA. *Moreno v. UtiliQuest, LLC*, 29 F.4th 567, 573 (9th Cir. 2022). Section 7 protects the rights of employees to

unionize, to bargain collectively, and to engage in concerted activity for mutual aid and protection. *Id.* at 574. In turn, section 8 bars unfair labor practices by employers or labor organizations and makes it illegal "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the NLRA]." *Id.*

Plaintiffs do not contend that freedom from captive audience meetings is a protected right of employees under section 7, or that taking an adverse action against an employee who refuses to listen to an employer's speech on political or religious matters constitutes an unfair labor practice by an employer under section 8. Indeed, they contend that on the contrary, captive audience meetings are *not* an unfair labor practice. Pls.' Mem. P. & A. at 14. Thus, plaintiffs do not properly raise *Garmon* preemption here.

But even if they had, they have still failed to demonstrate a likelihood of success because the exceptions to preemption recognized in *Glacier Northwest* apply here. First, this case does not involve a situation where a party could have raised a claim before the Board itself. *See Glacier Nw.*, 598 U.S. at 777 n.1 (preemption does not apply where party lacks reasonable opportunity to raise claim before Board). As the Supreme Court has recognized, *Garmon* "justifies pre-emption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so." *Sears, Roebuck & Co.*, 436 U.S. at 201; *see also Retail Prop. Tr.*, 768 F.3d at 951 (holding that *Garmon* preemption was "not at issue" where one party had no right to invoke the Board's primary jurisdiction and the other party "failed to do so"). "The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." *Sears, Roebuck & Co.*, 436 U.S. at 202. This is not a case where plaintiffs allege that a party has a reasonable opportunity to invoke the Board's jurisdiction. Plaintiffs nowhere contend that they have sought to have the Board weigh in on this matter, let alone that they could have—or that the State defendants could have either. Given the absence of any opportunity or attempt to bring an identical claim before the Board such that the Board could exercise its primary jurisdiction, *Garmon* preemption does not apply here.

Additionally, *Garmon* preemption is inapplicable because SB 399 falls within another exception from preemption: it involves "'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,' a court cannot conclude that Congress 'deprived the States of the power to act.'" *Glacier Nw.*, 598 U.S. at 777 n.1 (citation omitted). The Supreme Court has long recognized that "'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.'" *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (citation omitted) (holding NLRA did not preempt Massachusetts law establishing minimum mental-health care benefits). Such statutes establishing minimum employment standards "affect[ing] union and nonunion employees equally, and neither encourag[ing] nor discourag[ing] the collective-bargaining process" do not have "any but the most indirect effect on the right of self-organization" protected by the NLRA. *Id.* at 755. Such laws are not meant to "encourage or discourage employees in the promotion of their interests collectively" but rather "'give specific minimum protections to *individual* workers.'" *Id.* SB 399 is just like any other law that creates "minimum standards 'independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization." *Id.* (citation omitted; alteration in original).

Moreover, SB 399 is not a law "directly regulating relations between unions and employers," *Retail Prop. Tr.*, 768 F.3d at 960. Instead, it is designed to protect all employees from potential coercion on religious or political matters—and to thereby protect each individual employee's freedom of thought and autonomy, whether unionized, unionizing, or neither. It is focused on protecting individual freedom of conscience on religious and political matters that have no bearing on workplace relations. Indeed, SB 399 expressly carves out meetings and communications relevant to an employees' work duties. *See, e.g.*, Cal. Labor Code § 1137(g)(1), (g)(2). Rather than intruding on the federal regulation of employer-employee regulations protected by the NRLA and falling within the scope of *Garmon* preemption, SB 399 furthers deeply rooted local concerns: protecting

workers from coercive speech on non-workplace matters in a setting where there is a power imbalance. It is therefore outside the scope of *Garmon* preemption.

**2. *Machinists* Preemption**

In addition, plaintiffs contend that SB 399 is preempted under *Machinists* preemption. *Machinists* preemption "forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended 'be unregulated because left to be controlled by the free play of economic forces.'" *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008) (citation omitted). It is "based on the premise that 'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" *Id.* (citation omitted). At the same time, however, *Machinists* preemption "does not ordinarily preempt state laws of general applicability governing the 'particular substantive terms' that might be the subject of collective bargaining.'" *Idaho Bldg. & Const. Trades Council v. Inland Pac. Chapter of Associated Builders & Contractors*, 801 F.3d 950, 958 (9th Cir. 2015) (quoting *Metro. Life Ins.*, 471 U.S. at 733). For instance, courts have "upheld state statutes of general applicability establishing minimum labor standards." *Id.*

SB 399 is the latter: a generally applicable statute establishing minimum labor standards by protecting employees from retaliation. The statute is not a regulation of "'union organization, collective bargaining, and labor disputes,'" *Chamber of Commerce*, 554 U.S. at 65 (citation omitted). And it does not "directly regulat[e] relations between unions and employers." *Retail Prop. Tr.*, 768 F.3d at 960 (citation omitted). Instead, it generally prohibits employers from imposing adverse employment actions on employees who refuse to attend meetings or otherwise listen to communications about an employer's opinion on political or religious matters writ large. It thereby "largely touch[es] on noneconomic 'interests . . . deeply rooted in local feeling and responsibility.'" *Id.* These noneconomic concerns include the autonomy and expressive rights of workers to be free from coercion by their employers with respect to political and religious concerns, which can encompass some of the deepest personal decisions about one's identity and beliefs.

And by regulating what an employer can discipline an employee for, SB 399 touches upon substantive issues that are at the core of labor standards—just like numerous other laws regulating when employers can take adverse employment actions against an employee, *see supra* at 10 (listing examples of anti-discriminatory and anti-retaliation laws). SB 399, like other statutes setting a floor of protection for the terms and conditions of employment, is therefore outside the scope of *Machinists* preemption.

The decision in *Chamber of Commerce v. Brown* is not to the contrary, despite plaintiffs' arguments. *See* Pls.' Mem. P. & A. at 15. In that case, the Supreme Court considered whether *Machinists* preemption applied to a state statute that prohibited employers from spending state funds on anti-union efforts. 554 U.S. at 63. The Court held that the statute was preempted because the NLRA included "explicit direction from Congress to leave noncoercive speech unregulated." *Id.* at 68. It explained that a state "could not directly regulate noncoercive speech about unionization by means of an express prohibition" and thereby could not "indirectly regulate such conduct by imposing spending restrictions on the use of state funds." *Id.* at 69.

That holding has no applicability here. SB 399, as discussed above, is not a regulation of an employer's *speech*; it is a regulation of its *conduct*. In no place does SB 399 limit what an employer can say to its employees about unionization—or any other topic. It imposes no sanctions on an employer for hanging fliers, sending newsletters or emails, or hosting meetings about unionization and the employer's views on that subject. What SB 399 does limit is imposing an adverse employment action on an employee who declines to listen to the employer's opinion on the subject. Whatever *Chamber of Commerce v. Brown* says about an employer's right to speak noncoercively about unionization, it does not say anything about an employer's right to *force employees to listen*. Indeed, given the Court's repeated recognition of the importance of an individual's ability to avert their eyes from or plug their ears to speech they do not wish to hear, *see supra* at 10-11, it would be odd if the Court had recognized such a right. Nothing in the NLRA prohibits a state from requiring, as a general condition of employment, that an employer not sanction employees who elect not

to listen to the employer's views on political or religious matters. Thus, Plaintiffs have not shown a likelihood of success on their *Machinists* preemption claim.

## II. THE OTHER FACTORS DO NOT WEIGH IN FAVOR OF INJUNCTIVE RELIEF

Plaintiffs have likewise failed to establish the other requirements for injunctive relief. First, none of the plaintiffs have demonstrated any irreparable harm. If plaintiffs had demonstrated that SB 399 likely violated their constitutional rights, that would constitute irreparable harm. *E.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("deprivation of constitutional rights 'unquestionably constitutes irreparable injury'" (citation omitted)). However, as explained above, SB 339 is constitutional. *See supra* at 6-14.

Second, the balance of equities and public interest do not favor injunctive relief. Where, as here, the government is the opposing party, the last two factors of the preliminary injunction analysis—the balance of equities and public interest—merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). To analyze these factors, the Court "'balance[s] the competing claims of injury'" and "'consider[s] the effect of granting or withholding the requested relief,'" paying "'particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Winter*, 555 U.S. at 24 (citations omitted). As with irreparable harm, had the plaintiffs shown a likely constitutional violation—particularly of their First Amendment rights—this factor would have been met. *E.g.*, *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc). But since, as explained above, they have not, the remaining factors weigh against injunctive relief.

Even as a general matter, a State "suffers a form of irreparable injury" when it is "enjoined . . . from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2013) (internal quotation marks and citation omitted). Furthermore, enjoining SB 399 would also inflict harm on the workers it is meant to protect. SB 399 protects employees from potential coercion by their employers on political and religious matters. It helps preserve an employee's own ability to freely choose their own beliefs on such matters—thereby reinforcing the employee's own First

Amendment rights of free speech and free exercise. It does so in clearly concerning situations, as when an employer forces employees to attend a political rally or religious prayer meeting. And it does so in the seemingly benign examples that plaintiffs proffer. Plaintiffs may find nothing harmful in requiring an employee attend "a mandatory meeting to discuss supporting a food drive put on by a local Knights of Columbus," for instance. Pls.' Mem. P. & A. at 8. But an employee who is an agnostic, an atheist, or a practitioner of a religion other than Catholicism may have concerns about supporting an organization like the Knights of Columbus that seeks to further the beliefs of a different faith or may wish to put their time and charitable efforts towards other organizations.

In contrast, any actual burden on the plaintiffs is incidental. SB 399 imposes no restriction on an employer's speech on religious or political matters. Nor does it prevent employers from reaching out and communicating with employees who wish to hear the employer's opinion; employers are entirely free to communicate their opinions with a willing employee. All that the employer cannot do is punish an employee unwilling to listen. Weighing the State's interest in protecting employees from being forced to decide whether to listen to unwanted communications on an employer's politics or religion or risk losing their job against the narrow intrusion SB 399 poses to employers, the remaining injunctive relief factors weigh against granting plaintiffs' motion.

## III. ANY INJUNCTIVE RELIEF MUST BE NARROWLY TAILORED

Even if injunctive relief were warranted here (which it is not), any relief would have to be tailored solely to enjoin the portions or applications of SB 399 that harm plaintiffs. For any injunctive relief "'must be tailored to remedy the specific harm alleged.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (citation omitted). Such tailoring is particularly appropriate given SB 399 contains a severability clause, Cal. Labor Code § 1137(i), which creates a presumption in favor of severability, *e.g.*, *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014). Should this Court grant a preliminary injunction, it should tailor such relief to reach only those applications of SB 399 that

plaintiff has substantiated will impact its activities or are likely invalid under plaintiffs' claims.

## CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for a preliminary injunction of SB 399.

Dated: March 14, 2025

Respectfully submitted,

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# CERTIFICATE OF SERVICE

Case Name: ***California Chamber of Commerce, et al. v. Robert Bonta, et al.***
Case No.: **2:24-cv-03798-DJC-SCR**

I hereby certify that on March 14, 2025, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. **DEFENDANTS' OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION**
2. **DECLARATION OF KRISTIN A. LISKA IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION (with Exhibits 1-5)**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished electronically by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

This declaration was executed on March 14, 2025, at San Francisco, California.

| Vanessa Jordan | *Vanessa Jordan* |
|---|---|
| Declarant | Signature |