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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA CHAMBER OF COMMERCE and CALIFORNIA RESTAURANT ASSOCIATION,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of the State 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

SUPPLEMENTAL BRIEF OPPOSING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date:	May 22, 2025
Time:	3:00 p.m.
Dept:	7
Judge:	The Honorable Daniel J. Calabretta
Trial Date:	Not scheduled
Action Filed:	12/31/2024

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INTRODUCTION

Defendants file this supplemental brief in opposition to plaintiffs' motion for a preliminary injunction following the May 22, 2025, hearing on the motion. Defendants wish to make two additional points salient to the Court's resolution of this motion. First, plaintiffs' facial preemption challenge is subject to the *Salerno* standard for facial challenges, which requires them to show that no circumstances exist under which SB 399 would escape preemption by federal law. Because they cannot do so, plaintiffs have not shown a likelihood of success on a facial preemption challenge to SB 399. Nor have plaintiffs established standing for an as-applied challenge, much less created a record sufficient to show likelihood of success on such a challenge, at this juncture. Second, if the Court concludes to the contrary that plaintiffs have shown a likelihood that SB 399 is preempted, any invalid portions of SB 399 are severable from the remainder and any injunction should be limited accordingly.

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON A PREEMPTION CHALLENGE TO SB 399

During the hearing on plaintiffs' motion for a preliminary injunction, the Court asked questions regarding how to handle the facial nature of plaintiffs' preemption challenge to SB 399, including the proper scope of any relief. The Ninth Circuit provided guidance on this precise issue in *Puente Arizona v. Arpaio*, 821 F.3d 1098 (9th Cir. 2016). In *Puente Arizona*, the plaintiff raised a facial challenge to an Arizona law that prohibited the use of another's identity to obtain employment. *Id.* at 1102. The plaintiff contended the law was facially preempted by federal immigration law. *Id.* In analyzing the plaintiff's claim, the Ninth Circuit stated that in a typical facial challenge, a "plaintiff must show that 'no set of circumstances exists under which the Act would be valid.'" *Id.* at 1104 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). While a less stringent standard applies in the First Amendment context, "[w]ithout more direction" from the Supreme Court, the Ninth Circuit has "chosen to continue applying *Salerno* to facial preemption challenges." *Id.*; *see also, e.g.*, *Montana Med. Ass'n v. Knudsen*, 119 F.4th 618, 624 (9th Cir. 2024) (applying *Salerno* standard to facial preemption challenge); *Am. Apparel*

& Footwear Ass'n v. Baden, 107 F.4th 934, 938-939 (9th Cir. 2024) (same). The plaintiff in *Puente Arizona* thus had to meet "the high bar" of *Salerno* to prove success on its facial preemption challenge. *Puente Arizona*, 821 F.3d at 1108. The court held that it "cannot say that every application" of the challenged statute was preempted and therefore unconstitutional. *Id.* at 1108. It thus held that the law should not be "enjoined in all contexts as applied to all parties." *Id.*

Just as in *Puente Arizona*, plaintiffs here cannot show a likelihood of success on a facial National Labors Relations Act preemption challenge to the statute. Regardless of whether there may be some preempted applications of the statute (and defendants contend there are none), there are clearly numerous non-preempted applications: an employer who disciplines an employee who opts out of the employer's weekly Bible newsletter, refuses to attend a meeting about the employer's thoughts on who to vote for in a city council election, or leaves a meeting to encourage conversion to the employer's faith. Given the wide array of non-preempted applications of SB 399, plaintiffs cannot establish that their facial preemption challenge is likely to succeed on the merits.

Nor have they put forth a proper record to build an as-applied challenge as to NLRA preemption—or established standing for such an as-applied challenge. Plaintiffs provide no evidence that their member employers specifically wish to hold meetings that might implicate NLRA preemption such that they would have standing for an as-applied challenge. The specific examples of meetings their members seek to hold that are identified in plaintiffs' supporting declarations are all meetings unrelated to labor organizing or unionization. *See* Golombek Decl. ¶ 6 (members "held meetings to discuss the impacts of 2024 ballot measures"); Lunde Decl. ¶ 5 (members "held 'all-hands' meetings to discuss the impacts of PAGA and PAGA reform"); Condie Decl. ¶ 6 (members "held meetings to discuss the impacts of Proposition 32"). Nor do the declarations' conclusory statements that plaintiffs' members "internally discuss labor issues and other 'political matters' including proposed legislation, administrative regulations, elections, and court decisions" suffice to establish standing for, let alone the contours of, an as-applied challenge. *See* Golombek Decl. ¶ 6; Lunde Decl. ¶ 5; Condie Decl. ¶ 6. Plaintiffs have not

adequately articulated "an intention to engage in a course of conduct arguably affected with a constitutional interest" that is "proscribed by" SB 399 and within the scope of any NLRA preemption. *Kumar v. Koester*, 131 F.4th 746, 752 (9th Cir. 2025) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159-160 (2014)). They have not established standing for an as-applied challenge, let alone provided a sufficient record to establish a likelihood of success on that challenge. In the absence of a clear record establishing a viable as-applied preemption challenge and because SB 399 has non-preempted applications, plaintiffs have not shown a likelihood of success on any preemption claim.

II. ANY PREEMPTED PORTIONS OF THE STATUTE ARE SEVERABLE

Notwithstanding plaintiffs' failure to establish an as-applied preemption challenge, should the Court conclude there are preempted applications of SB 399, such applications are severable from the remainder of the statute. Federal courts apply California law when analyzing severability. *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014). California courts apply a three-part test to determine severability: the invalid part of the law "must be grammatically, functionally, and volitionally separable." *California Redevelopment Ass'n v. Matosantos*, 53 Cal. 4th 231, 271 (2011) (citation omitted). "Grammatical separability, also known as mechanical separability, depends on whether the invalid parts 'can be removed as a whole without affecting the wording' or coherence of what remains." *Id.* (citation omitted). "Functional separability depends on whether 'the remainder of the statute is complete in itself.'" *Id*. (citation omitted). "Volitional separability depends on whether the remainder 'would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute.'" *Id.* (citation omitted). The presence of a severability clause "establishes a presumption in favor of severance," *id.* at 270.

SB 399 contains a severability clause, establishing a presumption in favor of severance. *See* Cal. Labor Code § 1137(i). And any preempted portions of the statute are grammatically separable by tailoring the statutory definition of "religious matters" or "political matters," each of which include an enumerated list of topics, to remove the offending topic; the remaining definitions would be coherent and understandable. They are also operationally separable since

the remaining definition of "political matters" or "religious matters" would remain enforceable and the rest of the statute would be unaffected by this change. Finally, the severability clause establishes the Legislature would have chosen to enact the statute without any invalid portions had it foreseen the invalidity.

In sum, plaintiffs cannot establish a likelihood of success on their preemption claim because they cannot prevail on a facial preemption challenge and have not established an as-applied challenge. In the alternative, defendants ask this Court to limit any injunction granted on the basis of preemption to only applications of the statute that are enjoined.

Dated: June 2, 2025

Respectfully submitted,

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ANYA M. BINSACCA
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/s/ Kristin A. Liska
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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 June 2, 2025, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

SUPPLEMENTAL BRIEF OPPOSING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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 June 2, 2025, at San Francisco, California.

Vanessa Jordan	Vanessa Jordan
Declarant	Signature