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UNITED STATES DISTRICT COURT

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 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

PLAINTIFFS' SUPPLEMENTAL BRIEFING IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Complaint Filed: December 31, 2024
Trial Date: None Set

Plaintiffs California Chamber of Commerce, California Restaurant Association and Western Growers Association ("Plaintiffs") submit the instant memorandum, in response to the Court's invitation to submit supplemental briefing, following the May 22, 2025 hearing on Plaintiffs' Motion for a Preliminary Injunction. (Dkt. 24).

California Senate Bill 399 ("SB 399") is both an unconstitutional law that infringes on Plaintiffs' First and Fourteenth Amendment rights and is legislation that is preempted by the National Labor Relations Act ("NLRA"). The statute's intent in chilling employer speech is evident from merely reviewing the title of the legislation, where it references limiting "Employer Communication" and not some form of conduct. (Dkt. 19-1, Liska Decl., Exh.1-1). Reviewing the legislation in greater detail confirms that SB 399 prohibits employers from discussing important labor issues with employees, improperly limits employer speech on content relating to politics, religion and/or labor issues and seeks to adjudicate issues which are clearly within the purview of the National Labor Relations Board ("NLRB"). For the reasons set forth in its moving papers, at oral argument and below, Plaintiffs request that the Court grant its motion for a preliminary injunction against the entirety of SB 399.

I. SB 399 IS UNCONSTITUTIONAL.

A theme of Defendants' oral argument was that SB 399 does not limit "speech", but instead regulates "conduct." Such an argument is contrary to the decisions of the United States Supreme Court, most notably in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). At oral argument, the Court posed various hypothetical situations to counsel for both parties and asked whether such restrictions were speech-based restrictions or content based restrictions. Applying the principles of *R.A.V.* and *Honeyfund.com, Inc. v. Governor*, 94 F.4th 1272 (11th Cir. 2024) to those hypotheticals, one can see how application to the case at bar supports a finding of unconstitutionality. Because SB 399 only forbids certain speech at meetings, Defendants argue that the statute regulates *conduct* rather than speech, but the Supreme Court has expressly and definitively rejected such attempts at manipulating the speech/conduct distinction. Defendants fail to explain how SB 399 regulates conduct "separately identifiable" from speech; indeed, it is impossible to apply SB 399's restrictions without reference to the underlying speech that the

legislation explicitly targets.

Under the statute, for example, a CEO offering extemporaneous remarks about her vision for the company at an annual mandatory meeting would have to self-censor to ensure that her words don't violate SB 399 --a tightrope act that would be even more precarious if the company's future involves responding to minimum wage increases, the imposition of tariffs and the Company's view on the matter, DEI related subject matters, and/or charitable efforts for an organization during the Christmas season. A fact intensive analysis would be required in each case to determine whether a meeting was made mandatory based on an employer's agent's prior actions, their statements regarding the meeting, how the employee felt and what may have even been asked by employees. This chilling effect on an employer, to discuss a multitude of subject matters, is a restriction on free speech. Defendants' repeated citation to SB 399's anti-retaliation provision fail to recognize that to get to that point, a review of employer's speech and SB 399's limitation of said speech must be conducted.

Defendants are unable to articulate a distinction between the findings in *McDermott v. Amerpsand Pub., LLC*, 593 F.3d 950 (9th Cir. 2010) and *Interpipe v. Contracting, Inc. v. Becerra*, 898 F.3d 879, both dealing with restrictions on an employer's right to control content, and the subject matter. In fact, none of the cases cited at oral argument or in Defendants' moving papers involve the restriction of an employer's speech in the workplace or under matters covered by the NLRA. (*See* Defendants' Opposition, Dkt. 19, p. 6-11). Instead, Defendants request this Court apply First Amendment cases dealing with abortion issues, handing of leaflets outside of a healthcare facility, preclusion of sending people something in the mail and real estate listings. These cases, offered by Defendants, are distinguishable and are less persuasive than the more factually similar cases offered by Plaintiffs. It is without question that SB 399 impermissibly limits employer speech and therefore should be enjoined from enforcement.

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II. RECENT PRECEDENT SUPPORTS THE ISSUANCE OF A PRELIMINARY INJUNCTION

On May 20, 2025, the United States District Court, District of Oregon issued a ruling in *Casala LLC, et. al. v. Kotek* (Case No. 3:25-cv-244-SI) 2025 WL 1442792[1], granting injunctive relief against enforcement of a state statute for reasons identical to the bases Plaintiffs seek injunctive relief here. The *Casala* court reviewed Oregon's Measure 119 whose stated purpose was to "[e]nsure[s] that businesses licensed to sell or process cannabis enter into an agreement that allows their employees to organize and speak out without fear of retaliation." *Id.* Specifically, the measure stated that the Oregon Liquor and Cannabis Commission "shall require the applicant to submit, along with an application for a license or certification or renewal of a license or certification [to dispense marijuana]" a "signed labor peace agreement entered into between the applicant and a bona fide labor organization ……stating that the applicant and the bona fide labor organization have entered into and will abide by the terms of a labor peace agreement." *Id.*

Plaintiffs, in *Casala*, challenged the statute on the grounds that it violated an employer's right to freedom of speech with its employees under the First and Fourteenth Amendment and that the statute fell within both the *Garmon* and *Machinists* preemption doctrines. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n* ("*Machinists*"), 427 U.S. 132 (1976). The *Casala* court ruled in favor of Plaintiffs on all grounds and issued the requested injunctive relief. *Casala*, 2025 WL 1442792 at p. 11. The court found a violation of the plaintiffs' constitutional rights, where like SB 399, the relevant statute restricted multiple forms of speech and not just that which was threatening, coercive, false or misleading. Notably, like SB 399, Oregon's Measure 119 was still found to be unlawful even though it did not focus on one specific viewpoint. *Id.*

On the issue of *Garmon* pre-emption, the *Casala* court focused its conclusion on two seminal points which Plaintiffs request this Court equally rely on here: 1) that there exist

[1] A copy of the decision is filed concurrently with this supplemental briefing.

remedies under the NLRA which are sufficient to protect labor relations; and 2) the controversy implicated by the statute is identical to an issue that could be presented to the NLRB, as where here the "captive audience" part of SB 399 has been reviewed, as part of the NLRA, in *Amazon.com Services, LLC*, 373 NLRB No. 136 (2024). The *Casala* court found that the exceptions under *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 776 (2023) did not apply because of the unusual breadth of the *Garmon* doctrine. *Casala*, 2025 WL 1442792 at p.4 (preemption "goes beyond the usual preemption rule," forbidding states from regulating conduct "that the NLRA protects, prohibits, or arguably protects or prohibits." (quoting *Wis. Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 286 (1986)). The purpose of this broad doctrine is to address not only actual conflict but also "the *potential* for conflict with federal policy." *Retail Prop. Tr. v. United Bhd. of Carpenters*, 768 F.3d 938, 952 (9th Cir. 2014)). The *Casala* court deferred to the decades of precedent upholding and applying the *Garmon* preemption and found that the state did not have jurisdiction over such labor relations matters.

The *Casala* court further supported its granting of injunctive relief based on *Machinists* preemption. The court highlighted that *Machinists* preemption "bars states from ... regulating non-coercive labor speech by an employer." *Interpipe Contracting, Inc*, 898 F.3d at 887. This rule reflects Congress's determination that "the dangers that free expression might entail ... were a lesser risk than to have the Board police employer or union speech." *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 773 (2d Cir. 1969). The *Casala* court found that the Oregon statute interfered with economic forces that are outside the purview of the state, consistent with the plethora of precedent consistent with such conclusion. SB 399 regulates all types of employer speech on labor matters, and is therefore impermissible under the *Machinists* preemption.

Whether it be on constitutionality, *Garmon* preemption or *Machinists* preemption grounds, the *Casala* decision provides the proper framework and review of precedent to support the granting of Plaintiffs' motion in the subject litigation.

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III. SB 399 IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

Plaintiffs maintain that SB 399 is preempted by the NLRA. In general, the NLRA—codified at 29 U.S.C. §§ 151–69—governs labor-management relations in the private sector and " 'encourag[es] the practice and procedure of collective bargaining' between labor and management to resolve 'industrial disputes arising out of differences as to wages, hours, or other working conditions.' " *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 775 (2023) (alteration in original) (quoting 29 U.S.C. § 151).

The *Garmon* and *Machinists* preemption doctrines exist to preclude state interference with the NLRB's interpretation and active enforcement of the NLRA and therefore "forbid States to 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.' " *Idaho Bldg. & Constr. Trades Council, AFL-CIO v. Inland Pac. Chapter of Associated Builders & Contractors, Inc.*, 801 F.3d 950, 956 (9th Cir. 2015) (citations omitted) (internal quotation marks omitted).

A. The Garmon Doctrine.

Defendants' argument that SB 399 focuses on conduct, and not speech, ironically results in further support for the argument that SB 399 is preempted under *Garmon*. The "conduct" emphasized at oral argument was, in large part, the same "conduct" reviewed by the NLRB in *Amazon*. These "captive audience" meetings are referenced in the legislative history of SB 399 and fall square within the purview of the NLRB. Defendants implicitly acknowledged the strength of the *Garmon* preemption, at oral argument and instead sought to argue that one of the exemptions to the preemption apply. Again, there is no authority offered by Defendants with any kind of similar fact pattern finding that *Garmon* preemption is inapplicable.

B. The Machinists Doctrine.

Defendants have no rebuttal with respect to the application of *Chamber of Commerce v Brown* 554 U.S. 60 (2008) where Justice Stevens eloquently outlined how the *Machinists* doctrine applied to the California legislation at issue in *Brown*, and how this Court can do the same with respect to SB 399. The *Brown* opinion methodically outlines how non-coercive speech, such as what Defendants concede at least in part is regulated by SB 399, cannot be subject

to state scrutiny and that any law restricting such speech is preempted by the *Machinists* doctrine. Here, SB 399 improperly limits an employer's speech on labor relations issues by inhibiting them from providing employees with their position on unionization. Defendants' primary response is that, in essence, all a state needs to do is bury preempted language into a general law to avoid the application of the preemption principles, but such is contrary to the guiding law. Defendants further contend that employers have the ability to put up posters or alternative forms of communication, but that argument inherently acknowledges a limitation of speech that is preempted. Defendants offer nothing for the proposition that *Machinists* preemption is inapplicable when there is an alternative form of communication available to the employer.

IV. THE ENTIRETY OF SB 399 SHOULD BE ENJOINED BECAUSE THE UNCONSTITUTIONAL AND/OR PREEMPTED PARTS CANNOT BE SEVERED.

Plaintiffs seek a order preliminary enjoining Defendants from enforcing the entirety of SB 399. Should the Court find that the law is unconstitutional and that Plaintiffs have met their burden with respect to the instant motion, it is undisputed that the entirety of the legislation may be enjoined.

Defendants argue that should the Court find that application of the *Garmon* or *Machinists* preemption is proper, that the Court has the ability to sever parts of the statute it deems preempted. SB 399 contains a severability clause, which establishes a presumption the statute can be severed. In similar federal preemption cases, the Ninth Circuit has echoed the U.S. Supreme Court in stating that "[s]everability is of course a matter of state law." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1325 (9th Cir. 2015) (citing *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam).

Under California law, the presence of a severability clause "establishes a presumption" that "the invalid portions of a statute can be severed," but severance is not automatic. *Cal. Redevelopment Assn. v. Matosantos*, 267 P.3d 580, 607 (2011). California courts will look to three other criteria in assessing the severability of a state law; the invalid provision must be grammatically, functionally, and volitionally separable. *Matosantos*, 267 P.3d at 607. To the

extent the offending provision is not separable on any of these three considerations, the entire law must be stricken and/or enjoined. *Id.* 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.* Functional separability depends on whether the remainder of the statute is complete in itself. *Id.* 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.* Volitional separability is the "the 'most important' factor in the severability analysis." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 817 (9th Cir. 2013) (quoting *Katz v. Children's Hosp. of Orange Cnty.*, 28 F.3d 1520, 1531 (9th Cir. 1994).

Defendants argue that the Court could merely enjoin enforcement of the term "political matters" throughout the legislation, and keep enforcement of "religious matters" as the latter does not deal with traditional labor rights. The proposed "blue penciling" ignores, however, that such amendments are barred by functional separability and volitional separability. A review of the exhibits to the Liska Declaration, in support of Defendants' opposition to Plaintiffs' motion, demonstrates that the core of this legislation was to restrict labor related speech. (Dkt. 19-1) Each of the exhibits to the Liska Declaration contain references with "Proposed Changes to the Law," or something similar, and all predominantly reference the NLRA, NLRB, collective bargaining, and "captive audience meetings." (See e.g. Dkt. 19-1, Exhibit 2 Pages 1-6). Additionally, the Assembly Committee On Labor and Employee's analysis of the legislation, discusses solely unionization and political matters and the issue of NLRA preemption, and discusses nothing about religious matters (Id., Exhibit 3, Pages 1-5). There is no evidence or proof, offered by Defendants, that SB 399 would have been enacted solely for limitations on speech pertaining to religious matters.

Defendants' failure to establish severability on all three bases supports an injunction against enforcement of the whole law, but to the extent the Court finds severability does exist, Defendants maintain that the statute should be enjoined as to enforcement of any aspect of the law dealing with speech pertaining to "political matters." To be clear for the Court, Defendants maintain that even the *Garmon* and *Machnists* preemption support enjoying the entirety of SB

399 because the statute's restrictions, remedies and anti-retaliation are intertwined and not distinguishable based on the broad types of speech restricted under SB 399.

Dated: June 2, 2025

Respectfully submitted,

FISHER & PHILLIPS LLP

By: */s/ Lonnie D. Giamela*
Todd A. Lyon
Lonnie D. Giamela
Attorneys for Plaintiffs
California Chamber of Commerce, California Restaurant Association, and Western Growers Association

CERTIFICATE OF SERVICE

I, the undersigned, am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; am employed with the law offices of Fisher & Phillips LLP and my business address is 444 South Flower Street, Suite 1500, Los Angeles, California 90071.

On June 2, 2025 I served the foregoing document entitled **PLAINTIFFS' SUPPLEMENTAL BRIEFING IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on all the appearing and/or interested parties in this action by placing ☐ *the original* ☒ *a true copy* thereof enclosed in sealed envelope(s) addressed as follows:

Kristin A. Liska Deputy Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004	*Attorney for Defendants, Robert Bonta, Lilia Garcia- Brower, and Division Of Labor Standards Enforcement Of The California Department Of Industrial Relations* Kristin.Liska@doj.ca.gov

☐ **[by MAIL]** - I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

☒ **[by ELECTRONIC SUBMISSION]** - I served the above listed document(s) described via the United States District Court's Electronic Filing Program on the designated recipients via electronic transmission through the CM/ECF system on the Court's website. The Court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document(s). Registration as a CM/ECF user constitutes consent to electronic service through the court's transmission facilities.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed June 2, 2025 at Los Angeles, California.

Cina Kim
Print Name

By: */s/ Cina Kim*
Signature