Paul M. Secunda
psecunda@gmail.com
9062 N. Lake Dr.
Bayside, WI 53217
P: 414-352-9554 F: 414-288-6975

On Behalf of Law Professor Amici
in Support of Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ASSOCIATED OREGON INDUSTRIES and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiff, v. BRAD AVAKIAN, Individually and as Commissioner of the Oregon Bureau of Labor and Industries, and LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 296 Defendant.	No. 3:09-CV-1494-MO **BRIEF OF LAW PROFESSORS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

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I. INTEREST OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of defendants Brad Avakian and Laborers Local 296's opposition to plaintiffs' motion for summary judgment.[1] Defendants' opposition to this motion is consistent both with the purposes of the NLRA, to protect employee free choice, and with principles of federalism that permit states to govern in traditional areas of state concern.

Amici are law professors[2] at five law schools across the United States who teach and write about labor law, employment law, and NLRA preemption.[3] More specifically, *amici* teach, study and comment on the use of employer captive audience meetings during union organizational campaigns and the appropriate limits of federal preemption under the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151-169.

Amici have no financial stake in the outcome of this case but are interested in the consistent and uniform application of federal labor law, while at the same time ensuring that appropriate deference be given to states to protect their employees in the workplace. We are prompted to submit this brief because the decision in this case will have wide-ranging consequences for tens of

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[1] This brief is submitted with the consent of the parties and by leave of the Court.

[2] William B. Gould IV is the Charles A. Beardsley Professor of Law, Emeritus, at the Stanford Law School and former Chairman of the National Labor Relations Board; Michael H. Gottesman is a Professor of Law at the Georgetown University Law Center; Henry H. Drummonds is Professor of Law at the Lewis & Clark Law School; Joseph Slater is the Eugene N. Balk Professor of Law and Values at the University of Toledo College of Law; and Paul M. Secunda is Associate Professor of Law at Marquette University Law School. The names of educational institutions are provided for identification purposes only.

[3] A representative sample of *amici* writings include: William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461 (2007); Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT'L U. L. REV. (forthcoming 2010); Paul M. Secunda, *Towards the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008); Henry H. Drummonds, *Beyond the Employee Free Choice Act Debate: Unleashing the States in Labor-Management Relations Policy by Reforming Labor Law Preemption Doctrine Crafted by Judges a Half-Century Ago*, 19 CORNELL J. LAW AND PUBLIC POLICY 83 (2010); Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97 (2009); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990); Joseph Slater, *The "American Rule" That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53 (2007).

millions of American workers and their ability to exercise a free choice concerning whether or not they wish to join a labor union.

II. SUMMARY OF ARGUMENT

A finding of NLRA preemption in this case would be both inconsistent with Congress' purposes in enacting the NLRA and with principles of federalism which give the states and federal government shared authority over the employment relationship.

Indeed, a number of well-known exceptions exist to the Machinists labor preemption doctrine, Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), in the area of state police powers and the regulation of property rights.[4] Under this line of cases, traditional areas of state concern are within the states' power to regulate and, therefore, not within the scope of NLRA preemption. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). There are two sources of applicable authority here: (1) the state can place property restrictions on the bundle of property rights that the state grants to its property owners and (2) the state can provide for minimum conditions in the workplace under its police powers. Consistent with Section 8(c) of the NLRA, 29 U.S.C. § 158(c), employers can still inform employees of their views of unionization, but may not force employees into mandatory meetings to hear those views under SB 519. See Or. Rev. Stat. §§ 659.780, 659.785 (2010) (prohibiting employers from terminating employees for failure to attend non-work related mandatory meetings). In short, this Court should find that Oregon has the inherent power to enact SB 519 and such promulgation is consistent with both the reach and purposes of the NLRA and the principles of federalism.

First, under United States Supreme Court precedent interpreting rights of states to continue to regulate property rights in the labor relations context, SB 519 is not preempted by the NLRA. The state can place property restrictions on the bundle of property rights that the state grants to its

[4] San Diego Trades Council v. Garmon, 359 U.S. 236 (1959), is not implicated by this case at all. Under Garmon preemption, the NLRA preempts state laws that regulate conduct that Section 7 protects or arguably protects or that Section 8 prohibits or arguably prohibits. Id. at 245. Employers do not have Section 7 rights and are only prohibited by Section 8 from engaging in conduct that impermissibly interferes with employees' Section 7 rights. See Metropolitan Life, 471 U.S. at 749 (holding that if conduct is neither prohibited nor protected under the NLRA, it is not preempted by Garmon).

property owners--that is, the bundle of property rights that private property owners possess would not include the use of their property to compel attention to labor, political, or religious speech. In this manner, Oregon's legislation should be exempt from Machinists preemption based on the powers of the state to regulate property interests. This exception to preemption law derives directly from the U.S. Supreme Court's holding in Lechmere Inc. v. NLRB, 502 U.S. 527 (1992).

Second, a state can provide for minimum conditions in the workplace under its police powers. Congress could have chosen to occupy the field of labor relations law exclusively, but it has never exercised its full powers in this regard, leaving state and local government free to pass many state and local laws and regulations that apply to the workplace. In this regard, the Supreme Court has recognized an exception to Machinists preemption where the states "traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" See Metropolitan Life, 471 U.S. at 756 (citing Slaughter-House Cases, 16 Wall. 36, 62 (1873)). This power includes the "broad authority . . . to regulate the employment relationship to protect workers within the State." See id. at 756-57. In such circumstances, minimum employment standards that are not in conflict with the Act survive preemption. Thus, mandated benefit laws, child labor laws, occupational safety and health laws, minimum wage laws, and state severance statutes have all survived NLRA preemption. Id. Similarly, Oregon exercised appropriate power to enact SB 519 to prohibit employers from firing workers who refuse to attend captive audience meetings about their employer's political, religious, or union views.

Third, and finally, in this byzantine area of the law, a need exists to step back and provide a review of the shaky origins of the current preemption doctrine and its development into an incoherent, exception-riddled body of law which fails to point in any single direction. In fact, although *amici* agree with defendants that SB 519 is not preempted under current NLRA doctrine, the Court should also consider taking a rigorous analytical approach to labor preemption doctrine. In this regard, *amici* law professors assert that it is possible to understand labor preemption doctrine in a more coherent manner and come to the same conclusion with regard to the validity of SB 519. Under this sounder approach, once federal labor law is satisfied by permitting the free

exchange of ideas on unionization between employers and their employees under Section 8(c), Oregon is then able to go beyond that federal floor and provide additional protections to employees to be free from these employer mandatory indoctrination sessions.

III. ARGUMENT

Labor law preemption is a type of implied conflict preemption (as opposed to express or field preemption). In this branch of preemption jurisprudence, the Supreme Court has long held that a presumption against preemption exists. See Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009) (establishing this presumption as the general approach across statutory lines, including labor law cases); see also id. at 1194 (finding that the presumption against preemption applies to claims of implied conflict pre-emption) (citing California v. ARC America Corp., 490 U.S. 93, 101-102 (1989); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716 (1985); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 387 (2002)). "In *all* pre-emption cases, and particularly those in which Congress has legislated in a field which the states have traditionally occupied, a court starts with the assumption that historic police powers of states were not to be superseded by federal act, unless that was clear and manifest purpose of Congress." Id. (emphasis added). To paraphrase Wyeth, if Congress thought state-law actions posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the NLRA's 75-year history. Id. at 1200.

Congress can only displace state authority if it acts with a specific intention to do so under its Commerce and Fourteenth Amendment powers. Congress can explicitly declare its intention to preempt (or not preempt via a Savings Clause), and has often done so in many federal employment statutes like: the Employee Retirement Income Security Act, 29 U.S.C. § 1144; the Fair Labor Standards Act, 29 U.S.C. § 218; the Occupational Safety and Health Act, 29 U.S.C. § 667; the Landrum-Griffin Act, 29 U.S.C. §§ 413, 523; and, most recently, the Family and Medical Leave Act, 29 U.S.C. § 2651. Where Congress has not explicitly declared its intention to displace or save state law, like in the NLRA context, the doctrine of implied conflict preemption comes into play. Furthermore, even when Congress has remained silent on the preemption question, it is implied that Congress only meant to preempt in two situations: (1) where it is impossible to

comply with both federal and state law, or (2) where the state law "stands as an obstacle" to federal purposes. Wyeth, 129 S. Ct. at 1208 (Thomas, J., concurring). But such a Congressional intent to displace the constitutional allocation of power to the states is not lightly inferred.

As Justice Thomas pointed out in his concurrence in Wyeth, properly-limited federal preemption jurisprudence is consistent with long-standing principles of federalism and state sovereignty. Id. at 1205 (Thomas, J., concurring) ("In order 'to ensure the protection of our fundamental liberties, the Constitution establishes a system of dual sovereignty between the States and the Federal Government.' The Framers adopted this 'constitutionally mandated balance of power' to 'reduce the risk of tyranny and abuse from either front,' because a 'federalist structure of joint sovereigns preserves to the people numerous advantages,' such as 'a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society' and 'increase[d] opportunity for citizen involvement in democratic processes.'") (internal cites omitted).

In this regard, Congress is given enumerated powers by the Constitution and other powers, including the general "police power" to regulate the general health and welfare, are reserved to the states. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (citing Slaughter-House Cases, 16 Wall. 36, 62 (1873)). Thus, states traditionally have regulated the employment relationship. See id. at 756-57 ("[T]here is no suggestion in the legislative history of [Taft-Hartley] Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor conditions.").

As will be demonstrated below, a finding of NLRA preemption in this case would be both inconsistent with Congress' purposes in enacting the NLRA and with principles of federalism which gives the states and federal government shared authority over the employment relationship.

A. PRECEDENT INTERPRETING THE RIGHTS OF STATES TO CONTINUE TO REGULATE PROPERTY RIGHTS IN THE LABOR RELATIONS CONTEXT SUPPORTS THE CONCLUSION THAT SB 519 IS NOT PREEMPTED BY THE NLRA

The Supreme Court explained its holding in Lechmere Inc. v. NLRB, 502 U.S. 527 (1992), involving the relationship between federal labor law and state property regulation, in this manner:

> Without addressing the merits of petitioner's underlying claim, we note that petitioner appears to misconstrue Lechmere Inc. v. N.L.R.B. . . . . The right of employers to exclude union organizers from their private property emanates from state common law, and *while this right is not superseded by the NLRA*, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union employees to obtain access to an employer's property under limited circumstances.

Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217 n.21 (1994) (emphasis added). Two critical points can be derived from this passage: (1) The NLRA left most state property rights intact even if they influence the balance of power in a labor dispute or the ability of the two sides to campaign; and (2) these same private property rights are also not protected by the NLRA. The latter point makes clear that Garmon preemption, San Diego Trades Council v. Garmon, 359 U.S. 236, 245 (1959), is not implicated in these property rights situations or, put differently, situations where employers seek to use their property as they wish.

The first point above makes clear that *no* form of labor preemption, Garmon or Machinists, comes into play when states decide to modify the state law rights that were not displaced by the NLRA. Accord Waremart Foods, 337 N.L.R.B. 289, 289 (2001) ("The Respondent asserts that the ability to exclude non-union representatives from its property is the kind of economic weapon that Congress intended to be available to employers and thus is not subject to regulation by the States. Accordingly, the Respondent contends that the State's attempt to deprive it of that right is preempted under Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976). We reject that contention."), vacated on other grounds, 354 F.3d 870 (D.C. Cir. 2004).

Indeed, the Supreme Court applied this very same principle to the advantage of employers in Lechmere where it found that non-employee union organizers generally had no right to access employer property to solicit for union membership. See Lechmere, 502 U.S. at 537. The right to exclude these organizers did not derive from federal labor law, but rather from the state-based property rights of the employers. See Glendale Assocs., Ltd. v. N.L.R.B., 347 F.3d 1145, 1151 (9th Cir. 2003) ("[T]his Court, along with other Circuits and the Board, have found Lechmere to be inapplicable to cases where an employer excluded nonemployee union representatives in the absence of a state property right to do so."); see also id. at 1152 ("An employer's state property

right controls where an employer may ban nonemployee union representatives because 'state property law is what creates the interest entitling employers to exclude organizers in the first instance. Where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1) [of the NLRA].") (citing N.L.R.B. v. Calkins, 187 F.3d 1080, 1088 (9th Cir. 1999)); United Brotherhood of Carpenters v. NLRB (Macerich), 540 F. 3d 957 (9th Cir. 2008), cert denied, 130 S. Ct. 553 (2009) (applying state law property rights to determine extent of right to engage in expressive activity under Section 7 of the NLRA).

Thus, an employer can, consistent with federal labor law, use its state law property rights to its advantage in an organizing campaign, but a state is not barred from altering such rights. It is simply a matter of states, by statute, modifying the bundle of property rights that employers enjoy under state law. While there is a zone of federal prohibition, there is no zone of federal protection of an employer's right to exclude. If states wish to go further in restricting the employer's property rights, no federal interest is implicated. See also PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) ("Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of Lochner v. New York, 198 U.S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government.")). All of this is consistent with the understanding of the NLRB and federal courts that federal labor law operates against the background of state regulation of property rights. See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 188 (1978) ("[T]he history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation."). See also Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850 (Cal. 2007), enforcement granted, 524 F. 3d 1378 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 94 (2008) (question of state law certified to California Supreme Court to determine extent of property rights).

The Oregon legislation in dispute only does precisely what the courts and Board have

recognized is within the traditional prerogatives of the states to do in Lechmere. State law previously permitted employers to condition employment on their employees being compelled to attend meetings at work unrelated to job performance. SB 519 changes that by not permitting the employer to use its property to coerce employees to attend non-work related meetings. Lechmere permits this change in state property law because it stands for the proposition that the NLRA does not supersede the ability of states to regulate common law rights of property. As such, SB 519 was well within Oregon's power to enact.

B. CONSISTENT WITH NOTIONS OF FEDERALISM, OREGON MAY LEGISLATE MINIMUM CONDITIONS IN THE WORKPLACE UNDER ITS POLICE POWERS WHICH ARE NOT PREEMPTED BY THE NLRA

A state can provide for minimum conditions in the workplace under its police powers. Congress could have chosen to completely occupy the field of labor relations law, but it has never exercised its full powers in this regard, leaving the states free to pass many state and local laws and regulations that apply to the workplace. In this regard, the Supreme Court has recognized an exception to Machinists preemption where the states "traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" See Metropolitan Life, 471 U.S. at 756 (quoting Slaughter-House Cases, 16 Wall. 36, 62 (1873)).

This power established in Metropolitan Life includes the "broad authority . . . to regulate the employment relationship to protect workers within the State." Id. at 756-57. In such circumstances minimum employment standards that are not in conflict with the Act survive preemption. See id. ("[T]here is no suggestion in the legislative history of [Taft-Hartley] Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor conditions."); see also Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971) ("[The Court] cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationship between employees, employers, and unions; *obviously*, much of this is left to the States.") (emphasis added). The Court has used similar language in cases under the Railway Labor Act, 45 U.S.C. §§ 151-188: "We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves

and did not preclude the State . . . from making the order in question." See Terminal Ass'n v. Trainmen, 318 U.S. 1, 7 (1943).

Thus, mandated benefit laws, child labor laws, occupational safety and health laws, minimum wage laws, and state severance laws have all survived NLRA preemption challenges. See Metropolitan Life, 471 U.S. at 756 ("Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples."). See also Ft. Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987) (finding that, "Maine's severance payment law is 'a valid and unexceptional exercise of the [State's] police power.'"). Similarly, states should be able to enact laws that prohibit employers from firing workers who refuse to attend captive audience meetings about the employer's political, religious, or union views. In doing so, the Oregon statute would be merely modifying the employment at will rule. It does not muzzle an employer during union election campaigns (as the California statute arguably did in Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008));[5] the employer can campaign generally against the union, and can continue to hold meetings with employees to discuss the employers views on religion, politics, or unions. The employer just cannot fire or otherwise discipline an employee who declines to attend or leaves such a meeting. In all, this is just another limited erosion of employment at will, similar to the common law's recognition of the tort of wrongful discharge in violation of public policy, see Saridakis v. United Airlines, 166 F.3d 1272, 1278 (9th Cir. 1999) ("[W]rongful discharge claims based on public policy violations are not preempted by federal labor laws.") (citing Paige v. Henry J. Kaiser Co., 826 F.2d 857, 862 (9th Cir. 1987); Harper v. San Diego Transit Corp., 764 F.2d 663,

[5] In the present situation, the employees' interests weigh on the side of upholding the Oregon statute. In Brown, the ban on the use of monies from state contracts and grants to campaign for or against a union threatened the employer's free speech, the interests of employees in hearing that speech, and hearing both sides on the unionization question. Brown, 128 S. Ct. at 2416 ("AB 1889's enforcement mechanisms put considerable pressure on an employer either to forgo his 'free speech right to communicate his views to his employees,' or else to refuse the receipt of any state funds.") (internal citation omitted). Thus, the invalid California statute was found to have effectively crippled employer speech. Here the employer remains free to engage in speech for or against unions, and remains free to continue to hold meetings with employees to discuss the employer's views. The employees receive, however, protection against retaliatory discipline should they decline to attend. In any balancing of the interests, the Oregon statute is much less about placing restrictions on employers and much more about protecting the interests of employees.

668 (9th Cir.1985)), or the many statutes which make discrimination against whistleblowers or retaliation unlawful. See, e.g., Cal. Govt. Code Ann. § 8547.8; Cal. Lab. Code Ann. § 1102.5.

Finally, the Oregon captive audience law does not single out meetings concerning unionization. It covers matters of personal conscience and belief: religion, political campaigns, and unionization. All of these concerns can involve highly charged and complex issues of personal preference and trust. Oregon's legislature and Governor have chosen to carve out a narrow exception to employment at will to address the perception that it is unfair to require employees to listen to their employers' views about subjects laden with ideological content. Whether this is a wise law or not is not the question. The question is whether this statute falls within the labor standards exception to Machinists preemption. Clearly it does.

Additionally, SB 519 is an example of permissible minimum conditions legislation because it applies to *all workers* in Oregon, union or non-union, and bars employers from disciplining or discharging them for refusing to listen to speech unrelated to their job performance. And like the other minimum conditions laws, this state law does not interfere with existing federal labor law because the NLRA does not protect employer coercive *conduct*.[6] Most importantly, employers in Oregon are still able to communicate their views about unionization with their employees as Section 8(c) contemplates, but just are forbidden from forcing these same employees to listen on pain of losing their jobs or other benefits of employment. The right to speech *does not* include the right to compel someone to listen. Not under the First Amendment[7] and certainly not under statutory law.

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[6] In their summary judgment memoranda in this case, Plaintiffs insist that this case is about non-coercive employer speech under Section 8(c). It is clearly not. Speech is not prohibited in any manner by SB 519, only the *conduct* of forcing or compelling an employer to attend a non-work related employer meeting on political, religious, or labor topics.

[7] See Hill v. Colorado, 530 U.S. 703, 716-17 (2000); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); Thomas v. Collins, 323 U.S. 516, 537-38 (1945) (finding that employers may have right to persuade their employees, but "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer's First Amendment] right has been passed.").

C. SB 519 DOES NOT REGULATE CONDUCT ON THE PROTECTED-PROHIBITED CONTINUUM AND THEREFORE, OREGON IS FREE TO PROVIDE ADDITIONAL PROTECTIONS FOR EMPLOYEES AGAINST COERCIVE EMPLOYEE CONDUCT

Although this brief argues that SB 519 clearly survives labor law preemption under current labor preemption doctrine, this section seeks to provide an alternative and sounder doctrinal basis for finding SB 519 not preempted by federal labor law. As discussed above, a pro-preemption preference by the federal courts would be inconsistent with constitutional federalism.

Moreover, and quite simply, the current approach to labor law preemption under Garmon and Machinist preemption is overbroad. In this regard, a significant and overlooked distinction exists between different types of labor-oriented conduct which states seek to regulate. Specifically, some conduct, like picketing, lies on a "protected-prohibited continuum" which Congress has chosen to regulate in its entirety. Conduct on such a continuum is conduct that the NLRA protects up to a point and prohibits beyond that point. With regard to picketing, either it is protected as concerted activity for mutual aid and protection under Section 7 (because it enhances bargaining power) or it is prohibited conduct under Section 8 (as in the case of secondary picketing, 29 U.S.C. § 158(b)(4)), because of its impact on the business of neutral employers. But all in all, Congress has chosen to completely occupy the field of employee picketing under federal labor law and it is for the National Labor Relations Board (NLRB or Board), not the states, to decide where the line exists on this picketing continuum between protected and prohibited conduct. Indeed, it is important that the NLRB make this determination between protected and prohibited picketing in a consistent, uniform matter so future exercise of these rights will not be chilled.

On the other hand, much other union conduct exists that does not lie completely on this protected-prohibited continuum. Conduct outside of this continuum is prohibited in some of its manifestations, but federal law does not protect it otherwise. In these situations, *amici* maintain that states should be free to regulate beyond the point which the federal labor law, and corresponding federal interest, no longer come into play. See, e.g., Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) (striking middle ground between requiring total preemption of defamation suits and allowing states free reign). See also Old Dominion Branch No.

496 v. Austin, 418 U.S. 264 (1974). For instance, Congress and the courts have interpreted the NLRA to permit union access to employer property to address employees during organizational campaigns only when the union is completely unable to communicate with employees through other alternative means or where the employer discriminatorily restricts access to property. See Lechmere, Inc. v. NLRB, 502 U.S. 527, 538 (1992). Beyond this extremely limited right to access employer property, federal labor law is silent on the ability of the employer to exclude union organizers from their property. Lechmere stands for the proposition that an employer's property interest almost always outweighs the competing derivative rights of non-employee, union organizers under Section 7 of the NLRA. But it does not stand to reason that the NLRA thereby confers upon employers a right they had not previously possessed: to be free of state laws concerning private property or minimum employment conditions wherever federal law did not create a right of union access.

Similarly, employer captive audience meetings also constitute conduct not on the "protected-prohibited continuum" and therefore, states are free to regulate it as a property interest or minimum employment condition beyond a certain point. See Linn, 383 U.S. at 60-61 (rejecting NLRA preemption of state defamation claims because states have a strong interest in regulating more egregious forms of defamation against their citizens). So although federal labor law prohibits captive audience speech twenty-four hours before a representation election, see Peerless Plywood Co., 107 NLRB 427, 429 (1953), it is silent on the ability of employers to hold such meetings before that time. Seen in this light, SB 519's flat prohibition on employer captive audience meeting on non-work topics is just a means by which Oregon has chosen to modify existing property interests and the doctrine of employment at will. So although Section 8(c) requires the minimum condition of allowing employers to share their views on unionization with their employees, once that point is reached, federal labor law is silent and federal interests are no longer implicated. It is at that point, consistent with notions of federalism, that states should be given the power to ensure that employers can no longer require employees to attend captive audience meetings on non-work issues. See Linn, 383 U.S. at 63 (holding that states do not always have to defer to NLRB where state law addresses a harm that is separate from the harms addressed by the

NLRB).

Amici maintain that the federal courts are best able to undertake this needed clarification of labor preemption law because, in the absence of an express preemption provision in the NLRA, the Supreme Court has been the driving force in promulgating current labor preemption doctrine. By recognizing that employer captive audience meeting conduct is not completely on the prohibition-protection continuum, the end result would be a labor preemption doctrine that is more consistent with the purposes of NLRA in ensuring employee free choice and with the principles of federalism.

IV. CONCLUSION

For the reasons set forth above, the plaintiffs' motion for summary judgment should be denied.

Dated: March 22, 2010

Respectfully Submitted,

By: _____
PAUL M. SECUNDA,
Counsel of Record for Law Professor *Amici*

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