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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

NATIONAL LABOR RELATIONS BOARD,

Plaintiff,

v.

STATE OF OREGON,

Defendant.

Case No.: 6:20-CV-00203-MK

NATIONAL LABOR RELATIONS BOARD'S OPPOSITION TO MOTION TO DISMISS

The National Labor Relations Board ("Board") is an independent agency of the United States, created by Congress and charged with exclusive administration of the National Labor Relations Act, 29 U.S.C. §§ 151-169, ("NLRA"). Congress's objective was to ensure "uniform application" of the NLRA and to avoid "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Chauffeurs and Helpers Local 776*, 346 U.S. 485, 490 (1953). In its Complaint (Doc. 1), the Board brings an "as-applied" challenge to Oregon's captive audience statute (the "Oregon statute"), codified at ORS 659.780 and 659.785, to the extent that it regulates speech about unionization by employers covered by the NLRA. (Doc. 1). On April 7, 2020, Oregon filed its motion (Doc. 6) seeking to dismiss the Complaint on the grounds that the Board lacks standing and alternatively, that the

Complaint fails to state a claim for relief.

Oregon's contentions are without merit. The Board's Complaint sets forth the requisite elements necessary to establish standing. First, the State of Oregon caused the Board concrete injury by impermissibly infringing upon its jurisdiction to regulate coercive speech that violates the NLRA as well as speech that may be prejudicial to a fair election. The State caused this injury by enacting the statute at issue, and it can be redressed through a declaratory judgment invalidating a specific portion of the statute as it is applied to NLRA-covered employers. Furthermore, the Board's Complaint states a valid claim for relief because it presents a specific and narrow "as-applied" challenge to the Oregon statute. Accordingly, this Court should deny Oregon's motion to dismiss the Board's Complaint.

I. BACKGROUND

A. Statutory and Regulatory Background of the NLRA

In enacting the NLRA, Congress assigned the Board two principal responsibilities: 1) preventing and remedying unfair labor practices committed by employers or labor organizations as defined by Section 8 of the NLRA, 29 U.S.C. § 158; and 2) conducting secret ballot elections under Section 9 of the NLRA, 29 U.S.C. § 159, in which employees may vote as to whether they wish to be represented by a labor organization.

Relevant here, Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), provides that an employer may not interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the NLRA, 157 U.S.C. §§ 157.[1] For example, an employer that makes

[1] Section 7 of the NLRA provides, in pertinent part, that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities."

threatening statements to workers seeking to unionize commits an unfair labor practice. *See, e.g.*, *HarperCollins Publishers, Inc.*, 317 NLRB 168, 187 (1995) (threats of discharge violated Section 8(a)(1) of the NLRA), *enforced in relevant part*, 79 F.3d 1324 (2d Cir. 1995). However, Section 8(c) of the NLRA, 29 U.S.C. § 158(c), protects an employer's right to engage in speech regarding unionization, provided such speech is non-coercive, i.e., "contains no threat of reprisal or force or promise of benefit."

Under Section 9 of the NLRA, the Board is responsible for regulating elections to ensure that "laboratory conditions" are preserved so employees have the opportunity to make an uninhibited choice regarding union representation. *See Rexall Corp.*, 272 NLRB 316, 316 (1984). In Section 9, Congress provided the Board "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

Under nearly 70 years of Board case law interpreting the NLRA, employers are permitted to hold mandatory meetings to discuss their views about unions, i.e., "captive audience" speeches, except within 24 hours before a union election conducted by the Board. *Peerless Plywood Co.*, 107 NLRB 427, 429-30 (1953). Absent the type of narrow restriction recognized in *Peerless Plywood*, employees have no right under Board law to avoid attending compulsory meetings where management expresses non-coercive antiunion speech designed to influence the outcome of a union election. *See Litton Sys., Inc*., 173 NLRB 1024, 1030 (1968) (workers have "no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election"). Thus, an employer does not violate the NLRA by "suggesting to some employees that nonattendance might put their

jobs in jeopardy." *Ridgewood Mgmt. Co., Inc*., 171 NLRB 148, 151 (1968). Similarly, an employer does not commit an unfair labor practice by discharging an employee whose planned course of conduct disrupts captive audience speeches, *J.P. Stevens & Co., Inc*., 219 NLRB 850, 850 (1975), *enforced*, 547 F.2d 792 (4th Cir. 1976), or by discharging an employee who refuses to attend compulsory non-coercive antiunion speeches during working hours. *See, e.g., Litton Sys., Inc*., 173 NLRB at 1030.

Much of this case law flows from the rights conferred by Section 8(c), above, which "firmly establishe[s]" that "an employer's free speech right to communicate his views to his employees . . . cannot be infringed by . . . the Board." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969); *see also United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), *enforced*, 789 F.2d 121 (2d Cir. 1986) ("[A]n employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees"). The Supreme Court has recognized that the enactment of Section 8(c) embodies a general "congressional intent to encourage free debate on issues dividing labor and management." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008).

Together, Sections 8 and 9 of the NLRA confer on the Board primary, if not exclusive, jurisdiction to regulate coercive speech by an employer regarding unionization, as well as speech that may harm the requisite "laboratory conditions" necessary to conduct an election.

B. The Oregon State Statute

The Oregon statute entitled "Discrimination for nonparticipation in employer-sponsored meetings about religious or political matters," was enacted in January 2010. It provides, in relevant part, that:

> An employer . . . may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action

against an employee:

> (a) Because the employee declines to attend or participate in an employer-sponsored meeting or communication with the employer . . . if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters;
>
> (b) As a means of requiring an employee to attend a meeting or participate in communications described in paragraph (a) . . .; or
>
> (c) Because the employee . . . makes a good faith report, orally or in writing, of a violation or suspected violation of this section.

ORS 659.785(1).

ORS 659.780(5) defines "political matters" to include "the decision to join, not join, support or not support any lawful political or constituent group," and ORS 659.780(1) defines "constituent group" to include a labor organization.

An "employer" under ORS 659.785(3) includes "[a] person engaged in business that has employees" and public bodies. The NLRA covers most private employers that are not railroads or airlines.[2] Accordingly, many employers that are subject to the Oregon statute are also covered

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[2] The NLRA defines an employer to include "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer of agent of such labor organization." Section 2(2), 29 U.S.C. § 152(2). A "person" within the meaning of the NLRA, 29 U.S.C. § 152(1), includes "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code . . . or receivers." Section 2(1), 29 U.S.C. § 152(1).

While the Board has statutory authority to assert jurisdiction over all enterprises with operations that affect interstate commerce and that are not specifically exempted by Section 2(2), the Board has determined that, with few special exceptions, jurisdiction will be asserted over retail operations only if they have a gross annual volume of business of $500,000 or more, and over non-retailer operations only if they have $50,000 of annual direct or indirect inflow or outflow of goods or services across state lines. *See Carolina Supplies & Cement Co.*, 122 NLRB 88, 89 (1959) (addressing jurisdiction over retail enterprises); *Siemons Mailing* Service, 122 NLRB 81,

by the NLRA.

Essentially, the Oregon statute provides a private cause of action to any employee who is disciplined for refusing to attend a captive audience meeting held by an employer about, among other things, unionizing. ORS 659.785(2) provides that a prevailing claimant "may" be awarded reinstatement, backpay, and reestablishment of any employee benefits, including seniority; and "shall" be awarded treble damages, attorney's fees, and costs. Thus, under this statute, an Oregon employer risks litigation and significant financial liability if it takes adverse action against an employee for the refusal to attend any mandatory meeting to communicate its views about unions to its employees, at any time.

C. Applicable Preemption Principles

The doctrine of preemption arises from the Supremacy Clause of the Constitution. Art. VI, Cl. 2. Direct operation of the Supremacy Clause will invalidate state law that actually conflicts with federal law and thus interferes with the exercise of a federally-protected right. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501-02 (1984). As the Supreme Court recently explained, "if federal law 'imposes restrictions or confers rights on private actors' and 'a state law confers rights or imposes restrictions that conflict with the federal law, the federal law takes precedence and the state law is preempted.'" *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (quoting *Murphy v. National Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480 (2018)).

In the labor law context, federal preemption doctrine has long been applied to preclude enforcement of state regulations that threaten interference with national labor policy established

85 (1958) (addressing jurisdiction over non-retail enterprises); *see also https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards.*

under federal law. Federal labor 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]." *Chamber of Commerce v. Brown,* 554 U.S. at 65. Thus, under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-46 (1959), states are prohibited from regulating any "activity that the [NLRA] protects, prohibits or arguably protects or prohibits," *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 286 (1986), *i.e.*, activity that is subject to the regulatory jurisdiction of the Board. *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 749 (1985); *Moreno Roofing Co., Inc. v. Nagel*, 99 F.3d 340, 342 (9th Cir. 1996).[3] Moreover, the *Garmon* doctrine also precludes interference with the Board's ability to regulate representation elections under Section 9.[4] As explained below, the Oregon state statute creates ongoing interference with the Board's regulation of employer speech concerning unionization in both the unfair labor practice and representation contexts.

D. The Instant Litigation

On February 7, 2020, the Board filed its Complaint in this matter, seeking a declaratory judgment against Oregon. (Doc. 1.) The Complaint alleges that the Oregon statute is preempted by the NLRA under the direct operation of the Supremacy Clause, because it forbids conduct

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[3] The other major labor law preemption doctrine, "*Machinists* preemption," prohibits the regulation of conduct that "Congress intended to be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976) (cleaned up); *see also Chamber of Commerce v. Brown,* 554 U.S. at 65. *Machinists* preemption supplies the basis for one of the claims for relief in the Board's complaint (Doc. 1 at ¶ 12). However, the Board is not primarily relying on its *Machinists* claim in responding to Oregon's motion to dismiss, because the Board's direct injury is to its ability to regulate "captive audience" speeches concerning unionization under Sections 8 and 9 of the NLRA, which falls within *Garmon* preemption.

[4] *See, e.g.*, *Mich. Cmty. Servs., Inc. v. NLRB*, 309 F.3d 348, 361 (6th Cir. 2002); *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 802-03 (3d Cir. 1996); *Hobbs v. Hawkins*, 968 F.2d 471, 476 (5th Cir. 1992).

both permitted and protected by the NLRA. (*Id*. at ¶ 16.) Specifically, the Complaint alleges the Oregon statute impermissibly infringes on the Board's regulatory authority by purporting to regulate coercive and non-coercive employer speech concerning unionization at all times, including during a union election campaign. (*Id*. at ¶¶ 8-11.) The Complaint additionally alleges the Oregon statute is preempted because it regulates non-coercive speech by an employer about unions, which is conduct that Congress intended to be left unregulated. (*Id*. at ¶¶ 12-15.)

On April 7, 2020, the State of Oregon filed its Motion to Dismiss the Complaint ("Motion"), pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). (Doc. 6.) In its Motion, Oregon argues that the Board lacks standing under Article III to pursue its federal claims and, in the alternative, the Board's Complaint fails to state a claim for relief. (*Id.* at pp. 4-11.)

For the reasons set forth below, this Court should deny Oregon's Motion to Dismiss.

II. ARGUMENT

A. This Court Has Jurisdiction Under 28 U.S.C. Sections 1331 and 1337 to Resolve this Case

Where, as here, a complaint seeks a declaration that a state law is preempted by a federal statute pursuant to the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2 (Doc. 1 at ¶¶ 2 and 16), a court has jurisdiction under 28 U.S.C. § 1331. That statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *United States v. Morros*, 268 F.3d 695, 699-700 (9th Cir. 2001); *accord United States v. City of Arcata*, 629 F.3d 986, 990 (9th Cir. 2010).

Jurisdiction is also present under 28 U.S.C. § 1337(a), which provides that the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. *Capital Serv. Inc. v. NLRB*, 347 U.S. 501, 504 (1954). Thus, that section supplies federal court jurisdiction to hear complaints alleging that preempted state action

interferes with activity that Congress assigned the Board to regulate. *See Grain Processing Corp. v. Culver*, 708 F. Supp. 2d 859, 864 (S.D. Iowa 2010); *NLRB v. Arizona,* No. CV 11-00913-PHX-FJM, 2011 WL 4852312, at *6 (D. Ariz. Oct. 13, 2011) (*Arizona I*), *judgment granted against the NLRB on other grounds*, 2012 WL 3848400, at *7 (D. Ariz. Sept. 5, 2012).

B. The NLRB Has Standing to Challenge the Oregon Statute

To establish standing to sue under Article III, a plaintiff bears the burden of establishing three elements: (1) the plaintiff suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent," (2) the existence of a "causal connection between the injury and the conduct complained of" that is fairly traceable to defendant's action, and (3) the likelihood that the plaintiff's injury can be redressed by a decision in its favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In its Motion, Oregon argues that this Court lacks subject matter jurisdiction because the Board has not demonstrated causation or redressability. (Doc. 6 at pp. 4-10). As shown below, however, the Board's Complaint satisfies all three elements for standing set forth in *Lujan.*

1. The Board Has Suffered a Concrete Injury Because Oregon's Statute Creates a Direct Conflict Between the Statute's Regulation of Employer Speech about Unionization and the Board's Regulation of that Speech Under the NLRA

The law is clear that when a state law disrupts the ground rules of labor relations established by the NLRA, as the Oregon statute does here, that disruption by itself constitutes a concrete injury sufficient for judicial review. In its Motion, Oregon fails to substantively address the initial issue of injury to the Board, although it has not conceded this element of standing (Doc. 6 at p. 4 n.1). Instead, it focuses on its claim that the Board lacks standing because it is unable to satisfy causation and redressability. (Doc. 6 at pp. 4-10.) To satisfy its burden of demonstrating standing, the Board shows below that the Complaint sufficiently alleges a

concrete, actual injury-in-fact.

The Oregon statute conflicts with the NLRA by regulating captive audience speeches within the State of Oregon, thus causing concrete injury to the Board. The statute impermissibly infringes upon the Board's primary, if not exclusive, authority to regulate coercive employer speech about unions and to ensure that "laboratory conditions" are preserved so that employees have the opportunity to make an uninhibited choice regarding union representation. *See Rexall Corp.*, 272 NLRB at 316. As the Seventh Circuit concluded in finding preempted Milwaukee County's ban on captive audience speeches, "the employer could never require any of its employees to attend a meeting at which it expressed opposition to unionization." *Metropolitan Milwaukee Assoc. of Commerce v. Milwaukee County*, 431 F.3d 277, 280 (7th Cir. 2005).

In evaluating the Board's claim of injury here, cases analyzing the other aspects of justiciability under Article III, ripeness and mootness, are relevant.[5] Thus, courts, including the U.S. Supreme Court, have repeatedly concluded that the existence of allegedly preempted labor legislation, even in the absence of active enforcement, is sufficient for Article III justiciability. In *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115 (1974), the employer plaintiffs whose plants were struck sought a declaratory judgment that state regulations enabling certain striking workers to receive public assistance were preempted by the NLRA. Even though the strike at plaintiffs' plants had ended before the case was tried, the Court held that the dispute was not moot because "the availability of state welfare assistance for striking workers in New Jersey[,] pervades every

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[5] "[I]n many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (*en banc*). Further, mootness can be characterized as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (cleaned up); *see Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999).

work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract." *Id*. at 124.

Similarly, in *Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995), the D.C. Circuit found a facial challenge to a presidential executive order to be ripe for adjudication. That executive order authorized the disqualification of federal contractors who hired certain striker replacements. The Department of Labor argued that the executive order was not ripe because there was no evidence that the order would be enforced against any government contractors. The D.C. Circuit rejected this argument, holding that "[w]hether the Order and regulations result in the termination or debarment of any governmental contractors is irrelevant, however, for the injury alleged here is not the sanction that the Secretary might ultimately impose." *Id*. at 1100. Rather, "the mere existence of the Order alters the balance of bargaining power between employers and employees" established by the NLRA. *Id*.

And in *Employers Ass'n, Inc. v. United Steelworkers of America*, 32 F.3d 1297 (8th Cir. 1994), the Eighth Circuit held that a suit concerning whether the Minnesota Strikebreaker Replacement Law was preempted by the NLRA was ripe even though the union had not taken any action to enforce the law and no strike materialized. The court found that "the change wrought by the Striker Replacement Law in the ground rules of collective bargaining in Minnesota represents an injury sufficiently concrete to render the dispute ripe for judicial action." *Id.* at 1300. Observing that under the state law, "[t]he economic weapon of hiring permanent-replacement workers would no longer form the backdrop to labor-management discussions," the Eighth Circuit held that "we need not await an actual attempt on the part of the union to enforce the statute." *Id.* at 1300.

That a conflict between a state statute and the NLRA will constitute a concrete injury-in-

fact is further supported by *NLRB v. North Dakota*, 504 F. Supp. 2d 750 (D.N.D. 2007). In that case, a North Dakota statute directly conflicted with NLRB precedent. A part of North Dakota's "right-to-work" statute required non-union members who invoked a union's grievance provisions to pay the union its actual cost of representation. *Id*. at 754. However, Board decisions hold that in right-to-work states, a union that requires non-member employees to pay a fee for grievance processing commits an unfair labor practice. *Id*. The court found an actual justiciable controversy, and ruled that jurisdiction existed under 28 U.S.C. § 2201 and the statute was preempted. *Id*. at 753-54.

Like the state statutes discussed above, the Oregon statute challenged here disrupts the ground rules established by the NLRA and causes a concrete injury by its mere existence. By making it unlawful for employers in Oregon to take adverse employment action against employees who decline to attend captive audience speeches, the statute is attempting to regulate captive audience speeches within the State of Oregon. But any attempt by the Oregon statute to regulate captive audience speeches by employers that are covered by the NLRA is in direct conflict with the Board's primary, if not exclusive, authority of the NLRA to regulate coercive employer speech about unions under Section 8 of the NLRA, and to regulate conduct during union election campaigns under Section 9.

Thus, the statute's sheer existence forces NLRA-covered employers that wish to communicate their views to employees about unions during a mandatory meeting to make a Hobson's choice between waiving a right expressly protected and regulated by the Board, and risking substantial liability for violating the Oregon statute. (Doc. 1 at ¶ 20). Just like the statute challenged by the Board in *NLRB v. Arizona*, "[t]he alleged incursion on plaintiff's exclusive enforcement powers is neither remote nor speculative. By the very existence of the amendment

the injury has already occurred, and affects plaintiff's legal rights by undermining its exclusive authority to administer the [Act]." *See Arizona I,* 2011 WL 4852312, at *3.[6]

Indeed, the disruption caused by the conflict between the Oregon statute and the NLRA became even more evident in a recent union representation proceeding before the Board. In June 2019, the International Brotherhood of Teamsters Local 206 ("Local 206") filed a petition with the Board's Oregon office ("Region 19") seeking to represent a unit of employees of DS Services of America, Inc. ("DS Services"). *DS Services of America, Inc. and IBT, Local 206*, Case No. 19-RC-243327 (Doc. 1 at Exhibit 2). DS Services filed a motion with Region 19 seeking to stay the election, asserting that absent a stay, it would be obliged to comply with the Oregon statute and refrain from holding captive audience speeches during the election campaign, contrary to its rights under the NLRA. (*Id*. at Exhibit 3). Region 19's Regional Director denied the motion and noted that DS Services could raise issues related to the Oregon statute's impact in any post-election proceedings. (*Id*. at Exhibit 4). Because Local 206 lost the election (*id.* at Exhibit 5), this issue was not ultimately resolved by the Board. Nevertheless, the fact that this matter was raised in the Board proceeding helps demonstrate that the statute "imposes restrictions that conflict with the federal law." *Kansas v. Garcia*, 140 S. Ct. at 801.

This conflict with federal law created by the Oregon statute is now present in six currently-pending election petitions filed with the Board in Oregon.[7] For all of these petitions, as

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[6] Although the district court in that case found that the Board had adequately pleaded a causal connection between its injury and the amendment, 2011 WL 4852312, at *3, the court ultimately found that the amendment was not preempted by the NLRA. 2012 WL 3848400, at *7 (D. Ariz. Sept. 5, 2012).

[7] In its Complaint (at ¶ 20), the Board referenced six petitions then pending with the Board in the State of Oregon, filed in NLRB Case Nos. 19-RC-252363, 19-RC-253012, 19-RC-254203, 19-CA-255017, 19-RC-231425, and 19-RM-242193. Of these, NLRB Case Nos. 19-RC-255017 and 19-RM-242193 remain open. Since the filing of the Complaint however,

well as any future petitions filed in Oregon, the employers subject to these petitions are forced by the Oregon statute into making the unenviable choice to either comply with state law and avoid the treble damages awarded to all successful claimants, *see* ORS 659.785(2), or to exercise their federal right under Section 8(c) of the NLRA, 29 U.S.C. § 158(c), to inform their employees about their views regarding unionization. Forcing a choice between exercising federal rights and complying with state law is not permitted by the Supremacy Clause.

In short, because the Oregon statute attempts to regulate employer speech about unions which is under the authority of the Board under Sections 8 and 9 of the NLRA, Oregon's statute creates a concrete injury that is ripe for judicial review.

2. The State of Oregon Caused the Board's Injury By Enacting a Statute That Impermissibly Infringes Upon the Board's Regulatory Jurisdiction

Contrary to the State's claim in its Motion (Doc. 6 at pp. 4-8), the Complaint sufficiently alleges a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. As discussed above, Oregon has encroached upon the Board's jurisdiction to regulate coercive employer speech about unions and to regulate speech during a union election campaign. Oregon directly caused this injury through its enactment of a statute that purports to regulate the ability of NLRA-covered employers to hold captive audience speeches.

In its Motion, Oregon asserts that "[n]o action by the State could cause or could have caused any injury to NLRB because the State has no authority to enforce the statute NLRB challenges." (Doc. 6 at 2.) But in all the cases that Oregon cites in support (*id.* at 5-7), the

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additional petitions have been filed with the Board seeking elections in the State of Oregon, in NLRB Case Nos. 19-RC-259305; 19-RC-258057; 19-RC-256439; and 19-RD-259129. Of these additional petitions, NLRB Case Nos. 19-RC-259305 and 19-RC-259129 remain open. The status of any of these petitions may be found on the Board's public website at *https://www.nlrb.gov/search/case.*

plaintiffs were private, non-government entities. The instant case, in contrast, involves an agency of the federal government suing the State of Oregon because the challenged statute infringes on the Board's regulatory jurisdiction. Such a conflict, in and of itself, creates a controversy sufficient to satisfy the Article III's standing requirements, as repeatedly found by the courts. *See Conf. of Fed. Sav. & Loan Assoc. v. Stein*, 604 F.2d 1256, 1259 (9th Cir. 1979) (finding a justiciable controversy where state and federal agencies held conflicting positions regarding enforcement of an ultimately preempted state regulation); *NLRB v. North Dakota*, 504 F. Supp. 2d 750, 754 (D.N.D. 2007) ("it is clear that a conflict between a state statute and federal regulations presents a justiciable controversy"); *Arizona I, above*, 2011 WL 4852312, at *3. The Oregon statute (which was, of course, enacted under the authority of the State of Oregon) has directly infringed upon the Board's jurisdiction, causing it injury, thereby satisfying the element of causation.

3. The Board's Requested Remedy Will Redress the Injury Caused by Oregon's Statute

"A plaintiff meets the redressability requirement if it is likely, although not certain, that his injury can be redressed by a favorable decision." *Wolfson v. Brammer,* 616 F.3d 1045, 1056 (9th Cir. 2010). Here, the Board is seeking a declaratory judgment that the portion of the Oregon statute regulating speech about unionization is invalid and unenforceable as to employers that are covered by the NLRA (*see* n. 2, *above,* and p. 16*, below*). Such a judgment will fully redress the Board's injury to its jurisdiction.

C. The NLRB's Complaint States a Valid Claim for Relief

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a complaint should be dismissed if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as

true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A formulaic recitation of the elements of a cause of action" do not suffice. *Twombly*, 550 U.S. at 555. In the absence of sufficient facts, a complaint must allege a cognizable legal theory to survive a Rule 12(b)(6) dismissal. *See Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). When ruling on a motion to dismiss, a court must construe the pleadings in the light most favorable to the non-moving party and must draw all reasonable inferences in favor of the non-moving party. *Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011).

Assuming all the facts in the Board's Complaint are true, as this Court must do, *id.,* the Board has stated a valid claim, based on a cognizable legal theory, upon which relief may be granted. The Complaint clearly sets forth the provisions of the Oregon statute that are in direct conflict with the Board's jurisdictional authority. The Board's Complaint (Doc. 1 at ¶¶ 8-11) alleges that portions of ORS 659.785(1) and ORS 659.780(5) are in direct conflict with the NLRA's primary, if not exclusive, authority to regulate coercive employer speech regarding unionization and to regulate speech during union election campaigns. A judgment declaring that the term "labor organization," as used in ORS 659.780(1), is invalid and unenforceable as applied to speech by employers that are covered by the NLRA, will fully redress this conflict.[8]

Moreover, Oregon argues an incorrect standard of review, by asserting that the Board seeks to have the Oregon statute declared facially invalid in its entirety. (Doc. 6 at p. 10.) In fact, the Board is challenging a portion of the statute, and only as applied to NLRA-covered employers. An "as-applied" challenge attacks a subset of the statute's applications, as here, or the

[8] Should this Court deny Oregon's motion to dismiss, the Board intends to file a motion for summary judgment, seeking such a declaratory judgment.

application of the statute to a specific factual circumstance. *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011); *see Legal Aid Serv. of Oregon v. Legal Services Corp.,* 608 F.3d 1084, 1096 (9th Cir. 2010) ("[f]acial and as-applied challenges differ *in the extent to* which the invalidity of a statute need be demonstrated"). Thus, "[a] successful as-applied challenge does not render the law itself invalid but only the particular application of the law." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). On the other hand, a facial challenge to a statute attacks an entire legislative enactment or provision. *Hoye*, 653 F.3d at 857 (citing *Foti,*146 F.3d at 635 (a statute is facially unconstitutional if "it is unconstitutional in every conceivable application, or it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad")).

Here, the Board is not challenging the Oregon statute in its entirety; rather, as discussed above, it is challenging a portion of the statute, the term "labor organization," as used in ORS 659.780(1), and only as applied to speech by employers that are covered by the NLRA. Because the Complaint states a valid claim of preemption, this Court should reject Oregon's claim that dismissal is warranted under Fed. R. Civ. Pro. 12(b)(6).

III. CONCLUSION

For the reasons set forth above, the Board respectfully requests that this Court deny Oregon's Motion to Dismiss.

DATED: May 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Motion to Dismiss was filed with the Clerk of the Court using the CM/ECF system on May 21, 2020. Notification of this filing will be sent to the following:

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