



	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	WILLIS J. GOLDSMITH, ESQ.	
4	On behalf of the Petitioners	3
5	THOMAS G. HUNGAR, ESQ.	
6	On behalf of the United States, as amicus	
7	Curiae, supporting the Petitioners	16
8	MICHAEL GOTTESMAN, ESQ.	
9	On behalf of the Respondents	26
10	REBUTTAL ARGUMENT OF	
11	WILLIS J. GOLDSMITH, ESQ.	
12	On behalf of the Petitioners	55
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-939, Chamber of Commerce versus Brown. Mr. Goldsmith.

ORAL ARGUMENT OF WILLIS J. GOLDSMITH  
ON BEHALF OF THE PETITIONERS

MR. GOLDSMITH: Mr. Chief Justice, and may it please the Court:

In AB 1889, California defunded employer speech about union organizing because the State's labor policy is that such speech interferes with employee free choice. The Federal policy is that employer speech enhances employee free choice. California's labor policy is designed to discourage exactly what the NLRA promotes. The fact that California implemented its labor policy as an exercise of its spending authority is irrelevant under Gould. If the --

JUSTICE SCALIA: Why do you say the labor policy promotes it? It certainly permits it, but what -- what --

MR. GOLDSMITH: Well, Your Honor, I think that if you look at the exceptions to the policy, in particular those that allow State funds to be spent for things that clearly facilitate union organizing, for

1 example, that it's not prohibited under AB --

2 JUSTICE SCALIA: No, I'm talking about the  
3 -- the Federal policy. You say the Federal policy  
4 promotes this employer speech. Why do you say it  
5 promotes it? It clearly permits it. It clearly does  
6 not discourage it, but is that the same as promoting it?

7 MR. GOLDSMITH: I think -- I think it is,  
8 Your Honor. I think that the cases of this Court and  
9 the cases of the NLRB have made clear that free, open,  
10 robust debate is important on all matters having to do  
11 with the union/employer relationship. That was  
12 certainly what the Court noted in Linn.

13 The fact that employer speech is, I think,  
14 absolutely critical to an employee being well-enough  
15 informed to make an informed judgment about whether to  
16 say yes or no to a union, further underscores the point.

17 A union election or any situation involving  
18 a contest of any sort between a union and an employer is  
19 something on which both parties should have the right to  
20 speak, and to speak in a noncoercive way, and I think  
21 that clearly the National Labor Relations Act promotes  
22 that.

23 JUSTICE GINSBURG: Then why did Congress in  
24 several statutes have a provision from which California  
25 copied when it enacted this measure? In several

1 statutes, the Congress has said this Federal money will  
2 go to the grantee, if the grantee says it will not use  
3 any money that we give them to assist, promote, or deter  
4 union organizing.

5 MR. GOLDSMITH: Your Honor, those are three  
6 statutes that the court below and Respondents rely on  
7 heavily. Those statutes, first of all, I don't think in  
8 any way reflect the meaning or the sense of Congress  
9 that employer speech is to be inhibited in connection  
10 with union organizing. Those in no way, I think,  
11 reflect the overall intent of Congress. More ever,  
12 nothing in those statutes, in any way, undercuts the  
13 basic principles of the --

14 JUSTICE GINSBURG: But they run against that  
15 principle because they say at least under these programs  
16 -- I think there were more than three. Wasn't Medicare  
17 --

18 MR. GOLDSMITH: Medicare was the fourth, I  
19 believe. It was a regulation not a statute. But  
20 certainly in doing that, Congress didn't in any way  
21 modify the NLRA. There's nothing in the legislative  
22 history of those statutes that suggests that this  
23 Court's principles, as laid down in Machinists and  
24 Garmon, were in any way to be inhibited. And, moreover,  
25 what Congress can do certainly doesn't mean that the

1 States have the same right. But --

2 JUSTICE GINSBURG: Those -- those grantees  
3 would be subject to the NLRA. So, as to them, it is  
4 modified.

5 MR. GOLDSMITH: Well, it's not modified in  
6 the same way that AB 1889 modifies it, Your Honor.  
7 First of all, under those statutes there is no  
8 requirement that funds be segregated. There is no  
9 possibility of litigation, treble damages to follow.  
10 There is no possibility of attorneys' fees to the  
11 prevailing party. So those statutes are, I think, are  
12 really unique and don't in any way change the basic  
13 principle that I think all labor lawyers would agree,  
14 and that is that, under the National Labor Relations  
15 Act, all parties to a union election or any issue  
16 between a union and an employer have the right to speak  
17 in a noncoercive way.

18 JUSTICE BREYER: Say: Speak, go ahead,  
19 speak, speak. Just not on our nickel.

20 MR. GOLDSMITH: Well, I think that's clearly  
21 what they say, but it's not that simple given the way  
22 this statute operates, Your Honor.

23 JUSTICE BREYER: And they also say -- by the  
24 way, that you answer this, I'd keep this in mind -- you  
25 may be right about it being too much of an

1 administrative burden, the treble damages et cetera, but  
2 they've made major concessions here, and they say that's  
3 a matter to be worked out on remand. And it may be that  
4 they have to be very careful about inhibiting your  
5 speech.

6           So let's go back over those administrative  
7 provisions one by one. They are suggesting to us, as I  
8 read it, don't do that now.

9           MR. GOLDSMITH: If I may respond to both  
10 questions, Your Honor. First of all the notion that one  
11 can use your own money, to use the vernacular, and use  
12 it to speak, doesn't answer the most basic question that  
13 the statute presents, and that is that whether you can  
14 or you can't -- and I'll get to that in a moment -- the  
15 fact is that California has regulated, used its spending  
16 power to make labor policy, something that this Court  
17 has made clear, in Gould and various other cases, it  
18 cannot do. But even getting past that, which I think is  
19 the end of the case, there are certain employers,  
20 certain Petitioners here who are a hundred percent  
21 funded by the State. They have no ability, as a result  
22 -- when I say "funded by the State" I mean they depend  
23 for their income on State programs, let's say -- they  
24 have no ability, none, to speak to employees.

25           CHIEF JUSTICE ROBERTS: Well --

1 MR. GOLDSMITH: The State has effectively --

2 CHIEF JUSTICE ROBERTS: That's not the  
3 State's fault.

4 MR. GOLDSMITH: Well, the State's argument  
5 to that, Mr. Chief Justice, is that that's a free-market  
6 choice. They can either do business in California or  
7 not. And I would refer the Court --

8 CHIEF JUSTICE ROBERTS: Well, they can do  
9 business with other entities beside the State.

10 MR. GOLDSMITH: They can, Your Honor, that's  
11 true, but that doesn't answer the question because for  
12 those that -- because of the service that they provide,  
13 such as under Medi-Cal, they have chosen to be in  
14 business with the State. They are being forced to make  
15 an election between doing business with the State or  
16 giving up an NLRA-protected right. That is --

17 JUSTICE BREYER: If you have -- you have a  
18 park service of the State and have you a hotdog stand  
19 there, it runs the hotdogs, it's private, but the State  
20 pays for everything. The State pays for everything.  
21 And it happens that, in the grant, they have no place  
22 for talking about the union. You're saying they are  
23 required to add to the legislation, a special grant, so  
24 that the employer can speak of the union?

25 MR. GOLDSMITH: Well, a grant presents a



1 slightly different problem.

2 JUSTICE BREYER: Why? Why? Because they  
3 say here we are talking about 100 percent money that  
4 comes out of the State treasury and all we are saying is  
5 use that money for the State purposes, and those  
6 purposes do not include talking one way or the other  
7 about the union.

8 MR. GOLDSMITH: Well, that may be the case  
9 for a particular program or a particular grant, but  
10 that's not what AB 1889 does, Your Honor. AB 1889  
11 affects on an across-the-board basis every single  
12 contractor, every single employer doing business with  
13 the State of California. So if -- if the State could  
14 show that it were making that -- it was making that  
15 policy decision for some fiscal purpose, then there  
16 might be an argument. But that's concededly not the  
17 case here, whereas --

18 JUSTICE GINSBURG: I thought you -- you are  
19 bringing a facial challenge, and I thought that you must  
20 show, not that the State must show, and the State -- the  
21 simple argument is look we are paying for certain  
22 things, and we want to get what we paid for. There are  
23 a lot of other things that we could have paid for, but  
24 we -- we want to get, say, a training program for  
25 elementary schoolteachers. And that has nothing to do

1 with union organizing. We don't want to pay for union  
2 organizing.

3 MR. GOLDSMITH: That might be an argument  
4 that the State could advance credibly if in fact this  
5 statute had anything to do with saving money. It  
6 doesn't. The court below unanimously concluded that  
7 this was not anything that had anything to do with the  
8 fiscal issues; it had solely to do with making labor  
9 policy. And as far as a facial challenge is concerned,  
10 Your Honor, the fact is that this statute was applied to  
11 the Petitioners. The Petitioners --

12 JUSTICE GINSBURG: Where did the lower court  
13 say it has nothing to do with the State getting what it  
14 is paying for and not paying for things it doesn't want  
15 to pay for?

16 MR. GOLDSMITH: Well, Your Honor, that's, of  
17 course, my vernacular for --

18 JUSTICE GINSBURG: That in --

19 MR. GOLDSMITH: -- what the court said, but  
20 what the court did say was that the State passed --  
21 legislature passed and the governor signed AB 1889  
22 solely for labor policy purposes, and that's clear from  
23 the preamble to the statute. The preamble to the  
24 statute says, it is the policy of the State of  
25 California -- in so many words -- that employer speech

1 interferes with employee free choice. There's nothing  
2 in the record. There's no attempt at all to suggest  
3 that anything achieved by 1889 saves the State a dime.  
4 That's an argument --

5 JUSTICE GINSBURG: So it would come out --  
6 it would come out differently if the statute has said,  
7 we want to get what we pay for and we don't -- we choose  
8 not to pay for labor relations?

9 MR. GOLDSMITH: Well, if the State could  
10 establish that it was acting as a proprietor, within  
11 meaning of this Court's decision in Boston Harbor, and  
12 establish as a proprietor that it was doing something to  
13 advance a fiscal purpose, then perhaps a statute so  
14 worded would survive the pre-emption challenge. But  
15 that is clearly not what happened here. There's no  
16 evidence that that happened, and that is not the purpose  
17 or the effect of AB 1889.

18 And as to the facial challenge issue, if I  
19 could answer both Justice Breyer and Your Honor, the  
20 fact is that this statute was applied to the  
21 Petitioners. The Petitioners went into district court  
22 and they said, this applies to us, it's burden some for  
23 us to do -- to do what the statute purports to require  
24 us to do. The district court granted an injunction and  
25 so on.

1           But whether it's a facial challenge or  
2 as-applied challenge I think really makes no difference  
3 here. The Ninth Circuit found that AB 1889 was not  
4 pre-empted as a matter of law. Our position is that AB  
5 1889 is pre-empted as a matter of law. The purpose and  
6 effect are clear. Sending this back to remand to  
7 develop facts or trying to sort this out and whether  
8 it's a facial or as-applied challenge really doesn't  
9 change the basic fact that the court below, as I said,  
10 decided this as a matter of law and NLRA pre-emption  
11 generally raises purely legal issues.

12           The legal issue is whether or not the  
13 Federal scheme has been interfered with, and I think  
14 that any fair reading of this statute makes it  
15 abundantly clear that that's exactly what happened.  
16 California was very open about it. The preamble says  
17 precisely that: We believe that employer speech  
18 interferes with employee free choice. So that they  
19 passed a statute that is designed to and does severely  
20 inhibit an employer's ability to speak. That's what  
21 they wanted to do; that's what they did; and that  
22 interferes with the Federal policy.

23           JUSTICE GINSBURG: Did they say something  
24 different from what Congress said in those three or four  
25 statutes that were mentioned earlier?

1 MR. GOLDSMITH: In terms of using the words  
2 assist, promote and deter, those words appear in those  
3 statutes in that Medicare regulation, or statute,  
4 component of the Medicare statute, and those appear also  
5 in, in AB 1899.

6 But, you know, again, Your Honor, from my  
7 perspective I think, you know, it's clear that nothing  
8 in those statutes changed the fundamental policy that  
9 speech, free speech, for both employers and for unions  
10 is something to be encouraged in the context of a union  
11 organizing drive for a number of reasons, not the least  
12 of which employees are allowed and entitled to hear both  
13 sides of the picture before being put in the position  
14 where they have to make a choice. California believes  
15 that employer speech is a bad thing. AB 1899 is a  
16 reflection of that. They believe it's bad because it  
17 interferes with employee free choice.

18 JUSTICE ALITO: If you take the example of a  
19 nursing home that participates in the Medi-Cal program,  
20 what does this require? They have to segregate the  
21 funds that they get from the State, and they can't use  
22 -- is it the case they can't use any of those funds for  
23 union-related speech or just the portion that does not  
24 represent profits?

25 MR. GOLDSMITH: They can't use any of those

1 funds. The notion that profits -- the statute doesn't  
2 say a word about profits, and, of course, if the statute  
3 were to say something about profits, it would make  
4 segregation of accounts problem in the statute even  
5 worse than it already is.

6 But what a nursing home has to do is to  
7 track every single possible circumstance under which an  
8 employee of the nursing home engaged in speech that was  
9 designed to assist -- which don't happen very often,  
10 presumably -- promote or deter union organizing.

11 And let me try to bring it down to what  
12 really happens in the union organizing campaign. This  
13 is, by and large, a seven-day-a-week, 24-hour a day  
14 operation. There are any number of encounters during  
15 the course of the union organizing drive that the  
16 employer responsible for complying with AB 1899 may  
17 never even know about.

18 So, for example, if an employee goes to his  
19 supervisor and says union X is trying to organize  
20 nursing home, what do you know about union X? And the  
21 supervisor says, well, the only thing I know about union  
22 X is they used to represent the nursing home across the  
23 street, and then that nursing home is now closed.

24 Now, that may be a purely factual statement,  
25 purely true statement. That's certainly what the

1 employer would argue. What the union might argue is  
2 that no, no. You have to put that in context, and that  
3 was a statement designed to deter the employee from  
4 voting for union X.

5 Now, if the employer guesses wrong on that  
6 issue, that is the employer says, well, this is factual,  
7 it's not something designed to deter union organizing,  
8 he is subject under the statute to litigation for not  
9 having segregated -- and I don't know what he would  
10 really segregate; the statute is unclear. Do you  
11 segregate the time? Do you account for the time that  
12 the employer spent talking --

13 JUSTICE SCALIA: Even if he guesses right,  
14 he is subject to the litigation.

15 MR. GOLDSMITH: I'm sorry.

16 JUSTICE SCALIA: You said if he guesses  
17 wrong, he is subject to litigation. He is subject to  
18 the litigation even if he guesses right.

19 MR. GOLDSMITH: That's correct, Your Honor,  
20 and unlike the prevailing party as the defendant, or the  
21 prevailing party will of course -- the prevailing  
22 plaintiff and the prevailing intervenors will recover  
23 reasonable costs of attorney's fees, the prevailing  
24 defendant under this statute does not. There is --  
25 there is no question that it's even impossible for an

1 employer under the situation that I described to  
2 effectively account for that encounter that I describe  
3 between an employer and employee.

4 Do you take the 30 seconds that it took and  
5 allocate 30 seconds of the salary? Do you take the  
6 overtime for the week that the supervisor might have  
7 worked? There is really no way that the statute allows  
8 for that to happen, and it I think underscores the  
9 degree to which this statute interferes dramatically  
10 with NLRA protected rights.

11 If there are no further questions, I'd like  
12 to reserve the rest of my time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 You've got a friend on the other side still.

15 MR. GOLDSMITH: I'm sorry, Your Honor. I  
16 forgot about that.

17 CHIEF JUSTICE ROBERTS: Mr. Hungar.

18 ORAL ARGUMENT OF THOMAS G. HUNGAR,

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONERS

22 MR. HUNGAR: Thank you, Mr. Chief Justice,  
23 and may it please the Court:

24 The National Labor Relations Act manifests  
25 congressional intent to encourage free debate on issues



1 dividing labor and management. State laws that restrict  
2 speech regarding unionization frustrate that fundamental  
3 national policy and are therefore pre-empted, as this  
4 Court held in Linn.

5 CHIEF JUSTICE ROBERTS: What about the  
6 spending clause question? You -- the Federal Government  
7 has a lot of programs where they use their own money and  
8 they come with a lot of conditions, and you -- your  
9 office frequently argues that those are justified under  
10 the spending clause. Why isn't what California is doing  
11 here similarly justified?

12 MR. HUNGAR: Well, first of all, obviously,  
13 Your Honor, the National Labor Relations Act does not  
14 constrain Congress' ability to impose particular  
15 restrictions. It does constrain the State's ability to  
16 use their spending power to regulate, as this Court held  
17 in Gould and in Nash.

18 CHIEF JUSTICE ROBERTS: How do we tell  
19 whether they are using their spending power to regulate  
20 as opposed to simply attaching conditions to what's done  
21 with State funds?

22 MR. HUNGAR: The Court has identified  
23 several factors that it has used to distinguish  
24 regulatory from proprietary conduct, first and foremost,  
25 as this Court said in Boston Harbor. It looks to

1 whether the State is acting in order to effectuate  
2 policy or is instead seeking to achieve cost savings  
3 program efficiency and the like. In addition, the Court  
4 looks to whether the measure --

5 CHIEF JUSTICE ROBERTS: On a case like Rust  
6 versus Sullivan, is the Federal Government acting to  
7 promote policy, or is it simply acting in a proprietary  
8 capacity?

9 MR. HUNGAR: Well, of course, that question  
10 did not come up in Rust against Sullivan because there  
11 was in a NLRA pre-emption issue there, and the question  
12 that the State was --

13 CHIEF JUSTICE ROBERTS: I'm talking about  
14 spending power versus regulatory power in general.

15 MR. HUNGAR: But what the Court did say in  
16 Rust is that the government has a legitimate policy  
17 interest in advancing its preference for life, in that  
18 case, that the Congress was entitled to advance. The  
19 problem here is that the policy interest that the State  
20 is advancing, a policy interest that says employer  
21 speech regarding unionization interferes with employee  
22 free choice, is a policy that is directly contrary to  
23 the Federal policy under the Act as Congress and the  
24 board have repeatedly recognized, and that this Court  
25 has repeatedly recognized.

1           So, there is no legitimate interest  
2 supporting what the State is doing here, it's an  
3 interest directly contrary to Federal policy, unlike in  
4 Rust and other First Amendment cases.

5           CHIEF JUSTICE ROBERTS: Well, give me an  
6 example of a spending clause provision that would be  
7 acceptable, not necessarily in this context, but in  
8 general, because you would say, well, that's not trying  
9 to implement a policy at all.

10           MR. HUNGAR: Well, if the -- one of the  
11 amicus briefs in this case points to a rule that the  
12 State has adopted recently apparently in the Medi-Cal  
13 context, which says that they will only reimburse  
14 administrative costs of hospitals up to the 50th  
15 percentile of costs incurred by similar facilities.

16           That's obviously not attempting to regulate  
17 any particular labor speech or any other type of  
18 conduct. It's simply saying we are only going to  
19 regulate this category, this broad general category of  
20 costs to a certain level. It's not targeted at a  
21 specific category of disfavored speech because the State  
22 disfavors that speech. It's simply attempting to save  
23 money.

24           That clearly would not be pre-empted, even  
25 though it might have a disproportionate impact on a

1 particular hospital that's engaged in a costly --

2 JUSTICE BREYER: Would your answer be the  
3 same if -- if -- and I hide contrary to fact, perhaps,  
4 that a magic administrative scheme were invented so that  
5 there was no administrative problem, we could identify  
6 with the greatest of ease each penny that came from a  
7 State and which did not? And then the State said, you  
8 know, we do have a policy here. We actually favor labor  
9 unions in our State, and some other State might have a  
10 different policy. But we think it best that the State  
11 officials involved when their company -- when their  
12 department is being organized, to say nothing. We think  
13 it best that the employers that we pay a hundred percent  
14 to, given their -- their strong funding by the State,  
15 that they got to find some money elsewhere, and those we  
16 pay 50 percent to better use the private money, not use  
17 our money.

18 Now, no administrative burden whatsoever,  
19 but that's the policy. Now, is there some rule or  
20 statute that would make that unlawful or pre-empted that  
21 policy?

22 MR. HUNGAR: Justice Breyer, I think -- I'm  
23 assuming in your hypothetical that this hypothetical  
24 law, in addition to posing no administrative burdens  
25 also doesn't have the strict liability of treble

1 damages.

2 JUSTICE BREYER: No, on all these things  
3 which I think they are asking us on the other side to  
4 leave for another day, none of them exist. They all  
5 work perfectly. It's only the magic system has been  
6 developed to, without any extraneous burden, segregate  
7 the State money from the non-State money. And the only  
8 rule is don't use the State money when you speak.  
9 That's the only rule.

10 MR. HUNGAR: Justice Breyer --

11 JUSTICE BREYER: By the way, other states  
12 have exactly opposite rules, they are right-to-work  
13 states. They give you extra State money. So -- but one  
14 State has this rule and --

15 MR. HUNGAR: Obviously that would be a very  
16 different case.

17 JUSTICE BREYER: Ah, well, if it's a very  
18 different case, then why aren't they right to say this  
19 is a facial challenge, leave that very different case  
20 which raises all the issues to be worked out when we  
21 discover whether this is --

22 JUSTICE SCALIA: Why do you say it's a very  
23 different case Mr. Hungar? I don't really understand  
24 it.

25 MR. HUNGAR: It's a very different case in

1 the sense that in this case it's -- from every one of  
2 the factors that this Court has looked to, to determine  
3 regulatory versus proprietary -- and this case cuts  
4 fairly in favor of the conclusion of the unanimous court  
5 of appeals, all 15 judges, that this is regulatory.  
6 It's punitive; it's government-wide; it's not program-  
7 or contract-specific; it's not the kind of conduct that  
8 private entities engage in. All of the factors -- and  
9 it's expressly as well as obviously, in effect, intended  
10 to disfavor a particular kind of speech that Congress  
11 favors.

12 So everything cuts in favor of it being  
13 regulatory; whereas, in your hypothetical, most of those  
14 considerations would not. However, I think it's still  
15 the case that in that hypothetical, what the State is  
16 doing is regulating -- for labor policy reasons it's  
17 disfavoring a particular type of speech. The State does  
18 not have any obligation under the Act to fund  
19 unionization speech, but what it can't do under the Act  
20 is deny a government benefit because of a -- a labor  
21 policy. That's what this Court held in Nash.

22 JUSTICE BREYER: Is my right-to-work example  
23 equally -- equally pre-empted?

24 MR. HUNGAR: Yes, I think it would be. But,  
25 again --

1 JUSTICE BREYER: So, they could not say in  
2 Utah, to take a State at random, the -- here we have  
3 government grants and there's overhead, and we would  
4 like you to spend this overhead; indeed, you're  
5 certainly free to spend this overhead in speaking as  
6 much as you want, should there be an organizing  
7 campaign. Don't worry about spending the government  
8 part. Can they do that? You say no, they couldn't?

9 MR. HUNGAR: Well -- I took your -- the Utah  
10 example to be one where the State was somehow mandating  
11 this particular expenditure.

12 JUSTICE BREYER: No.

13 MR. HUNGAR: If the State is simply -- is  
14 not taking -- is taking a hands-off approach, it's hard  
15 to characterize it as regulation. But what this Court  
16 held in Nash, what this Court held in Gould, what this  
17 Court held in Livadas is, when the State is denying  
18 benefits -- even though there might be plenty of  
19 legitimate reasons that might enable it to deny benefits  
20 -- if it's denying benefits for the purpose of advancing  
21 labor policy in an area where Congress has said there is  
22 to be no regulation, that's pre-empted, and that's  
23 doubly pre-empted here where the labor policy that the  
24 State is advancing is directly contrary to the Federal  
25 labor policy that Congress and the Board have

1    enunciated.

2                   And with respect to the facial versus  
3    as-applied or the suggestion that somehow because you  
4    might be able to craft a statute that would achieve some  
5    of the effects of this statute in a nonpre-empted way,  
6    that doesn't make this statute not facially pre-empted.  
7    This statute has the punitive provisions with the strict  
8    liability, treble damages, the segregation requirement  
9    that's virtually impossible to apply in practice, the  
10   clear expressive mission of a regulatory policy that's  
11   contrary to Federal policy.

12                   This is the statute that is in front of the  
13   Court.  This is the statute that is facially  
14   unconstitutional, and that's the issue that the Court  
15   should decide in order to correct the Ninth Circuit's  
16   error, which said it's both facially and as applied  
17   immune from pre-emption challenge before it --

18                   JUSTICE GINSBURG:  What policy was Congress  
19   implementing in the Federal funding statute that  
20   California copied?

21                   MR. HUNGAR:  Your Honor, California did not  
22   copy any Federal statutes.  None of the Federal statutes  
23   has a segregation requirement; none of them imposes  
24   strict liability, punitive damages.

25                   JUSTICE GINSBURG:  But they do say that the



1 money is not to be spent to assist, promote, or deter  
2 union organizing.

3 MR. HUNGAR: Yes, there are three Federal  
4 statutes that impose use restrictions.

5 JUSTICE GINSBURG: And why do they do that?

6 MR. HUNGAR: It's not clear why they did  
7 that, other than obviously they were choosing not to  
8 compensate those particular kinds of costs as well as  
9 the others. Congress is entitled to carve out  
10 particular exceptions to the general nonregulatory  
11 provisions of the Act, just as it has done in section  
12 8(c), where they have carved out coercive employer and  
13 union speech for regulation, even though other speech is  
14 to be unregulated.

15 It's important to understand also that the  
16 general policy in Federal grant programs is to the  
17 contrary. There is no such restriction in the vast  
18 majority of Federal grant programs involving the vast  
19 majority of Federal grant money.

20 JUSTICE GINSBURG: But you don't -- there's  
21 no reason, rhyme or reason to what they would have done  
22 in these three statutes that you say is flatly contrary  
23 to national labor relations policy?

24 MR. HUNGAR: Well, it's not contrary to  
25 national labor relations policy, because Congress has

1 chosen to create an exception, and it has the right to  
2 do so; the State does not.

3 JUSTICE SCALIA: It was labor policy. I  
4 mean, you have to acknowledge it was labor policy in  
5 these other cases, just a different labor policy that  
6 the Federal Government wanted, right?

7 MR. HUNGAR: In -- in a specific program --

8 JUSTICE SCALIA: Right.

9 MR. HUNGAR: -- which obviously the State's  
10 law does not apply to those programs; it applies to  
11 State spending across the board.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 Mr. Hungar.

15 Mr. Gottesman.

16 ORAL ARGUMENT OF MICHAEL GOTTESMAN

17 ON BEHALF OF THE RESPONDENTS

18 MR. GOTTESMAN: Mr. Chief Justice, and may  
19 it please the Court:

20 Until this statute was enacted, California  
21 was in the anomalous position that it was financing  
22 speech on one side of union organizing campaigns but not  
23 on the other, because most grants, programs, contracts  
24 include employment costs as an allowable cost.

25 CHIEF JUSTICE ROBERTS: Well, so was anyone

1 who hired a company to do any kind of work, right?  
2 Because the Federal policy meant that they couldn't try  
3 to restrict what activities the company engaged in with  
4 respect to union organizing.

5 MR. GOTTESMAN: Yes. I mean, a private  
6 employer could have said the same things that the State  
7 said: don't use our money to do this. And they would  
8 not have violated anything by doing that.

9 JUSTICE SOUTER: I'm not sure why you  
10 characterize California as financing one side of a  
11 debate, because -- and this I think is sort of the nub  
12 of the disagreement between the two sides here -- their  
13 argument is that a State can determine what it wants to  
14 buy with its money, but what California is doing is  
15 telling its contractor what it can do with the money  
16 after the State has got what it paid for.

17 MR. GOTTESMAN: That's not correct, Your  
18 Honor.

19 JUSTICE SOUTER: And that's the --

20 MR. GOTTESMAN: That's what they claim.

21 JUSTICE SOUTER: I understand that is the  
22 basic distinction between a case like Rust and a case  
23 like this.

24 MR. GOTTESMAN: Right.

25 JUSTICE SOUTER: They're trying to control

1 their profits as opposed to determining what they get --  
2 what you get for your money. And how do you respond to  
3 that?

4 MR. GOTTESMAN: Well, that's true if it were  
5 the case that the State's statute said: Even after you  
6 have earned this money by performing all the service we  
7 asked, you still can't -- it's therefore now your money;  
8 you can't use it. That is not what the statute means.  
9 That is -- the State has been very clear about that.

10 JUSTICE SOUTER: Well, is there any case in  
11 which California claims that it has not gotten the  
12 service that it paid for as a result of the position  
13 which an employer -- a grantee employer took on -- on a  
14 unionization issue?

15 MR. GOTTESMAN: Well, there haven't been any  
16 cases decided under this statute, but what the court of  
17 appeals pointed out is that the Petitioners did not move  
18 for summary judgment on the ground that you're  
19 forbidding us from using our money. They moved for  
20 summary judgment solely on the ground that it was the  
21 obligation of the State to give them money that they  
22 could use for these purposes. And that it was wrong --

23 CHIEF JUSTICE ROBERTS: No, that's not quite  
24 accurate. They moved for summary judgment on the ground  
25 that what the State was doing was in effect regulating

1 labor relations --

2 MR. GOTTESMAN: Right.

3 CHIEF JUSTICE ROBERTS: -- and that that  
4 activity was pre-empted.

5 MR. GOTTESMAN: Right. Well, yes, on that  
6 core issue, they said to -- to tell us that we cannot  
7 use State funds for this purpose -- well, they are still  
8 State funds -- is to regulate us. And we submit that  
9 that is wrong. This is --

10 JUSTICE SOUTER: Why do you say "while they  
11 are still State funds" -- the -- the money that the --  
12 that any employer is using, I presume, to the extent  
13 that it can be identified, is money in the employer's  
14 pocket. And the only claim that California would have,  
15 it seems to me from the pre-emption argument, is that in  
16 fact we are buying a form of speech or a form of  
17 promotion of labor policy when we contract with social  
18 service agencies or whatnot. But I don't understand  
19 that to be California's argument at all.

20 MR. GOTTESMAN: No. Our argument -- let's  
21 take one of the two provisions that the district court  
22 struck down, and that Petitioners argue properly struck  
23 down. It said that when we give you grant money, don't  
24 use that money for this purpose. Now, the State gives  
25 them the money up front, before they have provided the

1 services. And that's true universally.

2 JUSTICE SOUTER: Yes, but if they give them  
3 grant money -- let's say it's a grant rather than a  
4 contract, and I assume that's, you know, the point  
5 you're making. When they give them grant money, I  
6 assume they're giving them grant money in order to do or  
7 to perform whatever kind of service or function the  
8 agency is devoted to performing.

9 MR. GOTTESMAN: Correct.

10 JUSTICE SOUTER: Not to -- not to enforce  
11 labor policy of one sort or another, but to promote the  
12 arts or conservation or whatever the organization does.  
13 And there's no argument here that the organization is --  
14 is failing to promote conservation or the arts or  
15 whatever, and that for that reason, California isn't  
16 getting what it's paying for. The argument is that  
17 whatever California has to -- I'm sorry, whatever the  
18 organization has to spend, say, on its labor relations,  
19 which is something that is left over from its promotion  
20 of the arts, cannot be spent except in accordance with  
21 California policy.

22 MR. GOTTESMAN: Well, first, if they don't  
23 spend all the grant money on the prescribed purposes,  
24 they have to give it back to the State because grants  
25 aren't profit --

1 JUSTICE SOUTER: Yes, but I assume they are  
2 entitled to some overhead cost which would include the  
3 cost of their employee-related -- managing employee  
4 relations?

5 MR. GOTTESMAN: Right. And that's --

6 JUSTICE SOUTER: So that wouldn't be money  
7 left over. That would --

8 MR. GOTTESMAN: Right, but that, Your Honor,  
9 is where the concern that the State was addressing comes  
10 in.

11 Traditionally, when the State gave grant  
12 money, one of the permissible uses of that money was for  
13 the costs of employees who had to perform the grant, and  
14 without this limitation, that would have included the  
15 employer spending the money to combat unions. That  
16 would be -- could arguably be a legitimate cost.

17 JUSTICE SOUTER: So, is the argument that  
18 the employer in fact -- that the employer is in fact  
19 devoting less of the grant money to the purpose of the  
20 grant, so that it falls within Rust?

21 MR. GOTTESMAN: Well -- yes. Well, our  
22 position is certainly yes. That is, the State is  
23 entitled to prescribe what it is prepared to pay for in  
24 a grant and what not, and it is not required to  
25 subsidize the employer's campaign --

1 JUSTICE SCALIA: But the --

2 MR. GOTTESMAN: -- against a union or for a  
3 union, for that matter.

4 JUSTICE SCALIA: The difference between this  
5 and Rust is that the Federal Government in Rust was  
6 assuredly following a Federal policy.

7 MR. GOTTESMAN: Right.

8 JUSTICE SCALIA: But it was a Federal policy  
9 that the Federal Government had every right to  
10 implement. We do not want to support abortions.

11 MR. GOTTESMAN: Right.

12 JUSTICE SCALIA: The issue here is whether  
13 the policy that California is trying to implement --  
14 namely, we do not want the employer to -- in its view --  
15 disrupt the -- the labor management relations by -- by  
16 opposing union -- unionization.

17 MR. GOTTESMAN: Right.

18 JUSTICE SCALIA: That -- that is the issue,  
19 whether that is a policy that California can -- can  
20 implement.

21 MR. GOTTESMAN: That is not the State's  
22 policy, and the preamble to the statute does not say:  
23 the State disapproves of employers spending money. What  
24 it says --

25 CHIEF JUSTICE ROBERTS: No, but the policy



1 -- the policy is they don't want employers to talk about  
2 unionization.

3 MR. GOTTESMAN: No. They don't want them to  
4 spend them the employer's money -- the State's money to  
5 talk about unionization.

6 JUSTICE SCALIA: Why? Because it's wasting  
7 the money or because that is their --

8 MR. GOTTESMAN: Because the State wants --

9 JUSTICE SCALIA: -- their labor policy?

10 MR. GOTTESMAN: Because the State wants to  
11 be neutral, and that -- the right --

12 JUSTICE SOUTER: Then that -- then that, it  
13 seems to me, cuts the feet off your argument of a moment  
14 ago, that in fact the State's concern is that it's  
15 getting less of what it thought it was getting for with  
16 its grant, because more is being spent on labor policy.  
17 And now, it seems to me, you're saying no, that's not  
18 the case. It is simply the fact that the time that the  
19 employer spends in talking with employees, whatever the  
20 subject is, involves a policy that California does not  
21 want to support, and, therefore, California prohibits  
22 them spending that time for purely policy reasons.

23 MR. GOTTESMAN: Well, it prohibits them  
24 using the State's money to do it. Of course they can  
25 use their own money to do it.

1 JUSTICE SOUTER: Well, your argument a  
2 moment ago is that they were using the State's money  
3 because in fact they were providing less of the service  
4 that the grant was for and spending that in -- in  
5 conversation with employees about labor unions. And it  
6 seems to me your answer to Justice Scalia was  
7 inconsistent with that. Your answer to Justice Scalia,  
8 as I understood it, was it is simply that they do not  
9 want that policy being implemented by anyone who gets  
10 any money from the State within that State.

11 MR. GOTTESMAN: I don't think I said  
12 "inconsistently." What I said was, previously it was  
13 within the permissible scope of a grant to spend money  
14 in an organizing campaign, either assisting, promoting,  
15 or deterring unionization. The State is now saying that  
16 will no longer be. We don't really want to spend grant  
17 money on that, and our reason is that we think we -- the  
18 State's money should not be used by either side in that  
19 union organizing --

20 CHIEF JUSTICE ROBERTS: How is that -- how  
21 is that different from saying there's a Federal rule, an  
22 OSHA requirement you've got to have certain protective  
23 devices or whatever, and the State says, well, we want  
24 to get the most out of our money, so our money cannot be  
25 used to put in these federally required safety devices;

1 you can use somebody else's money for that. Why isn't  
2 that the same thing here? You're saying there's a  
3 Federal labor policy that allows this, and we don't want  
4 our money to be spent implementing that policy or  
5 pursuant to that policy.

6 MR. GOTTESMAN: Because there is no Federal  
7 labor policy that requires States to use State treasury  
8 money to finance a party who is engaged in this debate.  
9 That's why this is just like Rust.

10 JUSTICE SCALIA: Just like -- like Gould. I  
11 mean, there is a case where a State used State money, no  
12 contracting with any -- with any company that's been  
13 convicted of unfair labor practices three times.  
14 Strictly State contracting policy, we just don't want to  
15 spend our money dealing with such a person.

16 MR. GOTTESMAN: Right, but there we're  
17 saying we won't deal with you. That's -- that would  
18 classically -- if the State in this case said, no  
19 employer who opposes unions can have a State contract,  
20 that would be Gould. It would also be a violation of  
21 the First Amendment.

22 JUSTICE SCALIA: Why wouldn't that be the  
23 State's managing its own money? It's our money.

24 MR. GOTTESMAN: Well, But it is not --

25 JUSTICE SCALIA: We just don't want to deal

1 with people who oppose unions.

2 MR. GOTTESMAN: No, there's a huge  
3 difference between saying, don't use our money to do  
4 something, and saying, we won't deal with you even when  
5 you use your own money to do it. The implication that  
6 this is pre-emptive --

7 JUSTICE SOUTER: But on your argument, there  
8 is no "your own money." You're saying that everything  
9 that the grantee gets in a grant situation is the  
10 government's money.

11 MR. GOTTESMAN: Correct.

12 JUSTICE SOUTER: But that distinction that  
13 you just made in answer to Justice Scalia could not be  
14 drawn.

15 MR. GOTTESMAN: Well, if they have their own  
16 money, they can spend it on that. They just can't use  
17 the State's money.

18 JUSTICE SOUTER: No, the hypothesis of this  
19 whole argument is that we are talking with a grantee who  
20 was fully funded by -- I thought fully funded by the  
21 State, and I thought that was your strongest argument.  
22 So that this alternative -- well, you can use your own  
23 money -- is an alternative which, you know, by the very  
24 hypothesis that we are arguing on, will never exist.

25 MR. GOTTESMAN: Well, if we have a grantee

1 who has no other money, that doesn't mean the State has  
2 an obligation to provide them money to oppose  
3 unionization. It would be very odd to believe -- and  
4 this is, after all, implied pre-emption -- that it was  
5 Congress's intent without mentioning it to say that it  
6 is the obligation of States to provide funding to  
7 employers to do this.

8 JUSTICE STEVENS: Mr. Gottesman, can I ask  
9 sort of a background question to be sure I understand  
10 your position?

11 Am I correct in assuming that if the State  
12 of California had its labor relations agency make it an  
13 unfair labor practice to engage in this employer speech  
14 described here, that that would be pre-empted?

15 MR. GOTTESMAN: Employer speech with its own  
16 money?

17 JUSTICE STEVENS: Yes.

18 MR. GOTTESMAN: Of course that would be  
19 pre-empted, absolutely pre-empted.

20 JUSTICE STEVENS: Okay.

21 MR. GOTTESMAN: If not pr-empted, it would  
22 certainly be a violation of the First Amendment as well,  
23 to punish them for engaging in speech.

24 JUSTICE STEVENS: Well, if they adopted the  
25 rule that the Federal labor board applied prior to the

1 Taft-Hartley Act.

2 MR. GOTTESMAN: Exactly.

3 JUSTICE STEVENS: That's what I'm asking.

4 MR. GOTTESMAN: Exactly. Yes.

5 JUSTICE STEVENS: That would be pre-empted?

6 MR. GOTTESMAN: Of course that would be  
7 pre-empted.

8 JUSTICE STEVENS: I want to be sure.

9 MR. GOTTESMAN: Our position, however, is  
10 that it's quite different to say that the National Labor  
11 Relations Act requires the State to pay for these  
12 activities. And --

13 CHIEF JUSTICE ROBERTS: Why --

14 JUSTICE STEVENS: It does require that this  
15 -- it arguably requires that this area of combat between  
16 labor and management be unregulated.

17 MR. GOTTESMAN: Right. And this is not  
18 regulation, for the very reasons that this Court in  
19 Regan and Rust and in a whole line of cases had said  
20 that it is not regulation to simply say, we the  
21 government are not going to pay for this activity.

22 That's all that California is saying in this  
23 case: we are not going to pay for it. It's the policy  
24 of the State not to interfere in these union organizing  
25 drives; therefore -- and this is the precise words of

1 the preamble -- "for this reason, the State should not  
2 subsidize."

3 JUSTICE SCALIA: I think your reason for not  
4 paying for this activity is that you don't like this  
5 activity.

6 MR. GOTTESMAN: That's not true.

7 JUSTICE SCALIA: I call that -- I call that  
8 regulating the activity.

9 MR. GOTTESMAN: That is not at all the case,  
10 Your Honor. There's nothing in this preamble -- the  
11 other side keeps characterizing the preamble, which they  
12 don't include in their statutory appendix, as saying, we  
13 don't like the employer doing it. That's not what it  
14 says; it's on page 3.

15 JUSTICE SCALIA: Well, you allow the  
16 employer to engage in all other employee relations, and  
17 you're willing -- that can be done without -- the one  
18 thing the employer can't do is speak out against the  
19 union. This isn't because you don't --

20 MR. GOTTESMAN: Well, you've got for or  
21 against. This is content discrimination, not viewpoint  
22 discrimination; and it is content discrimination whose  
23 purpose is to keep the State's funds out of this area of  
24 context. The taxpayers' money should not be spent  
25 supporting one side and not the other in these disputes.

1           This court in the Linn case -- and I want to  
2 quote this sentence, because this is the key to why a  
3 policy of neutrality with respect to the use of the  
4 State's money is not, you know, regulated. We -- this  
5 was a case in which, to be sure, it was the Federal  
6 Government was denying food stamps to strikers. And the  
7 claim was that was a violation of their associational  
8 rights under the First Amendment. Everybody else who  
9 satisfies the test for food stamps is entitled to them,  
10 but we are not going to give them to strikers.

11           And when the Federal Government is asked why  
12 is that, they said, well, we don't want to get involved.  
13 To be sure if we give them the money, that would make it  
14 likely the strike would go on longer. But we are not  
15 being anti-union. We just want to be hands off. We  
16 want to be -- we don't want Federal money spent to help  
17 one side or the other in this labor dispute.

18           And what this Court said was, we have little  
19 trouble in concluding that that provision is rationally  
20 related to the legitimate governmental objective of  
21 avoiding undue favoritism to one side or the other in  
22 private labor disputes.

23           Now, that's the core of what this statute is  
24 about. The labor union --

25           CHIEF JUSTICE ROBERTS: You're saying it



1 doesn't give favoritism to one side or another?

2 MR. GOTTESMAN: It just takes the State's  
3 money out.

4 CHIEF JUSTICE ROBERTS: So that depends, as  
5 a practical matter, on the view that there are at least  
6 some employers who would be arguing in favor of  
7 unionization?

8 MR. GOTTESMAN: Well, it wouldn't matter if  
9 they were arguing for or against. The point is that --

10 CHIEF JUSTICE ROBERTS: Yes, but my point is  
11 that there are precious few who argue in favor of it.

12 MR. GOTTESMAN: Right. Well that may well  
13 be true, but the point is when they are arguing against  
14 the union, until this statute State money was being used  
15 to argue against the union, the union was not getting  
16 any State money to respond. The State was funding one  
17 side of this dispute. And the notion that it was an  
18 implied purpose of Congress in the National Labor  
19 Relations Act to compel States to fund one side of a  
20 dispute with a subsidy is -- would be remarkable.

21 JUSTICE ALITO: Well, when the State pays a  
22 program participant -- let's again take the case of a  
23 nursing home -- for providing services to patients who  
24 are covered by Medi-Cal, and money is paid to the  
25 nursing home, it's your position that remains the State

1 's money.

2 MR. GOTTESMAN: If this -- if the nursing  
3 home -- there are a number of different ways in which  
4 this money is paid to the State. If the situation is  
5 the nursing home first provides the services and when  
6 they have done so billed the State for the money, that's  
7 not State funds. Once they receive the money, since  
8 they put the money up in front to provide the service,  
9 they are being reimbursed for it, that's not the State's  
10 funds. It's the State's funds if the State gives them  
11 the money up front.

12 As is true universally with respect to  
13 grants. We give you this money. This money now because  
14 of this statute its purposes are limited so that they do  
15 not include engaging in -- one side or the other in  
16 union organizing. If you have your own money, feel free  
17 to spend your own money on that, but we are not giving  
18 you this money for that purpose.

19 JUSTICE KENNEDY: Let me just be clear. The  
20 statute with reference to State contractors, which is  
21 the \$50,000 statute, and the statute with reference to  
22 private employers, which is the \$10,000 statute, in all  
23 of those cases, the law is applicable only if the money  
24 is paid before all the work is done?

25 MR. GOTTESMAN: Yes. If you look at the

1 contract one, which is not actually before the Court  
2 because nobody had standing -- the district court ruled  
3 to raise it -- it says the State funds to assist,  
4 promote or defer -- union organizing during the life of  
5 the contract are not to be spent on this.

6 So once the contract is done, that is --

7 JUSTICE SCALIA: Well, the question of when  
8 the contract is done is different from the question of  
9 when the money is paid.

10 MR. GOTTESMAN: Of course. Right.

11 JUSTICE SCALIA: He is asking with when the  
12 money is paid.

13 MR. GOTTESMAN: So when you pay the money up  
14 front and you say here is your money to do the  
15 contract --

16 JUSTICE SOUTER: Well, what about the  
17 situation in which the contract runs for a year and you  
18 bill monthly? On your theory the contract is still  
19 going on and yet there is no prepayment. I assume on  
20 your argument they would be just as bound by the  
21 California policy as if they got a hundred percent  
22 payment up front.

23 MR. GOTTESMAN: Well, that's -- that's a  
24 question about a meaning of a provision that isn't at  
25 this issue in this case. The ones that are at issue in

1 this case --

2 JUSTICE SOUTER: Well, do you concede that  
3 if they -- if all they did under a 12-month contract  
4 was -- was bill for services rendered every past 30  
5 days, that there would be either no application of the  
6 California law or that the application would be  
7 pre-empted?

8 MR. GOTTESMAN: That might well be the case.  
9 But we don't have an interpretation of that provision of  
10 the California law.

11 JUSTICE ALITO: I'm sorry. That was an  
12 either/or.

13 (Laughter.)

14 JUSTICE ALITO: Which might be the case?

15 MR. GOTTESMAN: Oh. I say it might be the  
16 case.

17 JUSTICE SOUTER: It's like saying yes.

18 MR. GOTTESMAN: Yes.

19 (Laughter.)

20 MR. GOTTESMAN: But again, that issue isn't  
21 here. What we've got here are programs, some of which  
22 the State advances the money, and some of which it pays  
23 after the services have been completed.

24 JUSTICE BREYER: So you did on that point on  
25 page 27 and 25 and 29 of the AFL-CIO brief, I took the

1 statements there, where it would say "organizations,"  
2 namely organizations, even those that receive a hundred  
3 percent of their money from the State are free to use  
4 their profits?

5 MR. GOTTESMAN: Right.

6 JUSTICE BREYER: If there are any, or any  
7 other non-state moneys they had?

8 MR. GOTTESMAN: And we the State responded  
9 say the same thing in our brief. We say it at pages 26  
10 to 27: The State maintains a legitimate interest in  
11 program funds until such time as the program participant  
12 has provided the State with a service the State has  
13 funded.

14 JUSTICE BREYER: So if you sell them tables  
15 and they write you a check, the State, for the tables,  
16 at that point the check is yours?

17 MR. GOTTESMAN: Of course.

18 JUSTICE BREYER: All right.

19 MR. GOTTESMAN: There is no question about  
20 that, because in that case, that would be covered by the  
21 contract provision that isn't here. But it says once  
22 the contract is completed, it's your money.

23 So the concern here only is that they not  
24 use our money. The State's brief also says --

25 CHIEF JUSTICE ROBERTS: What if there is a

1 warranty for another year, say if these tables break you  
2 have to replace them?

3 MR. GOTTESMAN: Well, that's a question  
4 of -- remember, neither of the lower courts has  
5 interpreted this statute. This statute has never been  
6 interpreted. That's -- and what the court of appeals  
7 said is that's because the argument that you all have  
8 been asking me about was not raised in summary judgment  
9 by the Petitioners. Their core argument is the State  
10 has an obligation to subsidize our speech. And that's  
11 the only issue they brought up on summary judgment.  
12 Because Judge Beezer in the panel decision said, oh,  
13 look at all these, quote, as he called them, horribles  
14 that will come from this, Judge Beezer got into all  
15 these issues: The accounting would be burdensome, that  
16 it's going to be the employer's own money.

17 And what the majority said is, number one,  
18 that's not here. And number two, they said this -- I  
19 believe it's on page 34 of the appendix but I'm not  
20 certain of the -- wait a minute, I can tell you the  
21 exact page. Yes, it's page 34, in a sense the parade of  
22 horribles goes far beyond the scope of plaintiff's  
23 facial challenge, that is the challenge they brought on  
24 summary judgment. The district court made no findings  
25 nor is there evidence that this statute, quote, "co-ops

1 the payments for goods and services and profits realized  
2 under a contract ."

3 JUSTICE BREYER: What is your recommendation  
4 as to -- we've heard today, too, in the briefs it's  
5 there, I put the thing that I've heard as -- well, the  
6 example with the tables is an example of it. When does  
7 the profit actually accrue? Is there treble damage  
8 provision that makes this much worse? Are there  
9 administrative requirements that in practice make it  
10 impossible? Is it administered in such a way that the  
11 employee we heard about would just not know what to say,  
12 the employer's representative?

13 All those things could be problems, and you  
14 say, well, they haven't been dealt with yet. And your  
15 recommendation as to what we should do is what?

16 MR. GOTTESMAN: Is affirm, because all the  
17 court has said is the motion for summary judgment was  
18 improperly granted.

19 JUSTICE BREYER: And if we did that, how  
20 would all these problems be worked out? I mean, how  
21 would the arguments that you -- they think are far too  
22 burdensome, you think they are not and can be done  
23 properly, how does that get worked out?

24 MR. GOTTESMAN: Well, first of all, let's  
25 talk about the burdens, the accounting burdens, which

1 are actually quite minimal under Medicaid, because they  
2 already have to do this because the Federal Medicaid  
3 requires them to -- to account for which were allowable  
4 expenditures and which were not in a very detailed  
5 accounting form. And of course, the Federal Medicaid  
6 says that this is not allowable expenditure, so they  
7 have to do this anyway, half this money is Federal and  
8 half is is State.

9 JUSTICE SCALIA: You're not going to go  
10 through all of these one by one, are you?

11 MR. GOTTESMAN: Pardon? No. I just wanted  
12 to give an example of that.

13 But with respect to each of these, we need  
14 to have a record. For example, on the burdens there is  
15 an affidavit from an accounting firm submitted by the  
16 defendants that says this is really not burdensome at  
17 all.

18 JUSTICE SCALIA: Let me ask you a basic  
19 question that doesn't require you to get into one by  
20 one. Suppose you have a State that doesn't want to have  
21 its money used to assist unions. This is an antiunion  
22 State and it adopts the same kind of law that you have.  
23 And it simply says, none of -- none of this State's --  
24 yes, you can recognize unions if you like, but none of  
25 the money that we give you --



1 MR. GOTTESMAN: Give who.

2 JUSTICE SCALIA: -- shall be used -- shall  
3 be used for collective bargaining or for any -- any  
4 activities involving unions.

5 MR. GOTTESMAN: That would be -- that would  
6 be the moneys we give to the employer?

7 JUSTICE SCALIA: Same. Yes.

8 MR. GOTTESMAN: I'm not sure which question  
9 you're asking.

10 JUSTICE SCALIA: To the employer. No  
11 employer getting money from the State can expend any of  
12 our money -- the same way yours is -- in collective  
13 bargaining with unions or in anything else. Now, we are  
14 not stopping employers from doing that. We just don't  
15 like unions, and it's our money and we don't want this  
16 employer to use it for unions. Would that be all right.

17 MR. GOTTESMAN: I think that would be  
18 problematic but only for this reason. If the employer  
19 is allowed to spend the State's money to -- to bargain  
20 with nonunion employees and you know medical  
21 researchers, whatever, negotiate contracts with them,  
22 but the State says you can't do it for collective  
23 bargaining, then that is exactly the Livadas case. That  
24 is the case in which the State is saying your  
25 entitlement to a State benefit turns on whether you are

1 unionized or not. In this case we'll let the employer  
2 do this with nonunion employees, but not with unionized  
3 employees. But if the State said we don't want to pay  
4 for the costs of negotiating --

5 JUSTICE SCALIA: Why does that -- why does  
6 that make a difference? If it violates Federal policy,  
7 it violates Federal policy. Livadas said you can't do  
8 it because it violates Federal policy, which is to favor  
9 unionization, and not to deter.

10 MR. GOTTESMAN: Right. But this statute  
11 neither favors nor deters. This statute --

12 JUSTICE SCALIA: You could say the same  
13 about that other one.

14 MR. GOTTESMAN: This statute simply says we  
15 don't want to subsidize either party, and as a practical  
16 matter we are only subsidizing one party in union  
17 organizing.

18 JUSTICE SCALIA: So does the statute I  
19 posit. Just don't use State money. You can use all of  
20 your own money to deal with unions; just we don't want  
21 our money used for it.

22 MR. GOTTESMAN: Right.

23 JUSTICE SCALIA: That clearly would be  
24 banned and I don't see why yours is any different.

25 MR. GOTTESMAN: Well because -- it would not

1 be banned if the State had said we don't want you to use  
2 State money to negotiate contracts with any of your  
3 employees; that would not be banned. It would be banned  
4 if they singled out only unionized employees that you're  
5 not allowed to use it with. You're allowed to use it  
6 with nonunion employees.

7 CHIEF JUSTICE ROBERTS: I want to get back  
8 to your responses on the procedural costs of the case.  
9 You said we don't know what the regulatory burden would  
10 be with respect to accounting rules.

11 MR. GOTTESMAN: Yes. There is a State  
12 disputed facts in the district court on that.

13 CHIEF JUSTICE ROBERTS: Does it make any  
14 difference if the argument is which is what I understood  
15 it to be, that you can't regulate at all? It's not  
16 simply that you can't regulate so long as it's  
17 particularly burdensome, but you don't have the  
18 authority to regulate in this at all.

19 MR. GOTTESMAN: But our argument is that  
20 this is not regulation. To say that the State money is  
21 not going to be spent for this is not regulation. Just  
22 as Regan and Rust says --

23 CHIEF JUSTICE ROBERTS: That gets to the --

24 MR. GOTTESMAN: It just says--

25 CHIEF JUSTICE ROBERTS: That gets to the

1 spending clause question. We're not -- I mean, we can  
2 address that without deciding whether the regulations  
3 are particularly burdensome. You were saying well, the  
4 accounting is not a big problem.

5 MR. GOTTESMAN: Yes.

6 CHIEF JUSTICE ROBERTS: But it doesn't mean  
7 that it's necessarily spending as opposed to regulation.

8 MR. GOTTESMAN: Well, we are not regulating  
9 whether the employer opposes unions. What we are  
10 regulating is what they do with the State's money.  
11 That's the only regulation that's here. We are saying  
12 don't use our money for this purpose. The only  
13 regulation that's going on is to see whether you use the  
14 State's money --

15 CHIEF JUSTICE ROBERTS: That doesn't seem to  
16 me to be responsive to my question. Your point was  
17 well, we don't know how burdensome a particular  
18 regulation is. If you lose on the question of whether  
19 it's spending or regulation, we don't have to wait to  
20 see how burdensome it is if we think you're not entitled  
21 to regulate at all.

22 MR. GOTTESMAN: Well, if you say that a  
23 State's position, "we don't want our money to be  
24 used" --

25 CHIEF JUSTICE ROBERTS: You're getting back

1 to the spending question.

2 MR. GOTTESMAN: -- is regulation --

3 CHIEF JUSTICE ROBERTS: I'm putting that  
4 aside.

5 MR. GOTTESMAN: I'm having -- the problem  
6 I'm having with Your Honor's question is presuming the  
7 answer to something. The -- if this is regulation, then  
8 there is a serious prospect of its being pre-emptive,  
9 but this is not regulation.

10 CHIEF JUSTICE ROBERTS: Regardless of  
11 whether -- regardless of whether it's burdensome  
12 regulation.

13 MR. GOTTESMAN: Right.

14 CHIEF JUSTICE ROBERTS: If it's regulation  
15 why isn't that appropriate to deal with on summary  
16 judgment. Not the spending question we have -- that's a  
17 different issue. But if there is no difference with  
18 respect to regulation whether it's burdensome or not, so  
19 we don't have to have further proceedings on whether  
20 it's burdensome.

21 MR. GOTTESMAN: Right. But the only issue  
22 they raised on summary judgment is that to deny us your  
23 money, the State's money, is regulation. And our  
24 position is that to deny you the State's money is not  
25 regulation, any more than it was in *Regan*, in *Rust*, in

1 this whole line of cases where the Court has said the  
2 government's choice not to subsidize an activity is not  
3 regulation.

4 JUSTICE KENNEDY: But on that point you're  
5 in disagreement with the Ninth Circuit, and --

6 MR. GOTTESMAN: Yes, we are. The Ninth  
7 Circuit misunderstood Boston Harbor. It thought Boston  
8 Harbor created two boxes that represented the whole  
9 world. You're either a market participant or you're a  
10 regulator. That's not what Boston Harbor said, if you  
11 go back and look at it. What Boston Harbor said, if you  
12 regulate you are vulnerable to pre-emption arguments; if  
13 you are not regulating, then you are free of pre-emption  
14 concerns.

15 JUSTICE KENNEDY: So the principal rationale  
16 for the Ninth Circuit's opinion is incorrect in your  
17 view?

18 MR. GOTTESMAN: Well, it's not -- no. The  
19 Ninth Circuit also talked about the First Amendment and  
20 got it right. It said when it talked about the dissent  
21 had said what this State is doing is violating the First  
22 Amendment, and the Ninth Circuit's response is no,  
23 that's not right. All this is is withholding a subsidy,  
24 and the First Amendment cases are clear: that's not  
25 regulation of a speech.

1                   What the Ninth Circuit thought erroneously  
2 is that Boston Harbor had denied it the right to take  
3 that same view, because it thought that Boston Harbor  
4 said that everything is regulation unless it's market  
5 participation, and that's not what Boston Harbor said,  
6 and this is not regulation.

7                   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8                   Mr. Goldsmith, you have four minutes  
9 remaining.

10                  REBUTTAL ARGUMENT OF WILLIS J. GOLDSMITH

11                   ON BEHALF OF THE PETITIONERS

12                  MR. GOLDSMITH: Thank you, Mr. Chief  
13 Justice.

14                  I'd just like to make a few comments in  
15 rebuttal. First of all, the preamble of the statute  
16 makes it absolutely clear as to what the State's purpose  
17 is. It's at page 3a of the appendix of the petition.  
18 It says it is the policy of the State not to interfere  
19 with an employee's choice about whether to join or to be  
20 represented by a labor union. For this reason the State  
21 should not subsidize -- and so on.

22                  So clearly the State has a labor policy  
23 position. It's a position as I said at the outset that  
24 is completely contrary to that of the NLRA. The NLRA's  
25 position is that employers just like unions ought to

1 have the right to speak in a noncoercive way to their  
2 employees.

3           Secondly, it is not our position that the  
4 NLRA requires the State to fund activities. It is our  
5 position that the NLRA and the decisions of this Court  
6 make it abundantly clear that the States are to stay out  
7 of this area altogether, period. And that would be the  
8 case whether it is the kind of statute that Justice  
9 Scalia was posing a question about, whether it was in  
10 effect anti-union or pro-union. It doesn't matter.  
11 They are both pre-empted.

12           The State has no business making labor  
13 policy. The decisions of this Court, the unanimous  
14 decisions of this Court in several circumstances I think  
15 make that very clear. And the Ninth Circuit did find  
16 that for all practical purposes, the State was  
17 regulating by making labor policy.

18           If I could make two points about neutrality.  
19 First of all, the statute is anything but neutral.  
20 First of all, the State's policy is not one of  
21 neutrality. As I just read from the preamble they have  
22 a position; the position is that noncoercive employer  
23 speech interferes with employee free choice, and the  
24 statute follows that position.

25           The decision to withdraw funds is not the



1 same thing as being neutral. Your Honor made a  
2 reference to the Hyde amendment. The Hyde amendment,  
3 Congress withdrew funds from -- from abortion  
4 practitioners. It was not neutral about abortion. And  
5 California here has made a judgment about noncoercive  
6 speech.

7 CHIEF JUSTICE ROBERTS: What about the Lyng  
8 case that Mr. Gottesman cited in response to that  
9 argument?

10 MR. GOLDSMITH: The Lyng case seems to me to  
11 be completely off the point on the pre-emption issue.  
12 But there is no question, Your Honor, Mr. Chief Justice,  
13 that Congress can make judgments about what it chooses  
14 to fund or not to fund. That did not open the door to  
15 the States to do whatever they wanted to do by way of  
16 funding or not funding. Lyng addressed a  
17 constitutional --

18 CHIEF JUSTICE ROBERTS: Well, Lyng said that  
19 the -- that Congress was being neutral not that it was  
20 making a choice on how to spend its funds. And I  
21 understood Mr. Gottesman's point to be that so too,  
22 here, California is being neutral.

23 MR. GOLDSMITH: But California is -- is not  
24 being neutral, not just because of what the preamble  
25 says but because of the add-ons to the statute if you

1 will. California has taken it much farther than simply  
2 withdrawing the subsidy. California has taken it to the  
3 point that you're exposed to treble damages, but then  
4 you have minute tracking and segregation of fund  
5 details, and California has taken it even one step  
6 farther and said on the other hand, if you want to spend  
7 State money to facilitate union organizing, that's  
8 perfectly fine with us. You can spend money to give  
9 access to union representatives to property. You can  
10 use State money to -- to facilitate neutrality  
11 agreements of one sort or another. Anything that would  
12 help a union organize employees, that's fine by us.

13 So California is not neutral in the same way  
14 that Lyng was neutral, but again I would suggest that,  
15 Mr. Chief Justice, that Lyng didn't open the door, any  
16 more than Rust or Regan opened the door to the States to  
17 make labor policy by granting or withholding moneys in  
18 any way that they saw fit. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 Mr. Goldsmith.

21 The case is submitted.

22 (Whereupon, at 12:08 p.m., the case in the  
23 above-entitled matter was submitted.)

24

25