

**Independence Residences, Inc. and Union of Needletrades Industrial and Textile Employees (UNITE) AFL-CIO.** Case 29-RC-10030

August 27, 2010

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER, BECKER, PEARCE, AND HAYES

The National Labor Relations Board has considered objections to a mail ballot election held between June 2 and 16, 2003, and the administrative law judge's report concerning their disposition. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 68 for and 32 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

The questions presented by the Employer's objections to the election are: (1) whether New York State Labor Law Section 211-a, which limits employers' use of state funds to encourage or discourage employees from participating in union organization, is preempted by Federal labor law; (2) whether, if Section 211-a is preempted, its mere existence is, per se, grounds for overturning the election results; and (3) whether, even if the existence of Section 211-a was not alone grounds for overturning the election results, the Employer met its burden of proving that the impact of Section 211-a on its ability to communicate with employees during the election campaign warrants setting aside the election results.

The Board has reviewed the record in light of the exceptions and briefs,<sup>1</sup> has adopted the judge's findings and recommendations to the extent discussed below, and finds that a certification of representative should be issued.

I. FACTS

*A. Section 211-a and Related Litigation*

In late 2002, the New York State legislature amended New York Labor Law Section 211-a. In relevant part, the amended law prohibits employers from using state funds<sup>2</sup> for three specific purposes: (1) training managers,

<sup>1</sup> The judge was sitting as a hearing officer in this representation proceeding. The Employer has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We use the term "state funds" as a shorthand. The law applies only to "monies appropriated by the state."

supervisors, or other administrative employees regarding methods to encourage or discourage union organization or participation in a union organizing drive; (2) hiring attorneys, consultants, or contractors to encourage or discourage union organization or participation in a union organizing drive; and (3) paying employees whose principal job duties are to engage in such activity.<sup>3</sup> The law requires an employer which receives state funds and expends funds for any of these purposes to maintain financial records sufficient to show that state funds were not spent for prohibited purposes. It also authorizes the New York State Attorney General to file a civil suit to enjoin prohibited expenditures, to recover state funds wrongfully spent, and to seek civil penalties of as much as three times the amount wrongfully spent. Finally, Section 211-a directs the New York State Commissioner of Labor to promulgate regulations detailing financial record-keeping requirements and to provide advice and guidance about contractual and administrative enforcement measures.

On April 3, 2003, a coalition of New York health care employer associations representing over 500 employers brought suit in a Federal district court to enjoin implementation of Section 211-a on the grounds, inter alia, that it was preempted by the National Labor Relations Act. The plaintiffs advanced both of the well-recognized theories of labor law preemption, named after the Supreme Court cases in which the theories were adopted. Under the *Garmon*<sup>4</sup> theory of preemption, a state or local law is preempted if it regulates conduct that the Act "protects, prohibits, or arguably protects or prohibits."<sup>5</sup> Un-

<sup>3</sup> Sec. 211-a.2 states that:

... no monies appropriated by the state for any purpose shall be used or made available to employers to: (a) train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; (b) hire or pay attorneys, consultants or other contractors to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; or (c) hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive.

We note that the antecedent par. 1 of Sec. 211-a suggests a broader proscription of employers' use of state funds to encourage or discourage unionization. However, the New York State Attorney General has consistently interpreted the statute as prohibiting only the three specific expenditures identified above in par. 2. See Br. for Appellant at 4-5 and Reply Br. for Appellant at 14, *Healthcare Assn. of New York State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006).

<sup>4</sup> *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>5</sup> *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986).

der the *Machinists*<sup>6</sup> theory of preemption, a state or local law is preempted if it regulates conduct that Congress intended under the Act to “be unregulated because left ‘to be controlled by the free play of economic forces.’”<sup>7</sup>

A year prior to the initiation of the legal challenge to Section 211-a, a group of employer associations initiated a separate action in Federal district court in California seeking to enjoin enforcement of a parallel, although not identical, California law, Assembly Bill 1889, on preemption and other grounds. The United States District Court for the Central District of California granted partial summary judgment in favor of the plaintiffs, holding that certain provisions of AB 1889 were preempted under the *Machinists* theory.<sup>8</sup> A panel of the United States Court of Appeals for the Ninth Circuit twice affirmed the district court’s judgment.<sup>9</sup> However, upon rehearing en banc, the circuit court held that the contested provisions of AB 1889 were not preempted.<sup>10</sup> Thereafter, the Supreme Court granted certiorari and reversed the Ninth Circuit’s decision. See *Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008). The Court held that the statutory provisions at issue were “pre-empted under *Machinists* because they regulate[d] within ‘a zone protected and reserved for market freedom.’” *Brown*, supra at 2412 (citations omitted).

In May 2005, relying heavily on the Ninth Circuit panel decision in the California litigation, a Federal district court judge in New York found Section 211-a preempted by the Act under *Machinists* and enjoined implementation and enforcement of the New York law.<sup>11</sup> Subsequently, the United States Court of Appeals for the Second Circuit reversed the district court’s decision and remanded the case for factual findings which the appellate court deemed necessary before it could determine whether either *Machinists* or *Garmon* preemption applied.<sup>12</sup> Upon remand, the case was held in abeyance

pending the Supreme Court’s decision in *Brown*. After that decision issued, the district court requested that the parties brief the impact of *Brown*. The New York litigation is still pending in the district court today. The New York State Commissioner of Labor has refrained from issuing regulations under Section 211-a.<sup>13</sup> In addition, the Employer has not cited any evidence, and there appears to be none, that the New York State Attorney General has filed any lawsuits to enforce the law.

#### B. Procedural History of this Case

On April 24, 2003—after Section 211-a had been enacted and after litigation challenging its validity had been brought—the Petitioner, Union of Needletrades Industrial and Textile Employees (UNITE), AFL–CIO filed its representation petition with the Board. On May 9, the Regional Director for Region 29 approved the parties’ Stipulated Election Agreement providing for a mail ballot election among employees in the specified appropriate bargaining unit. On May 16, after a change in counsel, the Employer requested that the Regional Director vacate the Stipulated Election Agreement and stay further proceedings in this case pending the outcome of the challenge to Section 211-a in Federal court. The Regional Director denied this request. The Employer then filed a request for review with the Board. On June 11, the Board denied the request for review, stating that “the Employer may seek to raise, in any post-election proceedings, questions regarding the impact, if any, of N.Y. Labor Law Section 211-a.”

As previously stated, in the election, a substantial majority of employees voted for the Petitioner, and the Employer subsequently filed timely objections seeking to set aside the election results because of the alleged impact of Section 211-a on its ability to communicate with bargaining unit employees. The election objections case was consolidated for hearing with unfair labor practice cases involving allegations that the Employer committed several violations of Section 8(a)(1) and (3) of the Act before and after the election. At the beginning of the hearing, the judge denied the Employer’s motion to sever the representation case from the unfair labor practice case. However, at the close of hearing, the judge stated that he would sever the cases for decision in hopes of expediting final resolution of the representation case.<sup>14</sup>

The judge issued the attached decision in the representation case first, recommending that the Employer’s ob-

<sup>6</sup> *Machinists Local 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

<sup>7</sup> *Machinists*, 427 U.S. at 140, quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

<sup>8</sup> *Chamber of Commerce v. Lockyer*, 225 F.Supp.2d 1199 (C.D. Cal. 2002) (*Lockyer I*).

<sup>9</sup> *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004) (*Lockyer II*), withdrawn and rehearing granted 408 F.3d 590 (9th Cir. 2005), reaffirmed 422 F.3d 973 (9th Cir. 2005) (*Lockyer III*), rehearing en banc granted 435 F.3d 999 (9th Cir. 2006), and opinion withdrawn 437 F.3d 890 (9th Cir. 2006).

<sup>10</sup> *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006) (*Lockyer IV*).

<sup>11</sup> *Healthcare Assn. of New York State, Inc. v. Pataki*, 388 F.Supp.2d 6 (N.D. New York 2005) (*Pataki I*). We note that the record before the district court included as exhibits documents from the representation case before us. However, the judge did not expressly rely on those exhibits in reaching his decision.

<sup>12</sup> 471 F.3d 87 (2d Cir. 2006) (*Pataki II*).

<sup>13</sup> See *id.* at 91. The judge in the present case made the same finding.

<sup>14</sup> We find no merit in the Employer’s argument that the judge committed prejudicial error by denying the Employer’s motion to sever the cases for hearing purposes while later severing them for decisional purposes.

jections be overruled and that the Petitioner be certified. In the subsequent unfair labor practice case decision,<sup>15</sup> the judge found that the Employer violated Section 8(a)(1) of the Act during the critical preelection period by interrogating employees about union activities, soliciting grievances with an implied promise to remedy them, threatening to end its focus group program if employees chose union representation, and granting and timing the implementation of wage increases in order to influence employees' support for the Petitioner. The Employer did not file exceptions to this decision. Consequently, the Board adopted the decision in an unpublished Order on December 16, 2004.<sup>16</sup> The judge's findings of fact and conclusions of law in the unfair labor practice case are therefore undisputed, and we will refer to them where relevant to this proceeding.

### C. *The Election Campaign*

The Employer is a private nonprofit entity that provides residential and day services to individuals with developmental disabilities. In 2002, private donations and interest income accounted for approximately \$130,000 of its annual \$8 million operating budget. All other funds came from Federal, state, or local government sources. The New York State Office of Mental Retardation and Developmental Disabilities sets operating standards for the Employer's facilities and enforces those standards through periodic home visits and audits of detailed financial reports that the Employer is required to maintain.

In April 2003,<sup>17</sup> the Petitioner initiated an organizing campaign among the Employer's employees. It formed an employee organizing committee, visited employees at their homes, and began to ask employees to sign cards authorizing the Petitioner to represent them. Shortly before filing its election petition on April 23, the Petitioner sent a 1-page document to employees, signed by 12 employee-members of the organizing committee, claiming that a majority of employees had signed authorization cards and stating that the next step would be to file for an election. The document then read that "we expect everyone to vote yes, and we expect management to remain neutral and to respect our rights and the law during the organizing campaign." Petitioner's coordinator of organizing, Allison Duwe, credibly testified that the statement about employer neutrality typically appears in union leaflets and was not meant to refer to Section 211-a.

<sup>15</sup> *Independence Residences*, JD(NY)-43-04 (Sept. 30, 2004) (available on the NLRB website at [www.nlr.gov](http://www.nlr.gov)).

<sup>16</sup> See Board's Rules and Regulations §102.48(a), citing Act §10(c).

<sup>17</sup> All subsequent dates are in 2003, unless otherwise indicated.

The Petitioner continued to campaign throughout the preelection period through a combination of leaflets, home visits, and employee meetings. There is no evidence that it ever initiated discussion of Section 211-a. When some employees asked Duwe about a statement in an Employer letter that it was required by law to refrain from encouraging or discouraging union organization and "must remain neutral whether or not that is how we really feel," Duwe told them that the Employer did not have to remain neutral and that it could express its opinion and provide information to employees.

The Employer also actively campaigned prior to the election. On the day the petition was filed, Executive Director Raymond De Natale sent a memorandum to all employees announcing that salary adjustments and merit increases, retroactive to October 1, 2002, were approved and being processed. On May 2, 1 month before the election, the Employer granted employees an across-the-board wage increase of 15 cents an hour, plus individual merit increases of varying amounts. As found by the judge in the companion unfair labor practice case, the Employer unlawfully granted and timed the implementation of these increases in order to influence employee support for the Petitioner.

During the campaign, the Employer also distributed numerous flyers and sent letters to employees: (1) cautioning that voting for the Petitioner was not in the employees' best interests; (2) questioning whether the Petitioner, which had historically represented garment workers, was the right union to represent health care employees; (3) challenging the Petitioner's claims about initiation fees and dues, and stating that the cost of dues could exceed any wage gains secured in negotiations; (4) publicizing the Board's finding that the Petitioner violated the Act in a case involving another employer; (5) emphasizing that contract negotiations could take a long time, might result in a strike, and were not guaranteed to produce a contract with improved wages and benefits; (6) accusing the Petitioner of making false promises; (7) stating that employees would lose their voice if they voted for the Petitioner to represent them; (8) and urging all employees to vote in the election because failure to vote would effectively be a vote for the Petitioner.<sup>18</sup>

Executive Director De Natale and other management officials repeated these messages during two meetings employees were required to attend during working hours on May 28. In addition, as found by the judge in his unfair labor practice decision, Director of Human Resources Heather Barker unlawfully threatened during one

<sup>18</sup> Except where specifically noted, none of the Employer's campaign activities have been found to have violated the Act.

meeting to end the Employer's focus group program which permitted employees and management to meet and discuss health insurance issues, if the Petitioner won the election.

Management officials also discussed the Petitioner in individual and small group meetings with employees. The Employer violated Section 8(a)(1) in the course of three of these meetings. In late April and again on May 1, Program Manager Harold Burchett unlawfully asked employees if anyone in their workplace spoke with the Petitioner. On the latter occasion, Burchett told employees that he wanted to know because he was going to a manager's meeting at the main office. On June 1, Human Resources Director Barker and Chief Financial Officer Paul Chalita engaged in unlawful solicitation of grievances with an implicit promise to remedy them. Barker invited employees to discuss problems with their health benefits and asked what the Employer could do to improve the satisfaction of the staff. After several employees complained about different aspects of their health insurance coverage, Chalita stated that the Employer would look into improving health benefits and "we'll see what we can do about it."

It is undisputed that the Employer never expressly urged employees to vote "No" in its election campaign communications.<sup>19</sup> Labor consultant Steve Beyer, an Employer witness at the hearing, testified that the Employer's campaign was "neutral" and that a "nonneutral" campaign would have included the Employer telling the employees to vote "No." Executive Director De Natale similarly testified that he concluded from reading Section 211-a that the Employer was required to remain "neutral" during the election campaign. He issued a May 19 memorandum to managers and supervisors stating that the law "prohibits organizations like ours from encouraging or discouraging union membership." De Natale's memorandum continued by stating that since New York law prohibited management from communicating to employees its opposition to unionism, "we will have to simply present the facts in a straightforward, neutral manner in order to educate our employees about unionism and rely upon their good judgment to reject union representation because they have come to the conclusion, after considering as much information as we can give them, that union representation is not in their best interests."

De Natale testified that the Employer ran its campaign in accord with the instructions of his May 19 memorandum, limiting communications with employees to the dissemination of facts which the Employer hoped would

<sup>19</sup> We note, however, that at the mandatory meetings, Executive Director De Natale urged all employees to vote on the grounds that not voting was equivalent to voting yes.

enable the employees to come to their own conclusion that voting for the Union was not in their best interests. According to De Natale, the Employer's campaign would have been more "aggressive" and "stronger" in the absence of Section 211-a, but he provided no specific examples of what the Employer would have done differently other than explicitly to advocate that employees vote "No." He also said that he decided not to use the Employer's nonstate funds to campaign against the Petitioner because of the accounting difficulties involved in insuring that only those funds were used to support particular campaign activities.

## II. THE JUDGE'S RECOMMENDED DECISION ON OBJECTIONS

In ruling on the merits of the Employer's objections, the judge assumed, without deciding, that Section 211-a bars the use of public funds for any conduct that encourages or discourages union organization and that the New York law is preempted by the Act, as the Employer contends.<sup>20</sup> The judge nevertheless found that the Employer failed to establish that the law's existence and its alleged impact on the Employer's ability to campaign warranted setting aside the election. He rejected the argument that the Board itself was somehow complicit in enforcing Section 211-a because it refused to vacate the Stipulated Election Agreement and to stay the election. He also found no evidence that the Petitioner enforced or otherwise relied on Section 211-a during the critical period preceding the election.

The judge reviewed a variety of Board standards applicable to allegations of objectionable election conduct by both parties (i.e., a union petitioner and the employer)<sup>21</sup> and third parties,<sup>22</sup> and found that, under any arguably applicable standard, the Employer failed to meet its burden of proving that Section 211-a's impact on the election warranted setting aside its results. He rejected the Employer's argument that a finding that the law was preempted "automatically translates to a finding that the election should be set aside." As for evidence of

<sup>20</sup> The judge speculated that it was "highly likely" that the Board would consider Sec. 211-a to be preempted.

<sup>21</sup> See, e.g., *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (2004) (Board applies objective standard under which conduct by party is found objectionable if it has "tendency to interfere with the employees' freedom of choice").

<sup>22</sup> See, e.g., *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (third-party threats are objectionable when they are "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible"), and *Chipman Union, Inc.*, 316 NLRB 107, 107 (1995) (third-party statements of support for union representation by individual government officials are objectionable only if employees could reasonably have confused such statements as endorsements by the Board).

Section 211-a's actual impact on the election, the judge noted that Section 211-a simply prohibited employers from using public funds to discourage or encourage union organization. The Employer was free to campaign against the Petitioner with its own funds. Instead, in the judge's view, the Employer chose a "middle ground, and made a 'half hearted' attempt to remain neutral, by campaigning vigorously against the [Petitioner], but not expressly urging employees to vote 'No.'" Given such campaigning, the judge found that the Employer "used all the rights available to it to campaign against the [Petitioner]." He rejected the Employer's argument that "there is a significant difference between telling employees that voting for the [Petitioner] is not in their best interest, and telling them to vote 'No.'" In conclusion, noting the Petitioner's substantial margin of victory in the election, the judge determined that the Employer failed to meet its burden of proving that Section 211-a had an objectionable impact on the free choice of employees in the election. He therefore recommended overruling the Employer's objections.

### III. DISCUSSION

We have carefully considered the parties' competing arguments concerning whether Section 211-a so interfered with the election in this case that the results must be set aside. In considering that question, we have been mindful of the Supreme Court's own reluctance to embrace hard-and-fast rules of law that

would show indifference to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations.

*NLRB v. Steelworkers (NuTone)*, 357 U.S. 357, 362–363 (1958). We are guided by those statutory responsibilities in this case.

Indeed, we emphasize that we are deciding this case alone and only so much of it as is necessary to resolve the Employer's objections. In order to do so, we assume for purposes of our analysis of this case that Section 211-a is preempted by the Act;<sup>23</sup> we leave the ultimate resolution of that issue to the Federal court litigation. Even under that assumption, however, we decline to set aside the election. The question before us is whether the "surrounding conditions enable[d] employees to register a free and untrammelled choice for or against a bargain-

ing representative." *General Shoe Corp.*, 77 NLRB 124, 126 (1948). In the circumstances presented here, the Employer has failed to demonstrate that Section 211-a had a sufficient impact on eligible employees to warrant setting aside the election results. In particular, Section 211-a does not prohibit campaign activity of any kind, but merely limits the use of state funds to support certain specified activities; it does not affect campaign activity funded from other sources in any way. Moreover, the record establishes that the Employer did engage in vigorous campaign activity in opposition to the Petitioner and that the election results were not close. Under these circumstances, and for the reasons explained below, we conclude that the Employer has failed to sustain its objections.

#### A. The Proper Analytical Framework

At the outset, we note the unusual nature of the Employer's objections. They are not based on alleged conduct of the petitioning Union or of alleged union agents. Indeed, the judge found, and we agree, that there is no basis for holding the Petitioner responsible for the existence of Section 211-a and that Petitioner took no action to enforce the law. Nor are objections based on alleged conduct of employees or agents of the Board. Rather, the Employer's objections are based solely on a state law duly adopted by the New York legislature and signed by the Governor. That law, moreover, is not specifically or exclusively directed at any party to this election. It is a law of general applicability.

Thus, it would appear that this is a third-party case,<sup>24</sup> although certainly not a typical one. The conduct typically at issue in third-party cases is discrete conduct related to the specific election at issue. See *Westwood Horizons Hotel*, 270 NLRB 802 (1984) (setting aside an election based on threats of physical harm made by non-agent, prounion employees). That has been true even when the third party was a public official. See *Saint-Gobain Abrasives, Inc.*, 337 NLRB 82 (2001) (rejecting an employer's objection based on a Congressman's statements of support and campaigning for the union); *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765 (1958) (setting aside an election where the local police arrested the union's lead organizer at the preelection conference).

In objections cases based on third-party conduct, we will not overturn election results unless the third party's conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, supra at 803. In

<sup>23</sup> Given our assumption that Sec. 211-a is preempted, the dissent's repeated statement that we give "deference" to the state law is without foundation.

<sup>24</sup> The Employer's objections characterize the objectionable conduct as that of a "third party"—either the State of New York or of its Department of Labor or Attorney General.

third-party cases not involving threats, the Board has rephrased the standard, as in *Hollingsworth Mgt. Service*, 342 NLRB 556, 558 (2004): “In evaluating electioneering by nonparties, the standard is ‘whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.’ *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Southeastern Mills*, 227 NLRB 57, 58 (1976).” The Board has applied this third-party standard to objections based on the actions of public officials, even when those actions are based on a state statute clearly preempted by Federal labor law. See *Great Atlantic & Pacific Tea*, supra, 120 NLRB at 767 (applying third-party standard to arrest of union’s principal organizer just prior to election based on statute that “required *inter alia*, the obtaining of a permit before soliciting memberships . . . for any union which requires payment of dues or makes assessments against its members”);<sup>25</sup> cf. *Hill v. Florida*, 325 U.S. 538 (1945) (holding state law requiring licensing of union agents before union could function as collective-bargaining representative preempted). This heightened standard for objections based on third-party conduct reflects a recognition of the unfairness of saddling parties with the consequences of conduct over which they had no control.<sup>26</sup>

<sup>25</sup> The dissent seeks to distinguish this binding precedent on the grounds that the Board did not “engage in a preemption analysis” in the prior case. But that is exactly the point. The police officers’ conduct was clearly preempted, yet the Board did not in any way rely on that legal conclusion, but rather applied the traditional third-party standard with its focus on the impact of the third party’s action on voters.

<sup>26</sup> The dissent incorrectly suggests the application of the third-party standard rests on a finding that the third party, such as an individual employee, poses less of a threat to voters than their employer or potential union representative, and the dissent suggests that that finding cannot be made when the third party is a state. But the Board has never engaged in such analysis before applying the third-party standard, which has been consistently applied to all varieties of third parties, and the standard rests on an additional and independent policy rationale. As the Board explained in *Orleans Mfg. Co.*, 120 NLRB 630, 633–634 (1958),

[W]ere the Board to give the same weight to conduct by third persons as to conduct attributable to the parties, the possibility of obtaining quick and conclusive election results would be substantially diminished. The employer and the union are deterred from election misconduct by the unfair labor practice provisions of the Act and by the trouble and expense which repeated elections impose upon them. The absence of similar deterrents against third persons who wish to forestall a conclusive election may make them more prone to engage in conduct calculated to prevent such a result.

See also *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086 (2d Cir. 1969) (“[W]here one of the parties is directly at fault, the most effective deterrent to future misconduct is to deny that party what it sought to gain improperly. But, when . . . third parties are responsible for the improper comments, they have little concern with the expense and annoyance incurred by repeating the election, and the NLRB order in such a case carries with it no deterrent effect.”) Moreover, the Board has applied the longstanding third-party standard not simply to individual employ-

The Board’s express concern that applying the same standard used for objections based on parties’ conduct to that of third parties would “substantially diminish[]” its ability to fulfill the statutory mandate to obtain “quick and conclusive election results” fully applies here, where the objections are based on a generally applicable state law which was enacted 8 years ago and the validity of which has yet to be finally and effectively adjudicated.<sup>27</sup>

An objection based on a duly adopted state law of general applicability presents us with unique questions of federalism and our authority to effectively rule on preemption claims; questions that must be considered in order to determine how best to insure employee free choice. The essence of the Employer’s objections is that Section 211-a prevented it from campaigning to the full extent permitted by Federal labor law. Board-conducted elections, however, always take place against a background of state laws that significantly influence the ability of employers, unions, and employees to communicate their views on organization. For example, state trespass laws typically permit employers to exclude union organizers from the workplace. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). As a result, employers frequently enjoy exclusive access to employees in the workplace, while unions typically must make do with alternative channels of communication, even if they are “cumbersome or less-than-ideally effective.” *Lechmere*, supra, 502 U.S. at 539. Similarly, an employer’s right to control its property may permit it to impose—but not abide by itself—time, place, and manner restrictions on employees’ workplace organizing. See *NLRB v. Steelworkers (NuTone)*, 357 U.S. 357 (1958). State defamation laws, too, may inhibit the electioneering activities of employers, unions, and employees, despite the preemptive sweep of Federal labor law. See *Linn v. United Plant Guards Workers of America Local 114*, 383 U.S. 53 (1966) (permitting state lawsuits alleging defamation in the context of union organizing campaigns). Such laws may constrain campaign activity even if the laws are later held to be invalid as preempted, under the Constitution, or for other reasons. See, e.g., *Service Employees Local*

ees, but, as we pointed out above, to third parties that undoubtedly may exercise considerable coercive power such as elected officials and the police. The Board has never applied a per se or a virtually per se rule of the type suggested in the dissent to such governmental, or any other type of, third-party conduct.

<sup>27</sup> The dissent repeatedly suggests, incorrectly, that we adopt a new standard in this case. In fact, we apply the well-established third-party standard and merely emphasize that the policy foundations of that standard fully apply here. It is the dissent that would apply a novel, virtually per se standard in this case that has never before been applied to third-party conduct.

*5 v. City of Houston*, 595 F.3d 588 (5th Cir. 2010) (striking down portions of City’s law governing parades and rallies under the First Amendment).

The Board, however, has never set aside an election merely because such a law influenced or limited parties’ campaign activities in the absence of any party affirmatively exercising rights under or enforcing the law. The Supreme Court’s approach to employers’ exercise of their state law property rights reinforces our conclusion that the third-party standard applies here. The Court has held that an employer’s exercise of those rights does not violate the Act unless it creates a serious obstacle to the union’s ability to communicate with employees. See *Lechmere*, supra, 502 U.S. at 539, 541; see also *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180, 205 (1978) (“that the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.”). Here, the State of New York did not vest rights in property owners, but, analogously, through a duly adopted state law of general applicability, Section 211-a, restricted their rights to the limited extent that their property is revenue “appropriated by the state for any purpose.” Accordingly, we employ a parallel analysis in this case by applying the traditional third-party standard.<sup>28</sup>

*B. Even Assuming it is Preempted, Section 211-a is Not Per Se Grounds for Overturning the Election Results*

The Employer implicitly suggests that the New York law is different from those discussed above because it is preempted by the Act. Indeed, the Employer argues that the election “must be set aside because § 211-a’s impact on the behavior of the parties upset laboratory conditions as a matter of law.” In support, the Employer contends that it was wrongfully denied the ability “to respond to the union’s organizing activity in the manner it would have in the absence of” Section 211-a and that it is “impossible for the Board to assess the actual impact” of that circumstance.<sup>29</sup> Even assuming that Section 211-a is

<sup>28</sup> The Employer’s objections are unusual in a second respect: they are based on actions directed solely at the Employer. We have searched our prior decisions and found no case in which objections were based on allegations that a union petitioner or a third party improperly interfered with an employer’s participation in a campaign preceding an election. Because we uphold the judge’s rejection of the objections on other grounds, we do not reach the novel questions of whether such allegations may form the basis of a valid objection or, if so, under what circumstances.

<sup>29</sup> In fact, it is always difficult to assess the actual impact of alleged objectionable conduct on an election conducted via secret ballot and it is the Board’s general practice not to attempt to do so. See *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (the Board applies an objec-

preempted, however, we disagree that that legal conclusion alone mandates that the election be set aside.

In addition to the fact that it lacks any support in Board objections jurisprudence, there are strong practical and policy reasons not to adopt the Employer’s per se approach. The Employer’s approach is unworkable insofar as it necessitates a definitive and binding determination of the validity of Section 211-a. Even if we could resolve the preemption issue in this representation proceeding where the only question before us is whether to overturn the election results, we question whether it would be appropriate to do so, given that the State of New York is not a party to this proceeding and that, as described above, the issue is the subject of the ongoing Federal court litigation. More importantly for our purposes here, the Board lacks authority to enforce its views concerning the validity of Section 211-a. Thus, even if we were to opine here that Section 211-a is preempted, we could not assure any party that the law would not, nevertheless, be enforced against them. The state law would remain in effect, unless and until it is invalidated, or its enforcement enjoined, by a Federal or state court with jurisdiction over the question and authority to issue orders binding on the state. Until then, employers could continue to argue that the law inhibited their campaign activity and, as a result, that election results should be overturned.

The Board may, under appropriate circumstances, initiate an action in Federal court seeking to enjoin enforcement of a state law on preemption grounds.<sup>30</sup> As is made clear by the course of the existing Federal court litigation concerning Section 211-a, however, a final resolution of such a preemption challenge to a state law may take years. Even if preliminary injunctive relief is sought, it may be denied, and yet the law may still eventually be held preempted.<sup>31</sup> We are extremely reluctant

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tive standard). But, contrary to the dissent’s misstatement of the objective test as asking whether conduct “has a reasonable tendency to restrain activities protected by the Act,” the question asked by the Board is whether conduct has a reasonable “tendency to interfere with the employees’ freedom of choice.” *Id.* at 1021.

<sup>30</sup> See generally *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

<sup>31</sup> The dissent’s assumption that the Board will be able to promptly obtain preliminary injunctive relief barring enforcement of all preempted measures arguably affecting elections is based on the shaky foundations that (1) future legislation, regulation, and other state action will be “similar” to that already held preempted in *Brown* and (2) preemption questions are clear cut. In fact, such questions are often anything but clear cut. No less a labor law expert than Justice Frankfurter declared in *Machinists v. Gonzalez*, 356 U.S. 617, 619 (1958), that “[t]he statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature.” Moreover, even with a preliminary injunction in place, a party like the Employer in this case could still argue it was chilled by the possibility that the law might nevertheless ultimately be upheld and eventually enforced against it and thereby easily meet the dissent’s virtually per se

to adopt the rule proposed by the Employer when it might require us to hold in abeyance or potentially rerun all Board-supervised elections that take place in a state prior to a final and binding resolution of the question of the validity of such a law. Adoption of the Employer's or dissent's proposed approaches might very well lead to such an outcome despite the "Act's policy of expeditiously resolving questions concerning representation." *Northeastern University*, 261 NLRB 1001, 1002 (1982).

For all of those reasons, we reject the Employer's argument that the election in this case must be set aside as a matter of law.

*C. Section 211-a is Not Grounds for Overturning the Election Results Under the Circumstances of this Case*

There may be situations where a duly adopted state law of general applicability so interferes with the conduct of a Board election that we would find it grounds for overturning election results under our third-party standard. But that is not the case here. Section 211-a does not bar any form of campaign speech or conduct. Rather, the law merely prohibits employers from using state funds for three narrow purposes: (1) training management regarding methods to encourage or discourage union organization or employee participation in a union organizing drive; (2) hiring attorneys, consultants, or contractors to encourage or discourage union organization or employee participation in a union organizing drive; and (3) paying employees whose principal job duties are to engage in such activity. The law places no restrictions on employers' use of nonstate funds for any purpose.<sup>32</sup> And the law permits employers to use state funds for a wide variety of campaign purposes, *including* urging employees to vote no.

Not surprisingly, then, the evidence in the record clearly demonstrates that the Employer was able to, and did, engage in a vigorous campaign to defeat the Petitioner. The record shows that, notwithstanding the existence of Section 211-a, the Employer had full daily access to its employees in the workplace and used that access to actively campaign against the Petitioner. Through flyers, letters, captive-audience meetings, and individual and small group meetings, the Employer repeatedly conveyed to employees negative images of the

standard ("virtually impossible to conclude that the restrictions could have affected the election results").

<sup>32</sup> The Judge found that the Employer received \$80,000 to \$100,000 annually from private sources and that approximately half its revenue came from the Federal Government. While the Federal court litigation has not resolved the question of whether Federal Medicaid funds are covered by Sec. 211-a, see *Healthcare Assn. v. Pataki*, 471 F.3d at 105–106, we do not perceive any construction of the term "monies appropriated by the state that would encompass funds appropriated by the federal government."

Petitioner and of collective bargaining in general, in an unmistakable effort to discourage unionization. Contrary to the Employer's characterization, this campaign was not limited to providing employees with facts enabling them to make their own decision. The Employer freely offered opinions about the adverse consequences of unionization—summarized by the transparent euphemism that a vote for Petitioner would not be in the employees' "best interests"—and reinforced its opinions with unlawful interrogations, solicitation of grievances, a threat of lost benefits, and a grant of wage increases timed to dissuade employees from voting for the Petitioner.

Indeed, the Employer presented little evidence that the narrow restrictions on use of state funds actually imposed by Section 211-a impinged on its campaign in any way. As the judge found, when pressed for specific campaign conduct it would have engaged in but for Section 211-a, the Employer's witness mentioned only that the Employer would have explicitly urged employees to vote "no." Clearly, however, the Employer could have made such statements without running afoul of Section 211-a. The only additional relevant testimony was that the Employer discussed the possibility of hiring a consultant. We note, however, that the Employer could have hired a consultant using its nonstate funds.

In these circumstances, and on the record here, we cannot find that the Employer has carried its burden of proving that Section 211-a so interfered with the election that its results must be set aside.<sup>33</sup>

The dissent presents an extended analysis of the preemptive sweep of Federal labor law and speculates on the possible impact of our holding on state and local legislators,<sup>34</sup> but engages in no analysis whatsoever of the

<sup>33</sup> We recognize, of course, that the rule we apply today applies equally to preempted state action affecting unions and employers, and that state and local governments have acted in the past, and will likely to do so in the future, in a manner that impinges on the terrain of Federal labor law by restricting union activity as well as employer activity. See, e.g., *Hill v. Florida*, 325 U.S. 538 (1945) (holding state law requiring licensing of union agents before union could function as collective-bargaining representative preempted); cf. *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939) (holding city official's interference with union organizing violated the 14th amendment); *Thomas v. Collins*, 323 U.S. 516 (1945) (reversing denial of writ of habeas corpus to free union president imprisoned for contempt after violating temporary restraining order barring speech to employees prior to Board-supervised election absent state-issued organizers' card).

<sup>34</sup> The dissent's statement that the holding in this case will "give impetus" to states and localities to adopt preempted measures "to facilitate union organizing," suggests that elected officials, including state legislators and governors, are likely to act in violation of the Supremacy Clause of the United States Constitution. That suggestion is speculation and contrary to the presumption, repeatedly articulated by the Supreme Court and echoed in the lower Federal courts, that public officials "will act properly and according to law." *F.C.C. v. Schreiber*, 381 U.S. 279, 296 (1965). See also, e.g., *Jackson v. Marine Explora-*

question before us—whether the existence of Section 211-a so interfered with the employees’ choice to be represented that we must take the serious step of overturning the results of a secret-ballot election in which employees overwhelmingly chose to be represented after a vigorous campaign in which both the union and the employer participated. That is the determinative question as the rights contained in Section 7 of the Act, as put into practice by the election machinery created under Section 9, belong to employees, not to employers or labor organizations. The question before the Board in this case is not whether Section 211-a is preempted or whether the New York law chilled the Employer’s campaign activity, but whether Section 211-a “substantially impaired the employees’ exercise of free choice.” *Hollingsworth*, supra at 558.

Once the focus is returned to the proper question, it is clear, contrary to the dissent’s contention, that our holding rests on longstanding Board law establishing a standard applicable to third-party conduct potentially affecting the outcome of an election. That standard has repeatedly been applied to actions by public officials, including actions clearly preempted by Federal law. See, e.g., *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765, 766–767 (1958). The dissent would depart from that long line of precedent, without acknowledging that is what it proposes, and apply a newly minted standard<sup>35</sup> that would require the Board in almost every case to overturn the expressed will of employees based on a preempted restriction on their employer’s capacity to campaign no matter how vigorous a campaign the employer actually mounted. The dissent proposes that the Board overturn the results of every election conducted in a jurisdiction in which a preempted law or regulation is in effect unless “it is virtually impossible to conclude that the restrictions could have affected the election results.” The dissent would have the Board engage in no analysis of the severity of the preempted restriction, the likely scope of its chilling effect, or the ability of the parties to campaign

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*tion Co.*, 583 F.2d 1336, 1348 (5th Cir. 1978) (according “presumption of good faith that attends all actions by public officials”). Even if we believed it was appropriate to consider the impact of our holding on state and local officials rather than the impact of the particular state action at issue here on the employee voters in this case, we would not make the assumption, underlying the dissent, that such officials would act in violation of law.

<sup>35</sup> The cases from which the dissent draws its proposed standard involved unlawful conduct by parties to the election, i.e., parties governed by the Act and, therefore, capable of committing unfair labor practices. The State of New York was neither a party to the election nor is it governed by the Act. While protesting that the majority holding is “inconsistent with the Board’s historical approach to state intrusions into the Board’s election process,” the dissent does not cite a single objections case involving state action that supports the dissent’s proposed standard.

regardless of the restriction. In short, the dissent would have the Board engage in no analysis of the facts surrounding the vote. But, in “all elections, the Board looks to the facts and circumstances to determine whether the atmosphere was so tainted as to warrant the setting aside of the election.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005). The contrary standard proposed by the dissent simply bears no relation to the purpose of our election objections jurisprudence—protection of employees’ free choice of whether to be represented.

#### IV. CONCLUSION

For the reasons stated, we will certify the Petitioner’s status as the collective-bargaining representative.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Union of Needletrades Industrial and Textile Employees (UNITE) AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time and Relief employees in the classifications of Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers and Maintenance, employed by the Employer at and out of its office located at 93-22 Jamaica Avenue, Woodhaven, New York and its facilities listed in Appendix A, excluding all office clerical and administrative employees, technical employees, professional and managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

MEMBERS SCHAUMBER AND HAYES, dissenting.

The National Labor Relations Act (NLRA or the Act) expressly protects noncoercive speech by employers or unions from regulation by the Board. This mandate, which is rooted in First Amendment principles, manifests a conscious and specific congressional intent to encourage free, uninhibited, and robust debate on issues dividing labor and management, including the decision whether to choose or reject union representation. Because Congress has explicitly shielded this zone of activity from regulation, state attempts to legislatively restrict noncoercive campaign speech are federally preempted. The New York statute at issue in this case (§ 211-a), like the similar California statute struck down by the Supreme Court in *Chamber of Commerce v. Brown*,<sup>1</sup> constitutes an impermissible incursion into the realm of national labor policy.

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<sup>1</sup> 554 U.S. 60 (2008).

It is the Board's duty to zealously guard against such encroachment, and, until today, this Agency has faithfully done so. In particular, the General Counsel and the Board have consistently maintained that Section 211-a is preempted under both the *Garmon*<sup>2</sup> and *Machinists*<sup>3</sup> doctrines—first in communications with the New York State Government prior to the effective date of § 211-a and then in subsequent court filings throughout the *Pataki* litigation contesting the validity of the New York law.

Today, although assuming *arguendo* that Section 211-a is preempted, which it patently is under *Brown*, the majority articulates a legal standard for election objections that cannot be reconciled with this assumption and is wrong as a matter of policy and of fact. First, the majority turns federalism on its head by deferring to what it describes as a “duly adopted” state statute. This is not an issue of comity. By definition, legislation that is Federally preempted cannot have been duly enacted because Congress deprived the states of authority to legislate within that sphere. Preempted legislation intrudes upon and interferes with the Board's primary jurisdiction to administer an integrated and uniform national labor policy. Thus, rather than defer to such legislation, it is the Board's duty to zealously ensure that such laws yield to Federal authority and do not impact on Board elections or rights protected by the NLRA.

Second, the majority's “analytical framework” and highly deferential third-party-plus standard defies both the holding in *Brown* and the reality of the coercive effect of state or local governmental regulation on protected labor speech. Backed by the threat of prosecution and substantial financial loss, regulations such as Section 211-a pose a far greater control over subject employers' electoral behavior than any private or individual third party can wield.

Finally, and perhaps most importantly, the majority's analysis invites states and localities to test the limits of Federal supremacy by enacting laws and ordinances restricting the role of employers in union organizational campaigns. Until invalidated by the courts, the majority will give effect to those laws in NLRB election campaigns by overruling objections to their impact unless the law, in their view, “sufficiently” restrained the employer's campaign activities.

<sup>2</sup> See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *Garmon* preemption forbids states to “regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.” *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986).

<sup>3</sup> See *Machinists v. Wisconsin Employment Relations Common*, 427 U.S. 132 (1976). *Machinists* preemption “forbids both the National Labor Relations Board (NLRB) and the states to regulate conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces.”

In short, our colleagues' radical and unprecedented analysis is inconsistent with both explicit statutory restrictions and directly applicable Supreme Court jurisprudence, undermines the rights of employers to express, and employees to hear, noncoercive information opposing unionization, and subverts national labor policy by encouraging state and local legislative interference with the balance that Congress has struck in favor of free and uninhibited debate on unionization. We therefore respectfully dissent.

#### Facts

As amended, New York Labor Law § 211-a bars state-funded organizations from using “state” funds to pay attorneys or consultants, train managers, or hire certain employees, if any of those activities have the purpose of encouraging or discouraging union organization or an employee from participating in a union organizing drive. § 211-a(2).<sup>4</sup> Affected employers who choose not to remain neutral and wish to retain professional aid or to train their managers to respond to a union campaign must keep audited financial records for 3 years demonstrating that only private funds paid for the activities, and must make these records available upon request by state authorities. § 211-a(3). The Attorney General can sue violators for injunctive relief, for the return of unlawfully used funds, and for a civil penalty of up to \$1000 or, in certain cases, up to three times the unlawfully spent funds, whichever is greater. § 211-a(4).

The law was enacted on October 30, 2002. The Board's Assistant General Counsel for Special Litigation informed the State of New York that same day that the law appeared to be preempted. Thereafter, an association of employers subject to the law filed suit in Federal district court seeking a declaratory judgment that the law was preempted by the National Labor Relations Act (NLRA). See *Healthcare Assn. of New York v. Pataki*, 388 F.Supp.2d. 6 (N.D.N.Y. 2005), rev'd. 471 F.3d 87 (2d Cir. 2006).

The District Court determined that the New York law affected the balance of forces in the union organizing process by “hindering an employer's ability to disseminate information opposing unionization.” 388 F.Supp.2d.

<sup>4</sup> Sec. 211-a itself does not define the “state funds” to which its prohibitions apply. The Employer receives appropriated funds from the State of New York, which plainly are covered. About half of the Employer's revenue comes from the Federal Government, primarily under the Medicaid program. These funds also are distributed by the State of New York. The record in the *Pataki* litigation includes an affidavit of M. Patricia Smith, then Assistant Attorney General in Charge of the Labor Bureau, indicating that “medicaid funds are subject to the statute.” *Healthcare Assn. of New York v. Pataki*, 471 F.3d 87, 105 (2d Cir. 2006). For ease of reference, we shall refer to the funds subject to § 211-a as “public funds.”

at 23. As the District Court observed, the NLRA gives employees the right to join a union or to refuse to join a union, but “[i]t is difficult, if not impossible to see, however, how an employee could intelligently exercise such rights, especially the right to decline union representation, if the employee only hears one side of the story—the union’s.” *Id.*

The Board authorized the General Counsel to file an amicus brief with the Second Circuit in support of the District Court’s decision, setting forth the Board’s position that § 211-a was preempted under both the *Garmon* and *Machinists* doctrines. The Second Circuit remanded the case for factfinding it deemed necessary to determine whether either preemption doctrine applied. As the District Court has since recognized, the need for factfinding was vitiated by the Court’s opinion in *Brown*.<sup>5</sup>

The election petition here was filed on April 24, 2003. It is undisputed that the Employer was aware of § 211-a at all times relevant to this proceeding. Indeed, the Employer receives more than 99 percent of its \$8 million budget from public funds subject to these restrictions.<sup>6</sup> The Employer complied with § 211-a during the organizing drive that preceded the election at issue in this case. There is no evidence that the Employer hired consultants or paid employees whose principal duties were to encourage or discourage unionization, or that it trained its supervisors to assist it in lawfully responding to the union campaign. As more fully set forth in the underlying decision, the Employer’s Executive Director Raymond De Natale further testified that the Employer tailored its campaign literature in an effort to comply with the New York law. The Petitioner also reinforced the message of § 211-a in an undated leaflet to employees stating that “we expect management to remain neutral . . .” in the campaign.

Following this election campaign, the Union won the mail ballot election by a vote of 68–32, with 7 non-determinative challenged ballots. Thereafter, the Employer timely filed objections asserting that the election should be set aside because of the impact on the election of § 211-a.

<sup>5</sup> *Healthcare Assn. of New York v. Paterson*, 1:03-CV-0413 (N.D. N.Y., March 23, 2010).

<sup>6</sup> The majority questions the extent to which § 211-a applies to the Employer’s revenues, based on their belief that the statute exempts the Employer’s Medicaid revenue from its prohibitions. As noted above (see fn. 4), the position of the State of New York in the *Pataki* litigation is that §211-a applies to Medicaid funds disbursed by the State. Thus, we find no reason to question whether Medicaid and other Federal funds distributed by the State of New York, are exempt from the reach of the New York law. However, even if there were only uncertainty as to the scope of funds subject to § 211-a, that uncertainty would exert a chilling effect on employers covered by the statute, deterring them from spending such funds for proscribed purposes.

### The Report on Objections

The administrative law judge, sitting as a hearing officer, recommended that the objections be overruled. The judge assumed for the purpose of ruling on the objections that § 211-a was preempted by the NLRA. However, he determined that despite the law the Employer waged a vigorous campaign in which it made clear its opposition to unionization, and that the employees were not deprived “of their rights to hear both sides of the issues with respect to unionization.” For these reasons, he concluded that the Employer failed to show that the law precluded employees from exercising their free choice in this election.

### The Majority’s Opinion

The majority states that they assume § 211-a is preempted. In determining whether the Employer’s objection has merit, our colleagues appear to apply a relaxed version of the Board’s “third-party” standard, under which an election will not be set aside unless the conduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). They go on to state that this case involves “an objection based on a duly adopted state law of general applicability.” Citing to “questions of federalism” and cases accommodating the NLRA to un-preempted state laws governing property rights,<sup>7</sup> trespass,<sup>8</sup> and defamation,<sup>9</sup> the majority—though assuming that § 211-a is preempted—nevertheless determines that the preempted statute should likewise be accommodated “unless it creates a serious obstacle to the [employer’s] ability to communicate with employees.”

Applying this newly-fashioned standard, the majority finds no such obstacle here. They conclude that the Employer was able to engage in a “vigorous campaign to defeat the Petitioner,” inasmuch as it circulated flyers and letters and held “captive-audience meetings” in which it “conveyed to employees negative images of the Petitioner and of collective-bargaining in general. . . .” The majority also asserts that the Employer could have

<sup>7</sup> *NLRB v. Steelworkers (NuTone)*, 357 U.S. 357 (1958) (employer may lawfully maintain and enforce valid rules against solicitation or literature distribution by employees even if the employer itself engages in the same conduct).

<sup>8</sup> *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (NLRA does not displace state law property rights in the case of nonemployee union organizers except in cases where employees are so inaccessible that reasonable union efforts to communicate with them are ineffective). *Accord: Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (same).

<sup>9</sup> *Linn v. United Plant Guard Workers of America Local 114*, 383 U.S. 53 (1966) (NLRA does not preempt state defamation laws as applied to statements made in the course of a labor dispute with “actual malice” where there is proof of actual harm).

used its own funds not derived from the State to engage in the activities prohibited by § 211-a. On these facts, the majority concludes that § 211-a has not “so interfered” with the election that it must be set aside.

#### Discussion

##### *A. The Board’s Prior Position that § 211-a is Preempted is Compelled by Controlling Supreme Court Precedent*

Although it should not matter for purposes of analyzing the issue before us, there is no need for us merely to “assume,” as the majority does, that § 211-a is preempted. The Board’s steadfast position in the *Pataki* litigation that § 211-a is preempted has clearly been validated by the Supreme Court in *Brown*.<sup>10</sup> There, the Court reasoned that the California statute’s spending limitations, which parallel those in § 211-a, constituted impermissible indirect regulation, despite restricting only the use of state funds, because they “imposed a targeted negative restriction on employer speech about unionization” and “coupled its ‘use’ restriction with compliance costs and litigation risks that are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds.” *Id.* at 2415. Such compliance and enforcement provisions impose obvious and significant constraints on an employer’s free speech right to communicate its views on unionization to employees. *Id.* at 2416.

Notably, the *Brown* Court relied solely on the existence and likely effect of the compliance and enforcement provisions, without any citation to record evidence of the actual effect of the statute on covered employers. See *id.* at 2416. After all, the most effective threat is one that requires no further action to accomplish its purpose. The Court’s analysis provides the proper framework for the manner in which the Board should decide this case: namely to determine whether the restrictions and sanctions imposed by the preempted New York statute reasonably could have chilled employers (or other parties) in the exercise of the free speech rights vested by Section 8(c) of the Act in elections conducted while the statute remained in effect. If so, then the election should be set aside absent evidence that it would have been virtually impossible for the statute to have affected the election results.

##### *B. The Board Does Not and Should Not Defer to or Attempt to Accommodate Laws Preempted by the NLRA*

Our Constitution establishes a system under which the Federal Government possesses certain enumerated pow-

ers, while other powers are reserved to the States and to the people. This division of authority was adopted by the Framers to ensure the protection of our fundamental liberties. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Respect for the authority of the several States to pass laws regulating the conduct of those within their borders is a value we share with our colleagues.

However, an equally important core federalism principle is the rule that a valid law passed by Congress under one or more of the enumerated powers of the Federal Government is “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Constitution Article VI Cl.2. Such laws take precedence over inconsistent state enactments, as the Supreme Court has long held. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The National Labor Relations Act “is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.” *NLRB v. Hearst Publications*, 322 U.S. 111, 123 (1944). Congress designated the Board—not the courts or state legislatures—as the instrument for the implementation of national labor policy in order “to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.” *Garner v. Teamsters*, 346 U.S. 485, 490–491 (1953). Preemption principles implement that Federal labor policy by “preclud[ing] 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 of U.S. v. Brown*, 128 S.Ct. 2408, 2412 (2008) (internal quotations and citations omitted). Specifically, *Garmon* preemption “forbids States to regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits,” and *Machinists* preemption “forbids both the [Board] and States to regulate conduct that Congress intended to be unregulated because left to be controlled the free play of economic forces.” *Id.* (internal quotations and citations omitted).

By definition, a state statute that is Federally preempted interferes with the Board’s primary jurisdiction to interpret and enforce the Act and/or represents an impermissible attempt to regulate within a zone Congress protected and reserved for market freedom. Not surprisingly, therefore, the Board has never, until the majority’s decision today, deferred to or attempted to accommodate preempted laws but has instead sought to insure that they had no effect on the parties before it. In *Laclede Gas Light Co.*, 80 NLRB 839, 842 (1948), for example, the Board summarily rejected an election objection grounded on a state law permitting employees of an employer with

<sup>10</sup> Because the Court found the statute preempted under *Machinists*, it did not reach the question whether the provisions would also be preempted under *Garmon*. 128 S.Ct. at 2412.

more than one plant to have a separate plant unit if they so desired. See also *Eppinger & Russell Co.*, 56 NLRB 1259 (1944) (employer could not refuse to bargain with union based on its failure to comply with state law requiring union officials to obtain a license before acting as a union representative in that state).<sup>11</sup>

In furtherance of its statutory mandate, the Board's practice for years has been to seek to enjoin the application of preempted legislation under the authority of *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971). See *NLRB v. State of North Dakota*, 504 F.Supp.2d 750 (D. N.D. 2007) (declaratory judgment that NLRA preempted state law requiring nonmembers to pay union for expenses incurred in representing employee in grievance arbitration). The same vigilance has been applied to state court injunctions that are inconsistent with Federal labor policy.<sup>12</sup> The majority's decision represents an abrupt and unwarranted departure from these settled principles and practices. Rather than reaffirm the Board's primary role in implementing an integrated and uniform national labor policy, they question the Board's very authority to

<sup>11</sup> *ATC/Vancom of California, L.P.*, 338 NLRB 1166 (2003), enf'd. 370 F.3d 692 (7th Cir. 2004), a case cited by the majority, is not to the contrary. There, the Board held that an employer violated Sec. 8(a)(5) and (1) by barring the union representing its employees from using a bulletin board to post notices to employees where the parties' collective-bargaining agreement authorized the postings. The Board also sustained a parallel objection to the decertification election premised on this conduct and directed a second election. In reaching this conclusion, the Board rejected the employer's argument that its actions were privileged by the California employer neutrality law discussed above—but solely on the basis that it took the challenged actions before the law went into effect.

The Board specifically noted that the employer could move for reconsideration of the Board's Order if its actions were subsequently challenged under the California law. This unusual language makes clear that the potential impact of the California law on compliance with the Order, and on the anticipated second election, was of concern to the Board, just as application of the New York law to this election should be of concern to the Board now. It is hardly surprising that the Board would refrain from issuing an anticipatory ruling on whether or how the California law would affect compliance with its Order and Direction after that law became effective. That issue was neither presented by the facts of the case before the Board nor ripe for decision at that time. In any event, nothing in the Board's opinion in *ATC* supports the "serious obstacle" standard our colleagues have adopted today.

<sup>12</sup> See *NLRB v. Butts*, 554 F.Supp. 136 (D. La. 1982) (state court injunction prohibiting discharge of employees for nonmembership in union preempted); *NLRB v. State of New York*, 436 F.Supp. 335 (E.D. N.Y. 1977), aff'd. 591 F.2d 1331 (2d Cir. 1978), cert. denied 440 U.S. 950 (1979) (state court injunction prohibiting strike preempted); *NLRB v. State of Florida*, 868 F.2d 391 (11th Cir. 1989) (same). See also *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977), cert. denied 435 U.S. 904 (1978) (state labor board jurisdiction over medical residents preempted).

pass on preemption claims, a stance at odds with decades of Board precedent.<sup>13</sup>

Our colleagues concede that their analytical framework and standard are unprecedented, but purport to draw support for their position from cases dealing with nonpreempted state laws concerning property rights and defamation. In their view, elections "always take place against a background of state laws that significantly influence the ability of employers, unions, and employees to communicate their views on organization," and therefore Section 211-a should be accommodated in a manner similar to these nonpreempted statutes.

The majority's analysis is flawed in a myriad of ways, but most fundamentally by their failure to grasp the distinction between the cases they cite and the facts presented here. First, trespass and defamation are not protected by the Act, either explicitly or implicitly; non-coercive campaign speech is.<sup>14</sup> Congress has specifically shielded the latter from intrusive regulation either by the Board or the states. As the Supreme Court observed in *Brown*:

It is indicative of how important Congress deemed such free debate that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that free-wheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.

128 S.Ct. 2413–2414. The Board's institutional obligation to implement this policy judgment, and to ensure the full exercise of the rights vested by the statute, requires an approach decidedly different from cases involving conduct

<sup>13</sup> See, e.g., *Star Tribune*, 295 NLRB 543, 549 fn. 22 (1989) ("to the extent that the Minnesota statute permits the Respondent to engage in conduct that is arguably prohibited by the National Labor Relations Act . . . the state statute is preempted by the Act.") *State of Minnesota*, supra (Minnesota Labor Relations and Charitable Hospitals Acts preempted as applied to nonprofit hospitals subject to NLRA); *Massachusetts Nurses Assn.*, 225 NLRB 678 (1976), enf'd. 557 F.2d 894 (1st Cir. 1977) (NLRA preempts Massachusetts law mandating binding interest arbitration for hospitals).

<sup>14</sup> See *Brown*, 128 S.Ct. at 2414 ("In the case of noncoercive speech . . . the protection is both implicit and explicit. Sections 8(a) and 8(b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Moreover, the amendment to § 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization. Finally, the addition of 8(c) expressly precludes regulation of speech about unionization. . . .").

that either the Board or states are free to regulate. The majority's decision ignores this distinction.

Second, the cases cited by the majority all involve statutes that have been found *not to be preempted* by the NLRA—that is, a determination has been made that state legislation on those issues does not interfere with national labor policy. Accommodation to state law is entirely appropriate, if not required, in that setting. See, e.g., *NLRB v. Babcock & Wilcox Co.*, supra, 351 U.S. at 112 (“Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.”). Accord: *Linn v. United Plant Guard Workers of America Local 114*, supra, 383 U.S. 53 (malicious defamation that causes actual harm can be redressed under state law without interfering with national labor policy).

Entirely different considerations apply in the context of a preempted statute. As explained above, an “assumption” of Federal preemption means that: (1) the law’s application is inconsistent with Federal labor policy; (2) the law regulates conduct that Congress chose to leave unregulated, to be governed by the free play of economic forces; and (3) the law thereby affects the balance of forces in the union organizing process by “hindering an employer’s ability to disseminate information opposing unionization.” *Healthcare Assn. of New York v. Pataki*, supra, 388 F.Supp.2d at 23. Deference to preempted statutes therefore is neither warranted nor consistent with the Board’s statutory mandate.<sup>15</sup>

Our colleagues repeatedly deny that their standard is new or that it defers to a preempted law, but these characterizations are accurate all the same.<sup>16</sup> First, while

<sup>15</sup> See generally, Charish, Debra, *Union Neutrality Law or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law § 211-a*, 14 J.L. & Policy 779 (2006) (New York law is “at odds with federal labor policy as it currently exists. Should the unions believe that union neutrality laws are an effective and important mechanism for bolstering union membership, they ought to lobby Congress to amend the NLRA directly. . . .”)

<sup>16</sup> *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765 (1958), a case on which the majority relies, provides no support for the standard they espouse. There, the Board determined that the arrest of the union’s principal organizer in front of eligible voter’s minutes before the polls opened created an atmosphere of confusion that prevented a fair election. In setting aside the election, the Board applied the traditional third party standard—not the more permissive version the majority advances. And the Board’s decision rested entirely on the fact of the arrest, in front of eligible voters, and its timing, not the nature of the offense for which the union organizer was arrested. The Board placed no reliance on the fact that the arrest was for violation of a county ordinance requiring union organizers to obtain a permit before soliciting membership and did not engage in a preemption analysis. These considerations were irrelevant to the disposition of the case given its facts. As such,

purporting to apply the established third party standard, the majority grafts onto that standard—for the first time in Board history—the analysis used by the Supreme Court in accommodating the Act to unpreempted state laws. That accommodation analysis, in turn, requires in their view an unprecedented evidentiary showing that the law “creates a serious obstacle” to the employer’s ability to communicate with employees. Second, the majority’s analysis by its own terms treats Section 211-a no differently than a law that is not preempted; indeed, the majority expressly relies to this end on *NLRB v. Babcock & Wilcox Co.*, supra, a case that required accommodation of the Act to the unpreempted state law at issue there. Short of exempting § 211-a from any scrutiny whatsoever, it is difficult to imagine a more deferential standard of review, or one more inconsistent with the Board’s historic approach to state intrusions into the Board’s election processes.

### *C. The Majority’s Objectionable Conduct Standard is Inappropriate For Evaluating the Effect of Preempted State and Local Interference in Election Campaigns*

In fashioning a new standard of proof for objections to preempted state and local regulation of noncoercive speech in Board election campaigns, our colleagues start with the most permissive standard possible—the third party “general atmosphere of fear and reprisal” standard—and then raise the bar for objections even further through their use of the accommodation analysis and “serious obstacle” standard described above.<sup>17</sup> Precisely what an objecting party would have to establish under their standard to set aside an election, they never say; but whatever that heightened showing is, they conclude it was not met here because they find that § 211-a did not have a “sufficient” impact on eligible employees to warrant setting aside the election.

The justifications for imposing a heightened standard in assessing whether nonparty conduct, typically threats or promises, warrants setting aside an election do not apply in the context of state prohibitions against employer campaign activities protected by the NLRA. First,

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the case says nothing about the proper standard to apply where, as here, the election objection does turn on preemption principles.

<sup>17</sup> As noted above, a preempted statute cannot, by definition, have been “duly adopted.” Moreover, the majority is simply wrong to term New York Labor Law § 211-a a “State law of general applicability.” The law applies only to employers, not unions or other entities, and only to those who receive funds from the State. In any event, it does not matter “whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of labor relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.” *Garmon*, supra, 359 U.S. at 244.

as discussed above, the Board has a special institutional obligation to protect against state encroachment on the Board's processes, and that obligation dictates heightened, not lessened, scrutiny of the likely impact of preempted state legislation.

Second, and perhaps more importantly, the underlying premises for the Board's third party standard are inapplicable here. The Board applies a lower standard to the conduct of third parties in part because it tends to have less impact on the election than similar conduct by employers or unions—which either have or seek control of employees' working conditions.<sup>18</sup> These considerations are inapplicable to preempted regulation by a state or local governmental entity, which has a legislative mandate, the bureaucratic will, and the financial deep pockets to engage in sustained investigation of and litigation against suspected employer violators. Further, implicit in Section 211-a and similar legislation restricting the ability of employers to oppose unionization is the message that employers who engage in such disfavored activity are not only subject to civil fines but may ultimately lose the Government contracts whose revenue the employers depend on for their very existence.<sup>19</sup> The coercive potential and deterrent effect of such preempted laws is far, far greater than that of typical alleged third party election interference, such as a politician who suggests in a letter that the employer may close the plant, or a pro-union employee who promises fellow employees higher wages and benefits. Yet our colleagues have determined that the burden of proof for setting aside an election conducted under this governmental cloud of preempted regulatory restriction should be higher even than for allegations of third party misconduct.

A further justification sometimes offered for the more permissive third party standard is that imposing party-type liability might result in more elections being set aside because third parties, unlike unions and employers, would not be deterred by the trouble and expense of re-running elections and the threat of unfair labor practice liability. The absence of such deterrents might make third parties more likely to engage in repeated misconduct to prevent a final election result.<sup>20</sup> In the context of state interference with Board elections, however, the incentives are reversed. As discussed below, by imposing a highly deferential third party-plus standard that effectively implements the preempted restrictions of

211-a, our colleagues invite, rather than deter such legislative initiatives.

If the instant situation is analogous to any election objection context, it would be cases in which there has been a determination that an unlawful restriction has been imposed on a union's or employee's right to distribute or access information relevant to a decision on unionization. In those circumstances, with very few exceptions, the Board holds that the unlawful conduct is "a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in the election," *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962), and will set aside the election unless it is "virtually impossible to conclude" the unlawful conduct could have affected the election results. *Safeway, Inc.*, 338 NLRB 525, 526 fn. 3 (2002).<sup>21</sup> And in making that determination, the Board, as our colleagues concede, applies an objective test that considers only whether the restriction has a reasonable tendency to restrain activities protected by the Act; the Board does not look further to determine whether the restriction actually did so.

A similarly demanding standard should apply in the instant case, and if applied, would require setting aside the election results. Section 211-a unquestionably imposed restrictions, inter alia, on the Employer's right to lawfully hone and communicate its opposition to unionization to its employees through supervisors and consultants. Those restrictions, backed by substantial civil sanctions, plainly had a reasonable tendency to, and actually did, inhibit the Employer's free expression of its message, as there is no dispute in this case that the Employer complied with the prohibitions against using public funds to hire consultants, pay employees whose principal duties were to discourage unionization, or that it trained its supervisors to assist it in lawfully responding to the union campaign. Those restrictions, in turn, impaired the Section 7 right of every unit employee to receive information opposing unionization.

As the Supreme Court explained in finding similar regulatory restrictions preempted in *Brown*, AB 1889's enforcement mechanisms put considerable pressure on an employer either to forgo his free speech right to

<sup>18</sup> See, e.g., *Otterbacher Mfg.*, 279 NLRB 1167 (1986); NLRB Outline of Law and Procedure in Representation Cases (2008), Section 24-326, at p. 315.

<sup>19</sup> As noted previously, 99 percent of the Employer's budget comes from public funds subject to § 211-a.

<sup>20</sup> See, e.g., *Orleans Mfg. Co.*, 120 NLRB 630 (1958).

<sup>21</sup> The majority appears to argue that the virtually impossible standard is inapplicable because in *Safeway* and similar cases the source of the unlawful restriction on communication with employees was a party to the election governed by the Act, while in this case the source was the State of New York, which is not. That is a distinction without a difference because the preempted restrictions imposed by § 211-a are just as impermissible and just as disruptive to laboratory conditions as any restriction imposed by an employer or a union in violation of the Act. And the Board has ample authority to make the required preemption finding for the reasons stated above.

communicate his views to employees, or else to refuse the receipt of any state funds. In so doing, the statute impermissibly predicates benefits on refraining from conduct protected by federal labor law, and chills one side of the robust debate which has been protected under the NLRA.

128 S.Ct. 2416–2417 (internal citations and quotations omitted). Because § 211-a fundamentally altered the landscape Congress envisioned for Board elections, and had a reasonable tendency to interfere with free expression, it cannot be said that it is virtually impossible to conclude that the restrictions could have affected the election results. Thus, the election should be set aside.

Our colleagues attempt to revive, under the guise of an objections analysis, the very arguments explicitly rejected by the Supreme Court in *Brown*. Apparently conceding that § 211-a had at least some impact on the conduct of this election, they seek to minimize that impact by observing that the law “does not bar any form of campaign speech or conduct,” “merely prohibits employers from using state funds for three narrow purposes,” and left the Employer free to engage in the prohibited purposes “using its non-state funds.” However, the Court in *Brown* specifically rejected the “it’s only a use restriction” argument as a distinction without a difference, noting that “California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.” 128 S.Ct. 2414–2415. Applying the same principles subsequently articulated in *Brown*, the district court in the *Pataki* litigation came to exactly the same conclusion with respect to § 211-a, finding that its prohibitions, however narrow, “hinder[ ] an employer’s ability to disseminate information opposing unionization” and thereby interfere with employees’ right to refrain from union representation. *Pataki*, supra, 388 F.Supp.2d at 23. We view the Court’s decision in *Brown* as mandating the result in this case. Spending restrictions on the use of state funds, when coupled with recordkeeping requirements and sanctions, chill free expression no less than a direct bar on campaign speech or conduct. That reasonable tendency alone is a sufficient basis to set aside the election.

It is no answer to say, as our colleagues do, that the Employer was able to “engage in a vigorous campaign to defeat the Petitioner.” At bottom, this argument rests on their judgment that the Employer was able to do enough campaigning, and that the employees heard enough arguments against unionization to be able to make an in-

formed choice in the election. But this analysis, which they propose to engage in on a case-by-case basis in elections tainted by preempted state statutes such as § 211-a, involves precisely the type of judgments Section 8(c) precludes us from making. By adjudicating whether a state’s deprivation of certain statutorily protected campaign activities had, in the Board’s view, a “sufficient” impact on a given election to warrant setting it aside (or not), our colleagues engage in just another form of indirect regulation of noncoercive speech. This, we lack the authority to do. *NLRB v. Gissel Packing Co.*, supra (“an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.”); *Chamber of Commerce v. Brown*, supra (Congress has “clearly denied” the Board—and the states—the authority to regulate noncoercive speech).<sup>22</sup>

The majority nevertheless engages in precisely this inquiry, in the guise of considering all the facts and circumstances, and accuses us of failing to engage in “any analysis of the facts surrounding the vote.” See *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (“with all elections, the Board looks to all of the facts and circumstances to determine whether the atmosphere was so tainted as to warrant the setting aside of the election.”) To the contrary, we have considered all of the relevant facts, particularly the fact that the preempted New York law plainly chilled the exercise of covered employers’ Section 8(c) rights, and the concomitant Section 7 rights of employees to access to information in opposition to unionization. Those facts are dispositive, in our view, absent proof that it was virtually impossible that the preempted restrictions affected the election results. In contrast, our colleagues give controlling weight to their judgment that the Employer in this case was able to campaign “enough”—an irrelevant consideration because it requires a judgment we lack the statutory authority to make. Thus, our colleagues, not us, fail to give proper consideration to the relevant circumstances in this case.

*C. The Majority’s Analysis Invites States and Localities to Enact Preempted Legislation that Interferes with the Board’s Election Processes*

Compelling and obvious policy considerations dictate against the approach endorsed by the majority, which, if permitted to stand, would encourage future state and local legislative initiatives such as § 211-a, which already

<sup>22</sup> The majority’s reliance on the unfair labor practices committed by the Employer as evidence that the election was fair is equally unavailing. They were properly remedied by the Board’s unpublished order in the related unfair labor practice case, and have no bearing on whether the Employer was constrained in its lawful communication with employees.

have proliferated in recent years, typically at the behest of labor organizations. Under normal circumstances, the Supreme Court having now definitively spoken on the issue, we would anticipate that legislators would refrain from expending their limited resources on laws that are more than likely to be enmeshed in expensive and protracted litigation and ultimately enjoined as inconsistent with our integrated national labor scheme. However, our colleagues inject new incentives into the mix by giving effect to preempted legislation in Board elections unless covered employers can meet a vague and almost impossibly high burden of proof. We can think of no more damaging and dangerous course.<sup>23</sup>

Ignoring these ramifications, the majority contends, ironically, that “practical and policy reasons” actually dictate *their* approach, and that addressing the preemption issue and its impact on the Board’s analysis in such cases “might require us to hold in abeyance or potentially re-run all Board-supervised elections that take place in a state prior to a final and binding resolution of the question of the validity of such a law.” These concerns are overstated. First, the Board has an excellent track record of obtaining timely injunctive relief against preempted state laws in *Nash-Finch* litigation.<sup>24</sup> Indeed, it is pre-

<sup>23</sup> The majority’s opinion in effect implements a “New Federalism” doctrine advocated by some in academia to limit the scope of Federal preemption and to encourage states to be more proactive in passing legislation protective of union organizational activities because the Federal protective scheme under the Act has allegedly failed to do the job. See, e.g., Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 *Cornell J.L. & Pub. Policy* 83 (2009), and Paul M. Secunda, *The Ironic Necessity for State Protection of Workers*, 157 *U. Pa. L. Rev.* 29, 29 (2008). Of course, as applied to the Act and controlling Supreme Court precedent, the doctrine is no more valid than the nullification doctrine rejected long ago during the Jacksonian presidency. We do not suggest that state and local authorities would act in *deliberate* defiance of Federal law, although we obviously take notice that Sec. 211-a is the third such piece of legislation the Board has been called upon to examine in recent years. Our primary concern is that local authorities will be encouraged to pass legislation based on a restrictive, and ultimately incorrect view, of the scope of *Brown* and the preemption doctrine. That concern is certainly heightened by our colleagues’ unwillingness to do no more than “assume” preemption, and their adoption of a highly deferential standard that permits such legislation to directly impact Board elections.

Of course, we would hold the same view with respect to preempted legislation limiting an organizing union’s ability to communicate with employees, although no such cases have been presented to us for review.

<sup>24</sup> The majority questions our assumption of timely injunctive relief, but this assumption is well-founded in actual experience. See *NLRB v. Butts*, supra, 554 F.Supp. 136 (preliminary injunction obtained in 2 months); *NLRB v. State of North Dakota*, supra (declaratory judgment obtained in 3 months); *NLRB v. State of New York*, supra (injunction obtained in 11 months); *NLRB v. State of Florida*, supra (temporary restraining order issued in 7 days).

cisely to avoid the potential interference with Board conducted elections that the Agency has historically intervened, as it did in *Pataki*, at a very early stage to secure either an injunction or a commitment that the legislation will not be enforced pending judicial resolution.<sup>25</sup> Such litigation should prove even easier in the wake of the Supreme Court’s decision in *Brown*, which will permit many future preemption challenges to similar legislation to be resolved on summary judgment motions. Second, our colleagues point to no instance in which a state has insisted upon enforcement of legislation in the face of a Federal preemption challenge brought by the Board under the NLRA, so those fears are purely speculative.<sup>26</sup> Third, even if a court subsequently determined that state legislation was not preempted, that would not necessarily require a conclusion that the effects of the legislation did not sufficiently impact laboratory conditions to warrant setting aside an election. In short, the policy and practical considerations identified by our colleagues are more illusory than real and do not outweigh the vastly more significant problems created by their decision.<sup>27</sup>

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The majority also posits that even a valid injunction would not meet our standard because it might be overturned. The effect of such an injunction would, of course, depend on its terms and on the litigation positions of the parties. See *Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990) (discussing effect of subsequently-vacated preliminary injunction on possible prosecution for conduct that occurred while it was in force). Our point is that seeking such relief, as the Board has consistently done in the past, is preferable to the radically different course proffered by the majority.

<sup>25</sup> As discussed above, our colleagues appear to eschew the Board’s historic practice of early intervention in preemption cases; a stance difficult to square with their stated grave concerns about holding in abeyance elections conducted while such legislation remains in effect. The way to dispel such concerns is to enjoin enforcement or to obtain a voluntary agreement to the same effect.

<sup>26</sup> Indeed, the State of New York voluntarily agreed to refrain from enforcement activity under the New York statute at issue here as early as 2008. *Healthcare Assn. of New York v. Paterson*, 1:03-CV-0413 (N.D. N.Y., January 28, 2008) (unpublished order). Without passing on the sufficiency of this commitment, an issue that is not before us, we would not find that the New York statute reasonably could have chilled the exercise of Sec. 8(c) free speech rights by an employer that had timely notice of a sufficiently comprehensive nonenforcement commitment, and we doubt our colleagues would do so either.

<sup>27</sup> The concurrence notes the significant period of time that has elapsed since the election in this case. We share our colleague’s concern, however, our approach will minimize any further delay in this case and future cases presenting similar issues. The concurrence also stresses that the paramount consideration here is the wishes of the employees concerning union representation. Again, we agree, but Congress has determined that employees’ true wishes cannot be ascertained unless there is an opportunity for a free and unfettered debate on the pros and cons of unionization, which could not happen here because of the impermissible restrictions on speech imposed by the preempted statute. Finally, while we do not condone the Employer’s commission of unfair labor practices during the election campaign, we cannot agree with our concurring colleague’s apparent view that the lack of “clean

## CONCLUSION

By validating the results of a Board election conducted under the cloud of an obviously preempted Section 211-a, our colleagues give impetus to state and local legislative initiatives that aim to facilitate union organizing and stifle noncoercive employer speech. However, the Board's role is to effectuate the Congressional prerogatives embodied in the statute we administer. Those prerogatives include free, robust, and untrammelled debate on the pros and cons of union representation, and a uniform and integrated national labor policy that is not subject to varying local conceptions. The majority's decision ignores our statutory mandate and represents a radical departure from well-established principles of law and decades of Board practice. It is a step down a dangerous path that disregards Federally protected rights in favor of deference to state policy choices which conflict with those made by Congress. Because their decision is supported neither by law nor sound policy, we dissent.

CHAIRMAN LIEBMAN, concurring.

I join the majority opinion, but write separately to emphasize certain points at risk of being obscured by our debate here.

This case has languished at the Board for over 7 years—an unconscionably long time—as a *still-unresolved* challenge to New York State Labor Law Sec-

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hands" should preclude the Employer from objecting to the impact of Sec. 211-a on the election.

tion 211-a has worked its way through the Federal judicial system.

The Board itself has no power to enjoin the New York statute, preempted or not. On the dissent's view, the existence of a state law generally could prevent the Board from fulfilling its statutory duty to conduct union-representation elections and to give effect to the voters' choice. That result turns the principle of Federal supremacy upside down.

Here, the Employer insists that it was chilled by New York's law from conducting the antiunion campaign it wanted to mount. But the Employer was *not* chilled by the National Labor Relations Act. It committed unfair labor practices during the election period, trying to coerce employees. On factual grounds, then, it is hard to credit and endorse the Employer's claim—even apart from the unfairness of setting aside an election at the urging of a party that itself tried to destroy employee free choice.

The Board's proper focus is on the voters in this election case: employees. Nothing in the evidence persuades me that the New York law prevented employees from freely choosing whether or not they wished union representation. They knew just where the Employer stood—so opposed to the Union that it was willing to violate Federal law—and voted two to one for the Union even so. Viewed pragmatically, and with the basic goals of Federal labor law in mind, the resolution of this case is simple.