Case No. _____

IN THE
SUPREME COURT OF THE UNTIED STATES

JANE CHURCHON,
Petitioner,

v.

SUTTER VALLEY HOSPITALS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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September 30, 2024

QUESTION PRESENTED

The National Labor Relations Act (NLRA) governs relations between employers and Labor Unions. It provides for the creation of the National Labor Relations Board (NLRB) to adjudicate disputes between employees and employers. The NLRA contains no express provision providing for the preemption of state law claims. In the present case the Regional Director for the NLRB rejected a retaliation claim between a nurse and employee hospital. The California Third District Court of Appeals held that this rejection triggered preemption under *San Diego Building Trades Council* v. *Garmon*.

The question presented is:

1. Whether the Court should overrule *Garmon* or at least clarify that factual overlap between a civil complaint and an NLRB complaint is insufficient to invoke *Garmon* preemption.

PARTIES

Petitioner (plaintiff-appellant below) is Jane Churchon.

Respondent (defendant-respondent below) is Sutter Valley Hospitals.

RELATED PROCEEDINGS

1. *Churchon v. Sutter Valley Hospitals,* No. S283974 (Supreme Court of California), opinion issued on May 1, 2024;

2. *Churchon v. Sutter Valley Hospitals,* No. C095228 (3rd Dist. Court of Appeal of California), opinion issued January 29, 2024;

3. *Churchon v. Sutter Valley Hospitals,* No. 34-2018-00230710-CU-WT-GDS (Superior Court of California, County of Sacramento) judgment entered October 5, 2021.

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PETITION FOR A WRIT OF CERTIORARI

California's interpretation of the NLRA and *Garmon* preemption devastates the rights of employees who report violations of state law, when their employers also have the good fortune of also violating federal labor law. This significantly undermines California's ability to enforce its Labor Code, Health and Safety Code and protect, not only its workers, but the most vulnerable of its citizens, patients who are currently hospitalized.

Accordingly, this case reveals a serious problem with *Garmon* preemption it provides for the NLRB power beyond explicit Congressional intent. *Garmon* preemption reduces state power to enforce its labor laws to a vanishingly small areas outside the penumbras determined—not by Congress—but by a federal agency without explicit authority to do so.

OPINIONS AND ORDERS BELOW

1. The California Supreme Court's denial of Petitioner's Petition for Review is reproduced at 1a. Unreported opinion.

2. The California Third District Court of Appeals opinion upholding Summary Judgment reproduced at 3a. Unpublished opinion.

3. The Superior Court's unpublished order granting Respondent's motion for summary judgment is reproduced at 32a.

JURISDICTION

The California Supreme Court issued an order denying review on May 1, 2024. This Court has jurisdiction under 28 USC § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, 29 U.S.C. §§ 151-169 (Appendix 54a-120a), California's Labor Code Section 1102.5 (Appendix 47a) and 6310 (Appendix 51a), California's Health and Safety Code Section 1278.5 (Appendix 40a), and the Supremacy Clause of

the United States Constitution (Article VI. CL. 2.) (Appendix 121a).

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

I. Jane Churchon Complains about Violations of Law and Patient Safety Issues

Jane Churchon was a nurse with Respondent's Neonatal intensive care unit. After moved the unit to a new hospital, a number of serious patient safety issues arose, which amounted to violations of California state law. Ms. Churchon reported:

> concerns about problems in the workplace included understaffing that violated California state patient ratio regulations; understaffing, assignments, and ratios that risked patient safety; understaffing and resulting missed breaks that negatively impacted the health, safety, and well-being of nurses; violations of California state regulations about breaks, missed break premium pay, and overtime pay; other patient safety concerns regarding split assignments, the [neonatal intensive care unit] monitoring system, and inadequate and non-functioning medical equipment; [and] other employee safety concerns regarding

> insufficient security measures and protections in the [neonatal intensive care unit]. (Opinion pg. 2.)

Among Ms. Churchon's explicit complaints was that babies were being overdosed with medication. At the same time, Ms. Churchon became involved with "organizing for unionization of the workplace." (*Ibid*.)

Ms. Churchon raised her complaints with the new CEO at a "town hall meeting," immediately following that meeting Ms. Churchon was accused of "perpetuating workplace violence," and placed on administrative leave. She was subsequently fired.

II. Ms. Churchon's NLRB Complaint

Following her suspension but before her termination, Ms. Churchon filed a complaint with the NLRB alleging *inter alia* "Sutter "placed [her] on unpaid administrative leave pending investigation because [she] engaged in protected concerted activities with other employees concerning [their] working conditions," and unsafe for the babies at the new building because [they] usually have a [three-to-one] baby ratio, with three to four babies for each [registered nurse], but the law says that it's supposed

to be a [two-to-one] baby ratio with a maximum of two babies for each [registered nurse]."

The Regional Director dismissed her charge because there was "insufficient evidence" that Sutter violated section 8(a)(1) of the NLRA. Ms. Churchon appealed that decision to the general counsel for the NLRB. In a letter denying the appeal, the General counsel opined that Sutter conducted a "good faith" investigation into Ms. Churchon's alleged workplace violence, and there was no evidence that it relied upon anything improper in suspending Ms. Churchon.

III. Ms. Churchon Files a Civil Complaint

Following her termination, Ms. Churchon filed a verified complaint against Sutter alleging *inter alia* violations of Labor Code section 1102.5, Labor Code section 6310, violation of Health and Safety Code section 1278.5 and a wrongful termination in violation of public policy.

In this complaint, Ms. Churchon delineates her protected disclosures, and the retaliatory adverse actions she sustained as a result. In particular, she detailed the complaint she lodged to the CEO at the "town hall meeting:"

nurses could not safely take breaks entitled to them and avoid fatigue without leaving infants inadequately monitored; when they could safely take breaks, nurses did not have access to food during [12]-hour night shifts; assignment ratios above [one-to-two] endangered infant health and safety because of the subdivided pod layout of the [neonatal intensive care unit]; nurses could not safely and sanitarily warm up milk because Sutter did not provide them with milk warmers; Sutter management failed to follow through on promises to numerous nurses that they would be transitioned to day shift and/or fewer weekend shifts; Sutter management structured payroll so as to deprive weekend-shift nurses [of] overtime pay; Sutter management did not seriously consider the concerns and complaints of [neonatal intensive care unit] staff; [and] Sutter management created a retaliatory culture in which staff felt scared raising workplace complaints and concerns. (Opinion pg. 7.)

With regard to Labor Code section 1102.5, Ms. Churchon alleged that she made protected complaints, to persons in authority to correct, with regards to the "lack of proper ratios of nurses to babies, retaliatory behavior by management, overdosing baby patients with medication, and other patient safety issues," and as a result was subjected to multiple adverse employment actions including termination.

The Superior Court granted summary judgment on the basis that, *inter alia,* Ms. Churchon's claims were barred by *Garmon* preemption. On appeal, the Third District Court of Appeals found that Ms. Churchon's conduct was "arguably protected" by section 7 of the NLRA, and therefore subject to *Garmon* preemption.

The court of appeals further ruled that "the local interest" exception does not apply. The Court held that while, "California has a significant interest in protecting hospital employees from being discharged in retaliation for complaining about nurse-to-patient ratios that allegedly violate state regulations and threaten patient safety, or employee occupational health and safety issues," the risk of interference was high because the NLRB had already ruled on the facts

at issue. In doing so, the Court distinguished both Ninth Circuit Precedent and precedent of sister district courts. Following the issuance of the Opinion, the California Supreme Court declined to review the matter.

REASONS FOR GRANTING THE WRIT

This Petition asks this Court to resolve a conflict in the Courts of Appeal concerning California's interpretation of the National Labor Relations Act (29 U.S.C. § 151 et seq. This Petition asks this Court to end a decades long erroneous interpretation of the National Labor Relations Act (29 U.S.C. § 151 et seq. (("NLRA")) and preemption of state law claims under *San Diego Unions v. Garmon,* 359 U.S. 236 (1959) . ("*Garmon*"). Ms Churchon was a nurse at Respondent hospital and made complaints regarding patient safety, violations of California Law, and acuity ratios—nurse to patient ratio. Simultaneously, Ms. Churchon was attending union meetings and advocating for unionization of the nursing staff at Respondent hospital. Respondent placed Ms. Churchon on administrative leave and subsequently terminated her employment.

Ms. Churchon filed a complaint with the National Labor Relations Board ("NLRB") alleging

that she was placed on administrative leave because of her activity related to union advocacy. The Regional Director for the NLRB denied the claim based upon insufficient evidence. Ms. Churchon appealed to the general counsel for the NLRB, and the appeal was denied.

Following this denial of this appeal, Ms. Churchon filed a civil complaint alleging *inter alia* that Respondent terminated her employment in violation of California's Labor Code section 1102.5, Health and Safety Code section 1278.5, and public policy ("*Tameny*"). Respondent filed for summary judgment on the basis of *Garmon* Preemption, arguing that the denial of the claim by the NLRB foreclosed subsequent civil suits under California's anti-retaliation statutes. The appellate court affirmed this ruling, thus creating a bright line rule: where the regional director has made a determination addressing conduct that is also the subject of a state court action, the state court action is preempted. This is contrary to precedent from this Court and precedent from the Ninth Circuit.

Moreover, this case reveals how far afield *Garmon* preemption has allowed the NLRB to run from its Congressional mandate without explicit

statutory authority. But more importantly, this case reveals how far afield *Garmon* preemption has allowed the NLRB to run from its Congressional mandate without explicit statutory authority. It is an affront to Constitutional separation of powers and federalism. *Garmon* preemption, like *Chevron* deference, deprives courts of their Constitutional authority to interpret statutes, and decided controversies. But further, *Garmon* is anathema to the Supremacy clause, usurping the political power of the states not by explicit congressional authorization, but through the political whims of unelected bureaucrats. The right of California to protect hospital workers and their patients is of critical importance to the state, and should only be curtailed through explicit Congressional mandate.

DISCUSSION

I. This Court Should Grant Review to Bring California in Accordance with Ninth Circuit and Supreme Court Precedent

A. *Garmon* Preemption in Brief

Under Garmon Preemption, the NLRB has "primary jurisdiction" over conduct that is "arguably prohibited" by the NLRA. "[T]he States as well as the federal courts must defer to the exclusive competence

of the [NLRB] if the danger of state interference with national policy is to be averted." (*Garmon, supra*, 359 U.S. at 245.) However, the scope of the act is limited. In passing the NLRA, "the evil Congress was addressing was... unrelated to local or federal regulation establishing minimum terms of employment... Such regulation neither encourages nor discourages the collective-bargaining processes that are the subject of the NLRA." (*Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 20-21. (1987).) Accordingly, "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." (*Id*. at 21.) The power inferred to the NLRB ought to fall to the Courts consistent with the Supremacy Clause of the US Constitution.

1. Garmon *Preemption Exceeds the NLRB's Congressional Mandate*

The NLRB is a deeply political organization, and to the extent Congress afforded it a mandate to regulate labor relations, it has grossly exceeded it. The NLRB "pretends to act like a court solemnly arriving at the correct interpretation of a legislative command, but in fact acts like politicians carrying out their electoral mandate to favor labor or to favor

management." (Charles Fried, "Five to Four: Reflections on the School Voucher Cases" (2002) 116 Harv. L. Rev. 163.)

Garmon preemption allows national labor relations law to swing wildly depending upon which party won the last election. The Second Circuit Court of Appeals, at least, has called into question the extreme deference given to the NLRB when determining what conduct is prohibited by NLRA. (See *Spentonbush/Red Star Companies v. NLRB,* 106 F.3d 484, 492 (2nd Cir. 1997) (calling "into question … obeisance to the Board's decisions"). "[N]ational labor policy is in shambles in part because its meaning seems to depend primarily on which political party won the last election" (Ronald Turner, "Ideological Voting on the National Labor Relations Board" (2005-06) 8 U. Pa. J. Labor & Emp. L. 707.)

The United States Supreme Court has noted the appalling strangeness of granting deference to the determinations of the NLRB when rejecting *Chevron* deference to an NLRB ruling on individual arbitration clauses. Justice Gorsuch, writing for the majority, notes that allowing broad authority for the NLRB to reconcile statutes exceeds its Congressional mandate: "An agency eager to advance its statutory mission, but

without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'bootstrap[ping] itself into an area in which it has no jurisdiction.'" (*Epic Systems Corp. v. Lewis*, 584 U.S. 497, 520 (2018).) "All of which threatens to undo rather than honor legislative intentions." (*Ibid.*)

This is especially troubling given the effect on state labor laws, as is the case here. The ability for California to enforce its labor laws and protect infants in intensive care cannot change upon a whim of pollical appointees of the Federal Government. Such whimsical authority is far beyond the explicit grant of authority given the NLRB by Congress. (See *West Virginia v. Environmental Protection Agency,* 597 U.S. 697, 721 (2022) (holding that "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.")) In situations, where important area of economic or political significance are at stake, before a Federal agency can claim

authority to act it "must point to clear congressional authorization for the power it claims." (*Id.* at 723.)

Overreach by the NLRB is precisely what Justice Harlan warned of in his *Garmon* concurrence: "Should what the Court now intimates ever come to pass, then indeed state power to redress wrongful acts in the labor field will be reduced to the vanishing point." (*Garmon, supra*, 359 U.S. at 254 (J. Harlan concurring).) In this case, far worse has happened. A decision by a political appointee has rendered California unable to enforce its Health and Safety code and protect infant patients from substandard medical care. It was possible for Sutter to comply with its obligations under the NLRA and under state labor codes. These two statutes are not in "logical contradiction." (See *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174,* 598 U.S. 771, 788 (2023) (J. Thomas concurring).)

This is an affront to the Supremacy Clause of the US Constitution. It is without question that Garmon preemption goes beyond the general preemption as authorized by the Article VI of the Constitution:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

Pursuant to this clause Federal law supplants state law only where state and federal law "directly conflict." " (*PLIVA, Inc. v. Mensing,* 564 U.S. 604, 617 (2011).) The scope of Garmon preemption vastly exceeds "direct conflict," and removes the authority to decide whether federal law ought to supplant state law from Article Three courts (and their state court kin) and Congress and gives it to an executive branch agency.

Given the NLRB's history of wild political swings masquerading as jurisprudence, this Court should grant its interpretations of law no deference when interpreting whether California's Health and Safety codes apply to an employment relationship.

Instead, this Court should look to the text of California's Labor Code, Health and Safety Codes and to the text of the NLRA to determine whether they are in logical contradiction or whether an entity could abide by state law and federal law simultaneously.

Here there is no doubt they could. California's Labor Code section 1102.5, subdivision b, prohibits retaliation for reporting violations of local, state, and federal law and regulations. California's Health and Safety Code section 1278.5 similarly prohibits retaliation for reporting patient safety concerns. These are separate concerns that the conduct prohibited by the NLRA's anti-retaliation provisions—namely retaliation for engaging in collective action.

There is no textual authority in the NLRA which curtails state's hospital or general employment regulations. Put another way there is nothing in the text of the NLRA that seeks to limit the states authority to police hospital safety regulations nor general retaliation provisions.

2. The Court of Appeal's Ruling on the Local Interest Exception is Inconsistent with Ninth Circuit and US Supreme Court Precedent

The Court of Appeal ruled that Ms. Churchon's claims did not fall within the local interest exception, because Ms. Churchon did in fact raise the same facts with the NLRB, thus creating substantial risk of interference with the NLRB's Jurisdiction.

This is inconsistent with the Ninth Circuit holding in *Paige v. Henry J. Kaiser Co.,* 826 F.2d 857 (9th Cir. 1987) and its sole method of distinguishing it makes it inconsistent with United States Supreme Court precedent of *Linn v. United Plant Guard Workers of Am., Local 114,* 383 U.S. 53, 66 (1966) ("*Linn*").

In *Paige*, the Ninth Circuit explicitly held that "Congress's main goal in enacting the NLRA was to establish an equitable bargaining process, not to establish any particular substantive terms to which the parties must agree." (*Paige, supra,* 826 F.2d at 863.) *"State laws which set minimum safety standards do not interfere with the bargaining process itself."* (*Ibid.* [emphasis added].) The *Paige* court held that wrongful discharge claims based on violations of California's Occupational Health and Safety Act provisions were not preempted by the NLRA in spite of the fact that they involved facts which could have been raised before the NLRB. (*Id.* at 862-865; See also *Simo v. Union of Needletrades, Indus. & Textile Employees,* 322 F.3d 602, 621 (9th Cir. 2003) (finding no preemption of emotional distress claim despite the common issue of whether the home visits were also unfair labor practices); *Radcliffe v. Rainbow Const,.*

Co. 254 F.3d 772, 785-786 (9th Cir. 2001) (finding no preemption of false arrest, false imprisonment, or malicious prosecution claims even though the conduct could form the basis of an NLRB charge).)

The court of appeals distinguished *Paige* only upon the basis that the plaintiffs in *Paige* chose to forgo filing a claim with the NLRB, and instead relied upon *Platt v. Jack Cooper Transp. Co*., 959 F.2d 91, 95 (8th Cir. 1992), to say that a prior complaint to the NLRB preempts a future state law claims of retaliation[1].

The *Platt* ruling is inconsistent with United States Supreme Court Precedent, *Linn*. "In *Linn*, the regional director of the NLRB declined to file a complaint against a union because factual investigation led him to conclude 'the union was not responsible for' the offending conduct—there, the distribution of the allegedly libelous leaflets." (*Google*,

[1] "The *Platt* court determined it was 'highly relevant that Platt unsuccessfully sought relief through the grievance process, and directly from the [Board], before commencing [his] lawsuit.' It explained, 'The risk of interference with the Board's jurisdiction is . . . obvious and substantial' when an unsuccessful charge to the Board is recast as a state law claim.' (Opinion pg. 16 (quoting) *Platt,* supra, 959 F.2d at 95.)

supra, 54 Cal.App.5th at 968 (citing *Linn, supra*, 383 U.S. at 57).) "Yet, the Supreme Court allowed Linn's libel case against the union to proceed based on the peripheral concern and local interest exceptions, untroubled that the factual issue of the union's responsibility for the leaflets might be decided differently in the state court case." (*Ibid.* (citing *Linn, supra*, 383 U.S. at 61-62, 67).) This is directly analogous to the case at issue. The appellate court's sole basis for distinguishing *Paige,* was the existence of a contrary decision by the Regional Director of the NLRB on an element of the claim, Supreme Court precedent makes clear that this is not enough, and the local interest exception can exist in spite of such a contrary finding.

CONCLUSION AND REQUESTED RELIEF

As such, Petitioner respectfully requests that the Supreme Court review this case, reverse the holding of the Court of Appeal in order to secure uniformity within the law, overrule *Garmon*, and preserve California's right to protect its workers and patients under the Labor and Health and Safety Codes.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Case No. S283974

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JANE CHURCHON,
Plaintiff and Appellant,
v.
SUTTER VALLEY HOSPITALS,
Defendant and Respondent.

PETITION FOR REVIEW FROM THIRD APPELLATE DISTRICT COURT

May 1, 2024

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

s/ GUERRERO
Chief Justice

APPENDIX B

Case No. C095228

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

JANE CHURCHON,
Plaintiff and Appellant,
v.
SUTTER VALLEY HOSPITALS,
Defendant and Respondent.

OPINION

January 29, 2024

Defendant Sutter Valley Hospitals (Sutter) terminated plaintiff Jane Churchon's employment for violation of Sutter's policy against disruptive behavior and workplace violence. While plaintiff was on unpaid administrative leave pending the investigation that led to her termination, she filed a charge against Sutter with the National Labor Relations Board (Board). Plaintiff asserted that Sutter placed her on unpaid administrative leave "because [she] engaged in protected concerted activities with other employees concerning [their] working conditions." The Board dismissed plaintiff's charge for lack of sufficient evidence. Plaintiff then filed a complaint against Sutter in the trial court after she was terminated, asserting Labor Code violations and retaliation claims.

The question in this case is whether plaintiff's claims against Sutter are preempted by the National Labor Relations Act (29 U.S.C. § 151 et seq.) (Act). The trial court found that her claims are preempted, and we agree. We thus affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts recited below were compiled from the statements of undisputed material facts included in the parties' summary judgment briefs. We also

include facts taken from exhibits filed with Sutter's summary judgment motion. Plaintiff did not object to these exhibits. Those exhibits include plaintiff's charge against Sutter and supporting documents, as well as the Board's decision. The other exhibits are the disciplinary documents given to plaintiff by Sutter prompting the present lawsuit.

After Sutter moved its neonatal intensive care unit from one hospital to another, "a number of problems arose in the workplace, among them chronic understaffing, frequent missed breaks for nurses, and unsafe patient assignments and patient ratios." Following the move, plaintiff "immediately noticed and raised concerns she had about understaffing, missed breaks, patient ratios, patient assignments, and the [electronic medical records] rollout." In March 2016, plaintiff "became involved in organizing for unionization in the workplace." "From Summer 2016 through her termination, [plaintiff] persisted in reporting concerns about problems in the workplace." Plaintiff's "concerns about problems in the workplace included understaffing that violated California state patient ratio regulations; understaffing, assignments, and ratios that risked patient safety; understaffing and resulting missed

breaks that negatively impacted the health, safety, and well-being of nurses; violations of California state regulations about breaks, missed break premium pay, and overtime pay; other patient safety concerns regarding split assignments, the [neonatal intensive care unit] monitoring system, and inadequate and non-functioning medical equipment; [and] other employee safety concerns regarding insufficient security measures and protections in the [neonatal intensive care unit]."

After Sutter hired a new chief executive officer, it held meetings to introduce him to the staff. Plaintiff attended one such meeting, during which she "made complaints about workplace and patient safety as well as direct accusations to the new [chief executive officer] that [Sutter], including [neonatal intensive care unit] [l]eadership, was intolerant of dissenting opinion and had a 'punitive culture.' " "Immediately following the . . . meeting and [plaintiff's] complaints, [Sutter] accused [plaintiff] of perpetrating workplace violence."

Sutter placed plaintiff on unpaid administrative leave pending an investigation and then terminated her employment on April 26, 2017. In the corrective action notice provided to plaintiff upon her

termination, Sutter wrote that plaintiff violated its policy against disruptive behavior and workplace violence when she and two other nurses surrounded an assistant nurse manager, who was backed up against a wall, "in a work area in front of multiple coworkers." Sutter set forth that plaintiff "used her body to physically touch the [assistant nurse manager's] body in an aggressive manner," pointed her finger in the assistant nurse manager's face, spoke to the assistant nurse manager in an "abusive and aggressive" manner in a raised voice, and physically blocked the assistant nurse manager from being able to walk away. It further wrote that an observing employee stepped in between the assistant nurse manager and plaintiff because the assistant nurse manager was "visibly distressed" and plaintiff then followed that employee to the elevator while the assistant nurse manager repeatedly asked her to stop following the employee.

I

Plaintiff's Charge Filed With The Board

On April 14, 2017, after plaintiff was placed on unpaid administrative leave, she filed a charge with the Board. She alleged Sutter "placed [her] on unpaid administrative leave pending investigation because

[she] engaged in protected concerted activities with other employees concerning [their] working conditions." In her affidavit accompanying the charge, plaintiff explained that the hospital moved into a new building that made it "impossible to maintain the same quality of care" and patient safety as before the move. She wrote, "The new set-up is dangerous for the babies," and "also unsafe for the babies at the new building because [they] usually have a [three-to-one] baby ratio, with three to four babies for each [registered nurse], but the law says that it's supposed to be a [two-to- one] baby ratio with a maximum of two babies for each [registered nurse]."

Plaintiff explained she and three of her night-shift coworkers discussed the working conditions and each of them discussed their issues with their direct supervisors. Plaintiff suggested that they also raise their issues with the director of the neonatal intensive care unit by collectively writing a letter to her about their concerns and then have a meeting with the director in person. The nurses met and plaintiff wrote the letter to the director discussing their concerns. Plaintiff and one of the nurses met with the director thereafter and discussed their

concerns "about safety issues in [their] unit and about [their] patients' safety." After the meeting, plaintiff left a copy of the letter with the director.

Plaintiff next discussed her union-organizing activities, which we do not set forth in detail. She did note, however, that Sutter did not have a union. She further wrote about issues she had flagged with managers at various staff meetings, such as the unsanitary use of pots of water to warm bottles of milk, short staffing, and unsafe patient- to-staff ratios. Plaintiff also wrote of another nurse's inquiry about getting ergonomic desks.

Plaintiff told the director that she had previously "called a charge nurse to tell her that an assignment was unsafe and the charge nurse told [plaintiff] that she didn't have time to deal with it, and she hung up the phone on [plaintiff]." She further complained "that three or four baby assignments were unacceptable and the assistant nurse managers should try dealing with narcotics babies." Another nurse "spoke up and said that the assignments that she was being given were unsafe." The nurses complained "that there were no resources" and charge nurses were not doing anything about their complaints. Other nurses

further complained that there were not enough medication dispensing machines, that they had to stand to chart, and the assignment of "babies in different pods. . . was unsafe because there was a wall between the babies in the different pods."

Plaintiff wrote about "a [t]own [h]all meeting," during which most of the management staff was present. The night before the meeting, plaintiff asked coworkers to provide a list of items that they wanted her to bring up during the meeting. They did so. Plaintiff asked the chief executive officer the various questions on the list. Plaintiff then asked about breaks because of staffing issues and why Sutter was not offering part- time positions; raised concerns about the calculation of pay for certain shifts; complained there was no food available for night-shift workers and that there was no help provided regarding the isolation of the pods in the unit; inquired about staffing concerns in the maternity ward, when the unit would get milk warmers, and the timeframe for night-shift nurses to be given day-shift assignments; and said there was inadequate signage, management picked people for leadership roles because they "had the same opinions as them," and she felt like there was a "punitive culture"

rather than a "just culture." Another nurse asked about ergonomic desks, Sutter's perspective on the reason for being short-staffed, staff assignments, staffing issues, patient-to-nurse ratios, and patient care. A third nurse asked about a change in benefits. Other nurses also spoke up during the meeting, but no specifics were provided in plaintiff's charge.

Plaintiff wrote that, after she "clocked out," she walked along a hallway and encountered an assistant nurse manager speaking with others while they were discussing where to hang a flip chart. According to plaintiff, the assistant nurse manager got upset during the conversation when they discussed patient-to-nurse ratios and, after the assistant nurse manager said, "Ya, but," with her hand up—which she allegedly frequently did—plaintiff advised the assistant nurse manager that "it wasn't an effective communication strategy." The assistant nurse manager allegedly "burst into tears and ran down the hallway," while yelling, " 'I'm only human!' " Plaintiff alleged the assistant nurse manager was the only one to raise her voice, no one touched the assistant nurse manager, and no one pointed a finger "at anybody else." When the assistant nurse manager was leaving, she allegedly

told plaintiff, "Stay away from me, Jane!" after plaintiff apologized for "hurt[ing] [her] feelings." The next day, plaintiff was called into a meeting with human resources to discuss the incident; she detailed the discussion during that meeting. After the meeting, Sutter placed plaintiff on unpaid administrative leave to investigate an incident of workplace violence. Plaintiff noted other nurses were also placed on administrative leave due to the incident and thus "everyone is scared now to complain about patient safety."

The Board dismissed plaintiff's charge that Sutter "violated [s]ection 8(a)(1) of the Act by placing [her] on administrative leave in retaliation for [her] protected concerted activities because there [wa]s insufficient evidence to establish a violation of the Act." Plaintiff appealed the decision.

In its letter denying plaintiff's appeal, the Board wrote: "The [r]egional [o]ffice [i]nvestigation disclosed insufficient evidence to establish that the [e]mployer violated the [Act] by placing you on administrative leave in retaliation for your protected concerted activities. Rather, the [e]mployer conducted a good-faith investigation into the matter and there was nothing to suggest the investigation

was improper or that the [e]mployer relied upon any inappropriate evidence in reaching its decision to place you on administrative leave."

II

Plaintiff's Complaint Against Sutter

Following her termination, plaintiff filed a verified complaint against Sutter alleging five causes of action for violation of Labor Code section 1102.5, violation of Labor Code section 6310, failure to provide adequate meal and rest periods, wrongful termination in violation of public policy, and patient safety whistleblower retaliation in violation of Health and Safety Code section 1278.5.

In her first verified amended complaint, plaintiff detailed her concerns about patient safety in the new neonatal intensive care unit, her concerns about workplace conditions, and her discussions with various managers regarding her concerns. She further alleged that she attended staff meetings during which she "raised concerns including but not limited to assigned patient ratios, patient placement and lack of breaks for staff nurses." She also discussed her attendance at union meetings and discussions "regarding her concerns over Sutter's patient safety issues, employee health and safety

issues, general workplace issues, and Sutter management's lack of responsiveness."

Plaintiff laid out in detail what happened at the " 'town hall' style meeting," where the new chief executive officer heard concerns from staff. She explained that she "recited several common concerns she gathered from coworkers the night before," and specifically: "nurses could not safely take breaks entitled to them and avoid fatigue without leaving infants inadequately monitored; when they could safely take breaks, nurses did not have access to food during [12]-hour night shifts; assignment ratios above [one-to-two] endangered infant health and safety because of the subdivided pod layout of the [neonatal intensive care unit]; nurses could not safely and sanitarily warm up milk because Sutter did not provide them with milk warmers; Sutter management failed to follow through on promises to numerous nurses that they would be transitioned to day shift and/or fewer weekend shifts; Sutter management structured payroll so as to deprive weekend-shift nurses [of] overtime pay; Sutter management did not seriously consider the concerns and complaints of [neonatal intensive care unit] staff; [and] Sutter management created a retaliatory

culture in which staff felt scared raising workplace complaints and concerns." Plaintiff also laid out her perception of the discussion that occurred after that meeting, which led to her being placed on unpaid administrative leave pending an investigation and ultimately led to her termination.

In her first cause of action for violation of Labor Code section 1102.5, plaintiff alleges she "made numerous protected complaints to persons with authority over her at [Sutter] including, but not limited to, the unsafe working environment at [Sutter] with regards to the lack of proper ratios of nurses to babies, retaliatory behavior by management, overdosing baby patients with medication, and other patient safety issues." She claims Sutter "violated Labor Code section 1102.5 when it unlawfully retaliated against [her] by taking adverse employment actions . . . , including but not limited to making unfavorable changes to her work schedule, denying him/her/them reasonable accommodation, and wrongfully terminating her employment."

In her second cause of action for violation of Labor Code section 6310, plaintiff alleges Sutter violated the statute "by retaliating against [her] for

her protected complaints regarding the unsafe workplace, unsafe work practices, and her working conditions." We do not discuss the allegations asserted in the third cause of action for failure to provide adequate meal and rest periods because, as explained *post*, the cause of action is not at issue in this appeal.

In her fourth cause of action for wrongful termination in violation of public policy, plaintiff alleges that Sutter's violation of several statutes and regulations "were substantial motivating reasons for [p]laintiff's termination. During [p]laintiff's employment with [Sutter], [p]laintiff reported and/or made complaints to [Sutter] regarding hostile work environment harassment, and retaliation. Plaintiff performed her job duties well. [Sutter] subjected [her] to adverse employment actions, including but not limited to termination, because [she] complained about hostile work environment harassment, and retaliation."

And finally, in her fifth cause of action for violation of Health and Safety Code section 1278.5 regarding patient safety whistleblower retaliation, plaintiff asserts Sutter "harassed, and retaliated against [her] because she reported concerns about

patient care, services, and hospital conditions." Plaintiff prays for compensatory damages, punitive damages, attorney fees and costs, "cost of suit incurred," prejudgment interest, and "such other and further relief as the court may deem proper."

Sutter moved for summary judgment or, in the alternative, summary adjudication. The trial court granted Sutter's motion for summary judgment. The trial court found that Sutter was entitled to judgment on the third cause of action for failure to provide adequate meal and rest periods because plaintiff did not oppose the motion as to that cause of action and agreed to dismiss it. The trial court further found that Sutter was entitled to judgment on the remaining causes of action because plaintiff's claims are preempted under the Act.

Plaintiff appeals.

DISCUSSION[1]

Summary judgment should be granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is

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[1] Plaintiff does not challenge the trial court's grant of summary judgment as to her third cause of action for failure to provide adequate meal and rest periods.

entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) " 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] " 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " (*LaBarbera v. Security National Ins. Co.* (2022) 86 Cal.App.5th 1329, 1338- 1339.) We owe no deference to the trial court's reasoning; our task is to review the trial court's decision, not its rationale. (*Murchison v. County of Tehama* (2021) 69 Cal.App.5th 867, 882.)

Plaintiff argues the motion for summary judgment should have been denied because her claims are not preempted by the Act, Sutter's motion suffered from fatal procedural defects, the motion should have been denied on the merits, and the motion should have been denied as to her punitive damages allegations. Because we conclude plaintiff's

claims are preempted and Sutter's motion did not suffer from fatal procedural defects, we do not consider the remainder of her arguments.

Initially, plaintiff argues Sutter's motion for summary judgment should have been denied because its motion failed to completely dispose of a cause of action in accordance with Code of Civil Procedure section 437c, subdivision (f)(1), because: (1) Sutter focused on her termination and failed to address other adverse employment actions; and

(2) Sutter did not address numerous issues of material fact and improperly incorporated its separate statement of undisputed material facts. We find no merit in plaintiff's initial argument. Sutter moved for summary judgment as to all of plaintiff's causes of action on the ground of preemption, which was decisive despite the adverse action at issue or disputed facts concerning the merits of plaintiff's suit.

Turning to the issue of preemption, "Congress intended the [Act] to serve as a comprehensive law governing labor relations; accordingly, 'the [Board] has exclusive jurisdiction over disputes involving unfair labor practices, and "state jurisdiction must yield" when state action would regulate conduct

governed by the [Act].' " (*Doe v. Google, Inc.* (2020) 54 Cal.App.5th 948, 957.)

"Section 7 of the [Act] guarantees employees 'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .' (29 U.S.C. § 157.) Section 8 of the [Act] makes it an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in' section 7 [of the Act]. (29 U.S.C. § 158(a)(1).)" (*Luke v. Collotype Labels USA, Inc.* (2008) 159 Cal.App.4th 1463, 1469-1470.) "Because it is for the [Board] to determine, in the first instance, whether conduct is in fact governed by the [Act], the Act's preemptive effect may extend beyond conduct that the [Act] directly governs to 'activities which "arguably" constitute unfair labor practices under the Act.' " (*Doe v. Google, Inc.*, *supra*, 54 Cal.App.5th at p. 957.) State law claims are thus preempted if they concern conduct that is "arguably" protected by section 7 or "arguably" prohibited by section 8 of the Act. (*San Diego Unions v. Garmon* (1959) 359 U.S. 236, 245

(*Garmon*).)

"The scope of preemption based on conduct that is arguably protected by the [Act] does not[, however,] extend to state law claims where the activity regulated (1) is a 'merely peripheral concern' of the [Act] [citation] or (2) 'touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the [s]tate of the power to act.' " (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 633.) "[T]he local interest exception is founded upon a recognition that certain conduct can be the basis for state court action even though the same conduct might constitute an unfair labor practice under the [Act]." (*Hillhaven Oakland Nursing Etc. Center v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 859.) "Whether the [Act] preempts a cause of action is an issue of law we review de novo." (*Wal-Mart Stores, Inc. v. United Food & Commercial Workers Internat. Union* (2016) 4 Cal.App.5th 194, 201.)

Before delving into the issue, we note that we do not address plaintiff's claim that Sutter failed to demonstrate the alleged conduct did not constitute

concerted activity, as required for it to fall within the jurisdiction of the Board. Plaintiff did not raise that argument in the trial court, nor did she raise it in her opening brief. Instead plaintiff raised the argument in her reply brief and she thus did not give Sutter an opportunity to respond to the argument. We do not consider arguments raised for the first time in a reply brief. (*American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 275-276.)

Plaintiff argues the conduct alleged in her complaint is not arguably protected conduct under the Act because the Board "itself has declared 'authoritatively' that the [Act] inarguably does not protect whistleblowing about patient care," citing *Doe v.*

Google, Inc., *supra*, 54 Cal.App.5th at page 948. She asserts her whistleblower allegations pertain to "patient care concerns, including pod layout and split assignments, which prevented nurses from having a direct line of sight to their patients, functionality of medical equipment, patient ratios, and [Sutter's] electronic medical record system, which was rolled out at the same time as the move to the new [neonatal intensive care unit] layout and [which]

distracted staff from patient care." She further argues the conduct alleged in her complaint does not fall within the provisions of the Act because she raised her whistleblower complaints and concerns with management and did not merely discuss them with her peers. We conclude the conduct was arguably protected under the Act.

" '[T]he policy of the Act [is] to protect the right of workers to act together to better their working conditions.' " (*Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 567.) "Employee protests to improve working conditions have long been held protected activity" (*PHT, Inc. v. NLRB* (D.C. Cir. 1990) 920 F.2d 71, 73) and the Board "has jurisdiction to investigate unfair labor practices, which include discharges based on protected activity such as voicing safety complaints" (*Zurn Industries, Inc. v. NLRB* (9th Cir. 1982) 680 F.2d 683, 694). It is true that "[t]he Board has held repeatedly that employee concerns for the 'quality of care' and the 'welfare' of their patients are not interests 'encompassed by the "mutual aid or protection" clause' " of section 7 of the Act. (*Orchard Park Health Care Ctr.* (2004) 341 NLRB 642, 643; see *Good Samaritan Hosp.* (1982) 265 NLRB 618, 626 [employees' criticisms of the quality of care and the

welfare of the children were not directed to improve their lot as employees and thus fell outside the mutual aid and protection provisions of section 7 of the Act].) Nevertheless, plaintiff's protests regarding inadequate nurse-to-patient ratios, understaffing, et cetera, in her unit arguably constitute protected activity because they related not only to patient safety, but *also* to the working conditions of the nurses. Indeed, in the health care field issues of employee working conditions and patient welfare "often appear to be inextricably intertwined." (*Misericordia Hospital Medical Center v. NLRB* (2d Cir. 1980) 623 F.2d 808, 813; see *Washington State Nurses Ass'n v. NLRB* (9th Cir. 2008) 526 F.3d 577, 582 ["the courts and the Board have long recognized that nurses' working conditions are directly related to patient care and safety"].)

Where issues of employee working conditions, employee health and safety, and patient care or welfare are inextricably intertwined, as here, the alleged conduct constitutes arguably protected conduct under the Act, regardless of whether an employee has reported concerns to management or merely voiced them to colleagues. (*Zurn Industries, Inc. v. NLRB*, *supra*, 680 F.2d at p. 694 [the Board's

jurisdiction to investigate unfair labor practices includes discharges based on protected activity such as voicing safety complaints]; *Misericordia Hospital Medical Center v. NLRB*, *supra*, 623 F.2d at p. 813.) While the Board "has authoritatively rejected the argument that whistleblowing about employer conduct *unrelated to working conditions* is protected activity [and] the [Act] does not protect an employee reporting concerns about patient care in a nursing home," here plaintiff's whistleblowing *was related to working conditions*. (*Doe v. Google, Inc.*, *supra*, 54 Cal.App.5th at p. 960, italics added.)

"In the case before us, . . . the preemption question turns not on the characterization of the action but the nature of the activity called into question: is it arguably protected by the [Act]? This is not a matter that can be manipulated by the selection of a state or federal cause of action." (*Rodriguez v. Yellow Cab Coop.* (1988) 206 Cal.App.3d 668, 680.) The "proper focus of concern" is on "the conduct being regulated, not a formal description of governing legal standards." (*Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 292.) Here, the alleged *conduct* concerning patient safety is based on working conditions, and thus is

arguably protected under section 7 of the Act.

Because we have found the conduct to be arguably protected under section 7 of the Act, we do not address whether the conduct also constitutes conduct arguably prohibited under section 8 of the Act. (See *Machinists Auto. Trades Dist. Lodge v. Peterbilt Motors Co.* (1990) 220 Cal.App.3d 1402, 1407 [conduct should be either arguably protected or arguably prohibited under the Act].) We next consider whether the peripheral concern or local interest exception applies. (*Garmon*, *supra*, 359 U.S. at pp. 243-244; see also *Doe v. Google, Inc.*, *supra*, 54 Cal.App.5th at p. 957 ["Although framed as separate exceptions, these two factors are often analyzed together].) We conclude they do not.

"To determine whether regulated conduct touches interests deeply rooted in local feeling and responsibility such that state law is not preempted, a court must first consider whether there is 'a significant state interest in protecting the [employee] from the challenged conduct.' [Citation.] Second, it must consider the level of 'risk of interference with the regulatory jurisdiction of the . . . Board.' [Citation.] Once those two considerations have been measured, the court must balance them against each

other before ultimately concluding whether the state law is preempted." (*Pia v. URS Energy & Construction, Inc.* (S.D. Iowa 2017) 227 F.Supp.3d 999, 1003; see *Kaufman v. Allied Pilots Ass'n* (5th Cir. 2001) 274 F.3d 197, 201 ["The [United States Supreme] Court has explicitly rejected a formalistic implementation of *Garmon*, and invited a balancing of state interests and federal regulatory interests in analyzing the preemption question"]; *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 213-214, fn. 9 ["So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the [Board], and requires a balancing of state and federal interests"]; *Operating Engineers v. Jones* (1983) 460 U.S. 669, 676 ["The question of whether [state] regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the State as a protection to its citizens"].)

There is no question that California has a significant interest in protecting hospital employees

from being discharged in retaliation for complaining about nurse-to-patient ratios that allegedly violate state regulations and threaten patient safety, or employee occupational health and safety issues. There is further no question that patient safety and occupational health and safety concerns are only peripheral concerns of the Act.

"Next, this [c]ourt must determine the level of the 'risk of interference with the regulatory jurisdiction' of the . . . Board . . . if the state-law claim were to proceed. [Citation.] Because the level of risk is highly case-dependent, this determination 'requires a more fact-sensitive approach.' " (*Pia v. URS Energy & Construction, Inc.*, *supra*, 227 F.Supp.3d at p. 1004.) In that regard, the United States Supreme Court has said, "The critical inquiry . . . is not whether the [s]tate is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the . . . Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the

Board which the arguably prohibited branch of the *Garmon* [preemption] doctrine was designed to avoid." (*Sears v. San Diego County Dist. Council of Carpenters* (1978) 436 U.S. 180, 197.)

Here, plaintiff presented her charge to the Board and based that charge on the same *conduct and controversy* alleged in the complaint—i.e., that Sutter retaliated against her because she raised concerns about the nurses' working conditions, which she believed impacted patient care. As explained in her charge to the Board and her first amended verified complaint, plaintiff's unpaid administrative leave and termination arose out of the same alleged conduct. The Board found there was no evidence that Sutter retaliated against plaintiff or that Sutter's investigation was improper. The Board further found that Sutter had conducted a good-faith investigation into the incident that led to Sutter placing plaintiff on administrative leave (and ultimately terminating her employment). We thus disagree with plaintiff's assertion that the Board's decision did not constitute a finding of fact because it merely "found there was insufficient evidence to support the assertion that [her] administrative leave was retaliation for her concerted activities, and the employer conducted a

good faith investigation." Plaintiff's attempt to recast the question of retaliation into state law claims based on the same facts considered and upon which the Board made a determination risks interference with the unfair labor practice jurisdiction of the Board.

Plaintiff's reliance on *Paige* and *Inter-Modal* is misplaced. It is true *Paige* held the wrongful discharge claims in that case, which were based on violations of California's Occupational Health and Safety Act provisions, were pled merely as state law claims with the plaintiffs foregoing claims it could raise to the Board. Thus, the claims were not preempted, and jurisdiction did not exclusively reside with the Board. (*Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 862-865.) But, the plaintiffs in *Paige* did not first file a charge with the Board (*id.* at pp. 859-860); neither did the plaintiffs in *Inter-Modal Rail Employees Assn. v. Burlington Northern & Santa Fe Ry. Co.* (1999) 73 Cal.App.4th 918, 921-924). In contrast, the plaintiff in *Platt* did file a charge with the Board before filing his complaint. (*Platt v. Jack Cooper Transport Co.*, *supra*, 959 F.2d at p. 95.)

The *Platt* court determined it was "highly

relevant that Platt unsuccessfully sought relief through the grievance process, and directly from the [Board], before commencing [his] lawsuit." (*Platt v. Jack Cooper Transport Co.*, *supra*, 959 F.2d at p. 95.) It explained, " 'The risk of interference with the Board's jurisdiction is . . . obvious and substantial' when an unsuccessful charge to the Board is recast as a state law claim." (*Ibid.*, quoting *Operating Engineers v. Jones*, *supra*, 460 U.S. at p. 683.) The Eighth Circuit Court of Appeals agreed with the Eleventh Circuit Court of Appeals that the *Garmon* preemption " 'rationale has the greatest validity when a party has sought redress for his claims from the [Board] and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court.' " (*Platt*, at p. 95; quoting *Parker v. Connors Steel Co.* (11th Cir. 1988) 855 F.2d 1510, 1517.) The *Platt* court thus disagreed with *Paige* "to the extent *Paige* holds that plaintiffs may avoid *Garmon* preemption simply by choosing 'to plead their action as a state claim.' " (*Platt*, at p. 95, fn. 7, underscoring omitted, italics added.) At least one California appellate court has agreed in dicta that "*Paige* erroneously suggests that artful pleading will save a cause of action from *Garmon* preemption."

(*Rodriguez v. Yellow Cab Coop.*, *supra*, 206 Cal.App.3d at p. 680; see also *Mayes v. Kaiser Foundation Hospitals* (E.D. Cal. 2013) 917 F.Supp.2d 1074, 1084-1085 [*Paige* has questionable "precedential effect" because it concerned wrongful discharge claims under the Labor Management Relations Act and was more concerned about "removal jurisdiction than *Garmon* preemption"].)

Plaintiff asserts her "case is strikingly similar" to *Google*, "where a former employee sued his employer for various violations of the Labor Code's Private Attorney [*sic*] General Act . . . , and filed claims for unfair labor practices with the [Board]." She argues, "[L]ike in *Google* there is no risk of any contrary finding of fact." We disagree.

In *Google*, the plaintiffs sued their employers under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.), "alleging the employers' confidentiality policies restricted their employees' speech in violation of California law" (*Doe v. Google, Inc.*, *supra*, 54 Cal.App.5th at pp. 951-952). One of the plaintiffs also filed an unfair labor practice charge with the Board, alleging "Google's confidentiality rules violated section 8 of the [Act] by prohibiting employees from exercising their rights

under section 7 of the Act, which entitles employees to engage in 'concerted activities for the purpose of collective bargaining and other mutual aid or protection.' " (*Google*, at pp. 955-956.) "On the same day that [the] plaintiffs filed their third amended complaint

. . . , the regional director of the [Board] issued a complaint against Google based on [the] unfair labor practice charge. However, the regional director's complaint did not include certain allegations from [one of the plaintiffs'] charge[s], including the allegation relating to [that plaintiff's] termination, because the regional director determined [that plaintiff] had been a supervisor and therefore was not protected by the [Act]. [That plaintiff] appealed that decision, but the [Board's] general counsel denied the appeal." (*Id*. At p. 956.) The Board's regional director and Google ultimately reached an informal settlement on the Board's complaint, wherein Google did not admit liability but agreed "to post for 60 days a notice informing its employees of their rights under 'FEDERAL LAW.' " (*Id*. at pp. 961-962.)

The Court of Appeal reversed the trial court's order sustaining the employers' demurrers without

leave to amend on the ground of preemption under the Act. (*Doe v. Google, Inc.*, *supra*, 54 Cal.App.5th at p. 952.) The Court of Appeal concluded that, although "many of [the] plaintiffs' claims relate[d] to conduct that [wa]s arguably within the scope of the [Act]," "the claims f[e]ll within the local interest exception to *Garmon* preemption and [could] therefore go forward." (*Ibid.*) The Court of Appeal reasoned that the eventual state court outcome would not conflict with the settlement between the Board and Google because the settlement expressly implicated only federal law and expressly left open the possibility of court proceedings adjudicating matters involving the same conduct addressed in the settlement agreement. (*Id.* at p. 962.) Further, the court reasoned that Google would not face duplicative or punitive punishment because the settlement agreement punished Google for its prohibition on employees communicating with each other and the state court claims sought to punish Google for its prohibition on employees communicating with everyone else. (*Id.* at pp. 960-961, 963-964.) In other words, because the state law claims did not depend on a violation of the Act, they did not threaten the jurisdiction of the Board. (*Id.* at pp. 963-964.)

Unlike the facts of *Google*, the Board here made findings of fault, in that there was none, and did not preserve the possibility of other legal proceedings. Further, plaintiff's claims implicate only her workplace, in that Sutter's adverse actions were motivated by her complaints of poor workplace conditions. Whereas Google's conduct touched upon its employees' conduct outside the workplace and unrelated to organizing, Sutter's conduct implicated plaintiff's work relations and ability to complain about conditions of employment. This conduct is at the center of the Act. We thus disagree with plaintiff's assertion that *Google* "is strikingly similar" to her case.

Having found the alleged conduct of which plaintiff complains is arguably protected under the Act and neither the peripheral concern nor local interest exceptions apply, we conclude plaintiff's claims are preempted.

DISPOSITION

The judgment is affirmed. Plaintiff shall pay costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

s/ ROBIE, J

We concur:

s/ EARL, P. J

s/ HULL, J.

APPENDIX C

Case No. 34-2018-00230710

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

JANE CHURCHON,
Plaintiff,
v.
SUTTER VALLEY HOSPITALS,
Defendant.

NOTICE OF ENTRY OF ORDER

Jahmal T. Davis (SBN: 191504)
Warren Hodges (SBN: 287162)
Josue R. Aparico (SBN: 322750)
HANSON BRIDGETT LLP
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October 5, 2021

TO ALL PARTIES

1. A judgment, decree, or order was entered in this action on (date): October 1, 2021

Date: October 5, 2021

s/ Warren Hodges

FINAL JUDGMENT

On September 1, 2021, this Court granted Defendant Sutter Valley Hospitals' motion for summary judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. **Summary judgment is entered in favor of Defendant Sutter Valley Hospitals.**
2. **The Plaintiff, Jane Churchon, takes nothing from Defendant Sutter Valley by the complaint.**

Dated: 10-1-2021 s/ Hon. Christopher E. Krueger

Health and Safety Code section 1278.5

(a) The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations.

(b)(1) A health facility shall not discriminate or retaliate, in any manner, against a patient, employee, member of the medical staff, or other health care worker of the health facility because that person has done either of the following:

> (A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity.

(B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.

(2) An entity that owns or operates a health facility, or that owns or operates any other health facility, shall not discriminate or retaliate against a person because that person has taken any actions pursuant to this subdivision.

(3) A violation of this section shall be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities.

(c) Any type of discriminatory treatment of a patient by whom, or upon whose behalf, a grievance or complaint has been submitted, directly or indirectly, to a governmental entity or received by a health facility administrator within 180 days of the filing of the grievance or complaint, shall raise a rebuttable

presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint.

(d)(1) There shall be a rebuttable presumption that discriminatory action was taken by the health facility, or by the entity that owns or operates that health facility, or that owns or operates any other health facility, in retaliation against an employee, member of the medical staff, or any other health care worker of the facility, if responsible staff at the facility or the entity that owns or operates the facility had knowledge of the actions, participation, or cooperation of the person responsible for any acts described in paragraph (1) of subdivision (b), and the discriminatory action occurs within 120 days of the filing of the grievance or complaint by the employee, member of the medical staff or any other health care worker of the facility.

(2) For purposes of this section, discriminatory treatment of an employee, member of the medical staff, or any other health care worker includes, but is not limited to, discharge, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee, member of the medical

staff, or any other health care worker of the health care facility, or the threat of any of these actions.

(e) The presumptions in subdivisions (c) and (d) shall be presumptions affecting the burden of producing evidence as provided in Section 603 of the Evidence Code.

(f) A person who willfully violates this section is guilty of a misdemeanor punishable by a fine of not more than seventy-five thousand dollars ($75,000), in addition to the civil penalty provided in paragraph (3) of subdivision (b).

(g) An employee who has been discriminated against in employment pursuant to this section shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law. A health care worker who has been discriminated against pursuant to this section shall be entitled to reimbursement for lost income and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law.

A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of the member's privileges caused by the acts of the facility or the entity that owns or operates a health facility or any other health facility that is owned or operated by that entity, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law.

(h) The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process. Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in Section 805 and Sections 809 to 809.5, inclusive, of the

Business and Professions Code, would be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. This section does not preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm.

(i) For purposes of this section, "health facility" means a facility defined under this chapter, including, but not limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff.

(j) This section does not apply to an inmate of a correctional facility or juvenile facility of the Department of Corrections and Rehabilitation, or to an inmate housed in a local detention facility including a county jail or a juvenile hall, juvenile camp, or other juvenile detention facility.

(k) This section does not apply to a health facility that is a long-term health care facility, as defined in Section 1418. A health facility that is a long-term health care facility shall remain subject to Section 1432.

(*l*) This section does not limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code.

(m) This section does not abrogate or limit any other theory of liability or remedy otherwise available at law.

(n) An employee or the employee's representative shall have the right to discuss possible regulatory violations or patient safety concerns with the inspector privately during the course of an investigation or inspection by the department.

Labor Code section 1102.5

(a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or

noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised their rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to their employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f)(1) In addition to other remedies available, an employer is liable for a civil penalty not exceeding ten

thousand dollars ($10,000) per employee for each violation of this section to be awarded to the employee who was retaliated against.

(2) In assessing this penalty, the Labor Commissioner shall consider the nature and seriousness of the violation based on the evidence obtained during the course of the investigation. The Labor Commissioner's consideration of the nature and seriousness of the violation shall include, but is not limited to, the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace, and shall be considered to the extent evidence obtained during the investigation concerned any of these or other relevant factors.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950) of, or the physician-patient privilege of Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

(h) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person

who has, or is perceived to have, engaged in any acts protected by this section.

(i) For purposes of this section, “employer” or “a person acting on behalf of the employer” includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(j) The court is authorized to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of these provisions.

Labor Code section 6310

(a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following:

(1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, their employer, or their representative.

(2) Instituted or caused to be instituted any proceeding under or relating to their rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of themselves, or others of any rights afforded to them.

(3) Participated in an occupational health and safety committee established pursuant to Section 6401.7.

(4) Reported a work-related fatality, injury, or illness, requested access to occupational injury or illness reports and records that are made or maintained pursuant to Subchapter 1 (commencing with Section 14000) of Chapter 1 of Division 1 of Title 8 of the California Code of Regulations, or exercised any other rights

protected by the federal Occupational Safety and Health Act (29 U.S.C. Sec. 651 et seq.), except in cases where the employee alleges they have been retaliated against because they have filed or made known their intention to file a workers' compensation claim pursuant to Section 132a, which is under the exclusive jurisdiction of the Workers' Compensation Appeals Board.

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by their employer because the employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, their employer, or their representative, of unsafe working conditions, or work practices, in their employment or place of employment, or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be

eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

(c) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.

(d) For purposes of this section, "employer" or "a person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(e) Notwithstanding Section 6303 or other law, as used in this section, "employee" includes a domestic work employee, except for a person who performs household domestic service that is publicly funded, including publicly funded household domestic service provided to a recipient, client, or beneficiary with a share of cost in that service.

Title 29 United States Code section 151

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of

wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United

States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Title 29 United States Code section 152

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual

employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any

Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other

employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a)any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b)any employee, who (i) has completed the courses of specialized intellectual instruction and

study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

Title 29 United States Code section 153

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) Annual reports to Congress and the President

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated

shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

Title 29 United States Code section 154

(a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.

Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Title 29 United States Code section 155

The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Title 29 United States Code section 156

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Title 29 United States Code section 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Title 29 United States Code section 158

(a)Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such

employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given

testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an

employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)

(i)to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to

recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an

agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized

in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is

to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the

negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to

mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this

subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A)The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B)Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C)After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall

promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [1] and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and

subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in

subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any

health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Title 29 United States Code section 158a

Provision by an employer of facilities for the operations of a Federal Credit Union on the premises of such employer shall not be deemed to be intimidation, coercion, interference, restraint or discrimination within the provisions of sections 157 and 158 of this title, or acts amendatory thereof.

Title 29 United States Code section 159

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter,

the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due

notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any

election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d)Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in

whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Title 29 United States Code section 160

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor

practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to

intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this

subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law

judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States,

within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable

grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief

sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub. L. 98–620, title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair

labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge

shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief

or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in

promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

Title 29 United States Code section 161

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) Documentary evidence; summoning witnesses and taking testimony

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate

to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or

agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed. Pub. L. 91–452, title II, § 234, Oct. 15, 1970, 84 Stat. 930

(4) Process, service and return; fees of witnesses

Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions

are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) Process, where served

All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) Information and assistance from departments

The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Title 29 United States Code section 162

Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this subchapter shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

Title 29 United States Code section 163

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Title 29 United States Code section 164

(a) Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Agreements requiring union membership in violation of State law

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts

(1)The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of title 5, decline to

assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Title 29 United States Code section 165

Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U.S.C., title 11, sec. 672), conflicts with the application of the provisions of this subchapter, this subchapter shall prevail: Provided, That in any situation where the provisions of this subchapter cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Title 29 United States Code section 166

If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Title 29 United States Code section 167

This subchapter may be cited as the "National Labor Relations Act".

Title 29 United States Code section 168

No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 159 of this title, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 159(f), (g), or (h) of this title prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 159(f), (g), or (h) of this title prior to November 7, 1947: Provided, That no liability shall be imposed under any provision of this chapter upon any person for failure to honor any election or certificate referred to above, prior to October 22, 1951: Provided, however, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 160(e) or (f) of this title and which have become final.

Title 29 United States Code section 169

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

Title 28 United States Code section 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

U.S. Constitution, Article VI, Clause 2

In the 1940s, the Court began to develop modern standards, still recited and relied on, for determining when preemption occurred. All modern cases recite some variation of the basic standards. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress's intent we examine the explicit statutory language and the structure and purpose of the statute." Congress's intent to supplant state authority in a particular field may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Because preemption cases, when the statute contains no express provision, theoretically turn on statutory construction, generalizations about them can carry one only so far. Each case must construe a different federal statute with a distinct legislative history. If the statute and the legislative history are silent or unclear, the Supreme Court has developed general criteria which it purports to use in determining the preemptive reach.

"Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption:

field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, . . . and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." However, "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakably so ordained." At the same time, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."

In the final analysis, "the generalities" that may be drawn from the cases do not decide them. Rather, "the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances."

The Standards Applied

As might be expected from the caveat just quoted, any overview of the Court's preemption decisions can only make the field seem tangled, and to some extent it is. But some threads may be extracted.

Express Preemption. Of course, it is possible for Congress to write preemptive language that clearly and cleanly prescribes or does not prescribe displacement of state laws in an area. Provisions governing preemption can be relatively interpretation free, provides that "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any state . . . ." See *Jones v. Rath Packing Co.*, 430 U.S. 519, 528–32 (1977). See also *National Meat Ass'n v. Harris*, 565 U.S. ___, No. 10-224, slip op. (2012) (broad preemption of all state laws on slaughterhouse activities regardless of conflict with federal law). Similarly, much state action is saved by the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which states that "[n]othing in this chapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of

this chapter or the rules and regulations thereunder." For examples of other express preemptive provisions, see *Norfolk & Western Ry. v. American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991); *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). See also *Department of Treasury v. Fabe*, 508 U.S. 491 (1993). and the Court has recognized that certain statutory language can guide the interpretation. (m)(1)) (internal quotation marks omitted; emphasis added). A federal employee brought an action alleging violations of a Missouri consumer protection law against a private carrier that asserted a lien against the employee's personal injury settlement under the subrogation and reimbursement terms of a health insurance contract. While there was no dispute that the Missouri law "relates to health insurance," the Court examined whether the contractual subrogation and reimbursement terms "relate to . . . payments with respect to benefits." *Id.* at 2. Based on the statutory language, including "Congress' use of the expansive phrase 'relate to,'" the Court held that such contractual provisions do "'relate to . . . payments with respect to benefits' because subrogation and reimbursement rights yield just such payments. When a carrier exercises its right to either reimbursement or subrogation, it receives from either the beneficiary or a third party 'payment' respecting

the benefits the carrier had previously paid." *Id.* at 6–7. The Court also rejected the respondent's argument that allowing a contract to preempt state law violated the Supremacy Clause, which by its terms provides preemptive effect to the "laws of the United States." *Id.* at 9. The Court held "that the regime Congress enacted is compatible with the Supremacy Clause", *id.* at 1–2, because, like "[m]any other federal statutes," FEHBA provides that certain contract terms have preemptive force only to the extent that the contract "fall[s] within the statute's preemptive scope." *Id.* at 9. In this way, the Court concluded that the "statute, not a contract, strips state law of its force." *Id.* For a discussion of preemption in the context of the Supremacy Clause, see infra Article VI: Clause 2. For example, a prohibition of state taxes on carriage of air passengers "or on the gross receipts derived therefrom" was held to preempt a state tax on airlines, described by the state as a personal property tax, but based on a percentage of the airline's gross income. "The manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision are to impose a levy upon the gross receipts of airlines."

But, more often than not, express preemptive language may be ambiguous or at least not free from

conflicting interpretation.)). But see *id.* at 799, 803–04 (holding that § 1324a(b)(5) did not expressly preempt state prosecutions of non-U.S. citizens under state identify-theft and false-information statutes for using on a tax-withholding form the same false Social Security numbers as used on an I-9 form). Thus, the Court was divided with respect to whether a provision of the Airline Deregulation Act proscribing the states from having and enforcing laws "relating to rates, routes, or services of any air carrier" applied to displace state consumer-protection laws regulating airline fare advertising. (a)(1), was held to preempt state rules on advertising. See also *American Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995); *Nw., Inc. v. Ginsberg*, 572 U.S. ___, No. 12-462, slip op. (2014) (holding that the Airline Deregulation Act's preemption provision applied to state common law claims, including an airline customer's claim for breach of the implied covenant of good faith and fair dealing). But see *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. ___, No. 12-52, slip op. (2013) (provision of Federal Aviation Administration Authorization Act of 1994 preempting state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" held not to preempt state laws on the disposal of towed vehicles by towing

companies). Delimiting the scope of an exception in an express preemption provision can also present challenges. For example, the Immigration Control and Reform Act of 1986 (IRCA), which imposed the first comprehensive federal sanctions against employing aliens not authorized to work in the United States, preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ unauthorized aliens." (h)(2). In Chamber of Commerce of the *United States v. Whiting*, a majority of the Court adopted a straightforward "plain meaning" approach to uphold a 2007 Arizona law that called for the suspension or revocation of the business licenses (including articles of incorporation and like documents) of Arizona employers found to have knowingly hired an unauthorized alien. By contrast, two dissenting opinions were troubled that the Arizona sanction was far more severe than that authorized for similar violations under either federal law or state laws in force prior to IRCA. The dissents interpreted IRCA's "licensing and similar laws" language narrowly to cover only businesses that primarily recruit or refer workers for employment, or businesses that have been found by federal authorities to have violated federal sanctions, respectively.

At issue in *AT&T Mobility, LLC v. Concepcion* was a savings provision of the Federal Arbitration Act (FAA) that made arbitration provisions in contracts "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." An arbitration provision in their cellular telephone contract forbade plaintiffs from seeking arbitration of an allegedly fraudulent practice by AT&T on a class basis. The Court closely divided over whether the FAA saving clause made this anti-class arbitration provision attackable under California law against class action waivers in consumer contracts, or whether the savings clause looked solely to grounds for revoking the cellular contract that had nothing to do with the arbitration provision. Another case focused on a preemption clause that preempted certain laws of "a State [or] political subdivision of a State" regulating motor carriers, but excepted "[State] safely regulatory authority." The Court interpreted the exception to allow a safety regulation adopted by a city: "[a]bsent a clear statement to the contrary, Congress's reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts."

Perhaps the broadest preemption section ever enacted, § 514 of the Employment Retirement Income Security Act of 1974 (ERISA), is so constructed that the Court has been moved to comment that the provisions "are not a model of legislative drafting." The section declares that the statute shall "supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan," but saves to the States the power to enforce "any law . . . which regulates insurance, banking, or securities," except that an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts. (a), 1144(b)(2)(A), 1144(b)(2)(B). The Court has described this section as a "virtually unique pre-emption provision." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138–139 (1990); see also *id.* at 142–45 (describing and applying another preemption provision of ERISA). Interpretation of the provisions has resulted in contentious and divided Court opinions.

Also illustrative of the judicial difficulty with ambiguous preemption language are the fractured

opinions in *Cipollone*, in which the Court had to decide whether sections of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 and 1969, preempted state common-law actions against a cigarette company for the alleged harm visited on a smoker. The 1965 provision barred the requirement of any "statement" relating to smoking health, other than what the federal law imposed, and the 1969 provision barred the imposition of any "requirement or prohibition based on smoking and health" by any "State law." It was, thus, a fair question whether common-law claims, based on design defect, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud, were preempted or whether only positive state enactments came within the scope of the clauses. Two groups of Justices concluded that the 1965 section reached only positive state law and did not preempt common-law actions; different alignments of Justices concluded that the 1969 provisions did reach common-law claims, as well as positive enactments, and did preempt some of the claims insofar as they in fact constituted a requirement or prohibition based on smoking health.

Little clarification of the confusing Cipollone decision and opinions resulted in the cases following,

although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in *Medtronic, Inc. v. Lohr* was the Medical Device Amendments (MDA) of 1976, which prohibited states from adopting or continuing in effect "with respect to a [medical] device" any "requirement" that is "different from, or in addition to" the applicable federal requirement and that relates to the safety or effectiveness of the device. (a). The issue was whether a common-law tort obligation imposed a "requirement" that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as determined by the FDA to be "substantially equivalent" to a device previously on the market, a situation of some import to at least some of the Justices.

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent states from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4-1-4 with respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited

preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them from the category of requirements "with respect to" specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, "requirements" that were preempted, though they did not agree on the application of that view.

Following Cipollone, the Court observed that, although it "need not go beyond" the statutory preemption language, it did need to "identify the domain expressly pre-empted" by the language, so that "our interpretation of that language does not occur in a contextual vacuum." That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not cavalierly preempt common-law causes of action and the principle that Congress's purpose is the ultimate touchstone.

The Court continued to struggle with application of express preemption language to state common-law tort actions in *Geier v. American Honda Motor Co*. The

National Traffic and Motor Vehicle Safety Act contained both a preemption clause, prohibiting states from applying "any safety standard" different from an applicable federal standard, and a "saving clause," providing that "compliance with" a federal safety standard "does not exempt any person from any liability under common law." The Court determined that the express preemption clause was inapplicable, because the saving clause implied that some number of state common law actions would be saved. However, despite the saving clause, the Court ruled that a common law tort action seeking damages for failure to equip a car with a front seat airbag, in addition to a seat belt, was preempted. According to the Court, allowing the suit would frustrate the purpose of a Federal Motor Vehicle Safety Standard that specifically had intended to give manufacturers a choice among a variety of "passive restraint" systems for the applicable model year. The Court's holding makes clear, contrary to the suggestion in *Cipollone*, that existence of express preemption language does not foreclose the alternative operation of conflict (in this case "frustration of purpose") preemption. (interpreting FIFRA, the federal law governing pesticides).

In *Virginia Uranium, Inc., v. Warren*, the Supreme

Court considered whether a disputed statutory provision was a preemption clause at all. A clause in the Atomic Energy Act provided that nothing in the relevant section should be construed to affect state authority "to regulate activities for purposes other than protection against radiation hazards." (k)) (internal quotation mark omitted). A litigant argued this provision displaced "any state law . . . if that law was enacted for the purpose of protecting the public against 'radiation hazards.'" Justice Gorsuch disagreed, writing for three members of the Court, instead describing this provision as "a non-preemption clause." He said that this statute meant "only state laws that seek to regulate the activities discussed" in that section should be "be scrutinized to ensure their purposes aim at something other than regulating nuclear safety." Three concurring Justices agreed that the effect of this provision was relatively limited, reading the law to address only those "activities" that were already regulated under the statute.

Field Preemption. Where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," states are ousted from the field. Still a paradigmatic example of field preemption is *Hines*

v. Davidowitz, in which the Court held that a new federal law requiring the registration of all aliens in the country precluded enforcement of a pre-existing state law mandating registration of aliens within the state. Adverting to the supremacy of national power in foreign relations and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs, the Court had little difficulty declaring the entire field to have been occupied by federal law. Similarly, in *Pennsylvania v. Nelson*, the Court invalidated as preempted a state law punishing sedition against the National Government. The Court enunciated a three-part test: (1) the pervasiveness of federal regulation, (2) federal occupation of the field as necessitated by the need for national uniformity, and (3) the danger of conflict between state and federal administration.

Rice itself held that a federal system of regulating the operations of warehouses and the rates they charged completely occupied the field and ousted state regulation.

Field preemption analysis often involves delimiting the subject of federal regulation and determining whether a federal law has regulated part of the field, however defined, or the whole area, so that

state law cannot even supplement the federal. Illustrative of this point is the Court's holding that the Atomic Energy Act's preemption of the safety aspects of nuclear power did not invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities were available to treat nuclear wastes, because "economic" regulation of power generation has traditionally been left to the states—an arrangement maintained by the Act—and because the state law could be justified as an economic rather than a safety regulation.

A city's effort to enforce stiff penalties for ship pollution that resulted from boilers approved by the Federal Government was held not preempted, the field of boiler safety, but not boiler pollution, having been occupied by federal regulation. A state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which textually presupposed federal-state cooperation. On the other hand, a comprehensive regulation of the design, size, and movement of oil tankers in Puget Sound was found, save in one respect, to be either

expressly or implicitly preempted by federal law and regulations. Critical to the determination was the Court's conclusion that Congress, without actually saying so, had intended to mandate exclusive standards and a single federal decisionmaker for safety purposes in vessel regulation. Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.

The Court has, however, recognized that when a federal statute preempts a narrow field, leaving states to regulate outside of that field, state laws whose "target" is beyond the field of federal regulation are not necessarily displaced by field preemption principles, and such state laws may "incidentally" affect the preempted field. In *Oneok v. Learjet*, gas pipeline companies and the federal government asserted that state antitrust claims against the pipeline companies for alleged manipulation of certain indices used in setting natural gas prices were field preempted because the Natural Gas Act (NGA) regulates wholesale prices of natural gas. The Court disagreed. In so doing, the Court noted that the

alleged manipulation of the price indices also affected retail prices, the regulation of which is left to the states by the NGA. Because the Court viewed Congress as having struck a "careful balance" between federal and state regulation when enacting the NGA, it took the view that, "where (as here) a state law can be applied" both to sales regulated by the federal government and to other sales, "we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents." The Court found no such preemption here, in part because the " target at which the state law aims" was practices affecting retail prices, something which the Court viewed as "firmly on the States' side of th[e] dividing line." The Court also noted that the "broad applicability" of state antitrust laws supported a finding of no preemption here, as does the states' historic role in providing common law and statutory remedies against monopolies and unfair business practices. However, while declining to find field preemption, the Court left open the possibility of conflict preemption, which had not been raised by the parties.

Congress may preempt state regulation without itself prescribing a federal standard; it may

deregulate a field and thus occupy it by opting for market regulation and precluding state or local regulation.

Conflict Preemption. Several possible situations will lead to a holding that a state law is preempted as in conflict with federal law. First, it may be that the two laws, federal and state, will actually conflict. Thus, in *Rose v. Arkansas State Police*, federal law provided for death benefits for state law enforcement officers "in addition to" any other compensation, while the state law required a reduction in state benefits by the amount received from other sources. The Court, in a brief, per curiam opinion, had no difficulty finding the state provision preempted.

Second, conflict preemption may occur when it is practically impossible to comply with the terms of both laws. Thus, where a federal agency had authorized federal savings and loan associations to include "due-on-sale" clauses in their loan instruments and where the state had largely prevented inclusion of such clauses, while it was literally possible for lenders to comply with both rules, the federal rule being permissive, the state regulation prevented the exercise of the flexibility the federal agency had conferred and was preempted. More

problematic are circumstances in which a party has an administrative avenue for seeking removal of impediments to dual compliance. In *Pliva, Inc. v. Mensing*, federal law required generic drugs to be labeled the same as the brand name counterpart, while state tort law required drug labels to contain adequate warnings to render use of the drug reasonably safe. There had been accumulating evidence that long-term use of the drug metoclopramide carried a significant risk of severe neurological damage, but manufacturers of generic metoclopramide neither amended their warning labels nor sought to have the Food and Drug Administration require the brand name manufacturer to include stronger label warnings, which consequently would have led to stronger labeling of the generic. Five Justices held that state tort law was preempted. It was impossible to comply both with the state law duty to change the label and the federal law duty to keep the label the same. The four dissenting Justices argued that inability to change the labels unilaterally was insufficient, standing alone, to establish a defense based on impossibility. Emphasizing the federal duty to monitor the safety of their drugs, the dissenters would require that the generic manufacturers also show some effort to

effectuate a labeling change through the FDA.

The Court reached a similar result in *Mutual Pharmaceutical Co. v. Bartlett*. There, the Court again faced the question of whether FDA labeling requirements preempted state tort law in a case involving sales by a generic drug manufacturer. The lower court had held that it was not impossible for the manufacturer to comply with both the FDA's labeling requirements and state law that required stronger warnings regarding the drug's safety because the manufacturer could simply stop selling the drug. The Supreme Court rejected the "stop-selling rationale" because it "would render impossibility pre-emption a dead letter and work a revolution in . . . pre-emption case law."

In contrast to *Pliva, Inc. v. Mensing* and *Mutual Pharmaceutical Co. v. Bartlett*, the Court found no preemption in *Wyeth v. Levine*, a state tort action against a brand-name drug manufacturer based on inadequate labeling.; *see also Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. ___, No. 17-290, slip op. at 9 (2019) (explaining that pursuant to the standard announced in *Wyeth*, "state law failure-to-warn claims are pre-empted" by federal law "when there is 'clear evidence' that the FDA would not have approved the

warning that state law requires," and holding that impossibility preemption based on clear evidence is a question of law for a judge, not a jury, to decide). A brand-name drug manufacturer, unlike makers of generic drugs, could unilaterally strengthen labeling under federal regulations, subject to subsequent FDA override, and thereby independently meet state tort law requirements. In another case of alleged impossibility, it was held possible for an employer to comply both with a state law mandating leave and reinstatement to pregnant employees and with a federal law prohibiting employment discrimination on the basis of pregnancy. Similarly, when faced with both federal and state standards on the ripeness of avocados, the Court discerned that the federal standard was a "minimum" one rather than a "uniform" one and decided that growers could comply with both.

Third, a fruitful source of preemption is found when it is determined that the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. (holding that a provision of Arizona law making it a crime for "'an unauthorized alien to knowingly apply for work'" in Arizona was preempted because it "would interfere with the careful balance struck by Congress with respect to

unauthorized employment of aliens" in the Immigration Reform and Control Act of 1986 (IRCA)). But see *Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020) (distinguishing Arizona because in "enacting IRCA, Congress did not decide that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution," and, in fact, "federal law makes it a crime to use fraudulent information on a W-4" withholding form). Thus, despite the inclusion of a saving clause preserving liability under common law, the National Traffic and Motor Vehicle Safety Act nevertheless was found to have preempted a state common law tort action based on the failure of a car manufacturer to install front seat airbags: Giving car manufacturers some leeway in developing and introducing passive safety restraint devices was, according to the Court, a key congressional objective under the Act, one that would frustrated should a tort action be allowed to proceed. The Court also has voided a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal law permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the state allowed no such deviation. Although it was possible

for a producer to satisfy the federal standard while satisfying the tougher state standard, the Court discerned that to do so defeated one purpose of the federal requirement—the facilitating of value comparisons by shoppers. Because different producers in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers would not be comparing packages containing identical amounts of flour solids. In *Felder v. Casey*, a state notice-of-claim statute was found to frustrate the remedial objectives of civil rights laws as applied to actions brought in state court under 42 U.S.C. § 1983. A state law recognizing the validity of an unrecorded oral sale of an aircraft was held preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft's title readily available by requiring that all transfers be documented and recorded.

In *Boggs v. Boggs*, the Court, 5-to-4, applied the "stands as an obstacle" test for conflict even though the statute (ERISA) contains an express preemption section. The dispute arose in a community-property state, in which heirs of a deceased wife claimed

property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law "relate[d] to" a covered pension plan or because state law had an impermissible "connection with" a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. "We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption."

Similarly, the Court found it unnecessary to

consider field preemption due to its holding that a Massachusetts law barring state agencies from purchasing goods or services from companies doing business with Burma imposed obstacles to the accomplishment of Congress's full objectives under the federal Burma sanctions law. The state law was said to undermine the federal law in several respects that could have implicated field preemption—by limiting the President's effective discretion to control sanctions, and by frustrating the President's ability to engage in effective diplomacy in developing a comprehensive multilateral strategy—but the Court "decline[d] to speak to field preemption as a separate issue."

Also, a state law making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers was held to counter a strong federal policy protecting the right of farmers to join or not join such associations. And a state assertion of the right to set minimum stream-flow requirements different from those established by FERC in its licensing capacity was denied as being preempted under the Federal Power Act, despite language requiring deference to state laws "relating to the control, appropriation, use, or distribution of water."

Contrarily, a comprehensive federal regulation of insecticides and other such chemicals was held not to preempt a town ordinance that required a permit for the spraying of pesticides, there being no conflict between requirements. The application of state antitrust laws to authorize indirect purchasers to recover for all overcharges passed on to them by direct purchasers was held to implicate no preemption concerns, because the federal antitrust laws had been interpreted to not permit indirect purchasers to recover under federal law; the state law may have been inconsistent with federal law but in no way did it frustrate federal objectives and policies. The effect of federal policy was not strong enough to warrant a holding of preemption when a state authorized condemnation of abandoned railroad property after conclusion of an ICC proceeding permitting abandonment, although the railroad's opportunity costs in the property had been considered in the decision on abandonment.