UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA CHAMBER OF COMMERCE, et al.,

Plaintiff,

v.

ROBERT BONTA, et al.,

Defendants.

No. 2:24-cv-03798-DJC-

ORDER

This case concerns a challenge to California Senate Bill 399, which broadly speaking prohibits employers from subjecting employees to adverse action where the employee declines to attend a meeting where the employer communicates his or her opinion about religious or political matters. Importantly for resolving this motion is the fact that political matters expressly includes discussions related to the decision whether or not to form or join a labor union. Plaintiffs, a collection of employer interest groups, seek to preliminary enjoin the enforcement of SB 399 on the grounds that it is preempted under the National Labor Relations Act and violates the Free Speech Clause of the First Amendment. Plaintiffs are particularly concerned that SB 399 will chill employer speech thereby distorting the conversation between

employers and employees. Plaintiffs also contend that SB 399 is a viewpoint and content-based regulation that cannot withstand strict scrutiny.

With respect to preemption, the Court agrees that SB 399 is preempted by the National Labor Relations Act to the extent it purports to prohibit employers from requiring the presence of employees to communicate the employer's message on unionization. The result is somewhat counterintuitive since the National Labor Relations Board interprets the Act to prohibit such meetings, but under the broad preemptive scope given to the Act, that matter is for the Board — not the States — to decide. Concerning the First Amendment challenge the Court rejects that SB 399 simply regulates conduct, since what conduct is prohibited turned solely on the subject being discussed at a required meeting. While the Court recognizes the State's interests in protecting employees in these circumstances, the Court concludes SB 399 is a content-based regulation of speech that cannot withstand strict scrutiny. Accordingly, the Court GRANTS Plaintiffs' requested relief and preliminarily enjoins SB 399.

BACKGROUND

In 2024, the California Legislature enacted Senate Bill 399 ("SB 399"), codified as California Labor Code § 1137, which became effective January 1, 2025. (Mot. PI (ECF No. 13) at 1.) SB 399 was enacted in response to the Legislature's concern about "captive audience meetings" held by employers during which employers share their opinions on political or religious matters unrelated to the employees' job duties. (Def. Opp'n (ECF No. 19) at 1–2; Liska Decl. (ECF No. 19-1) Ex. 1, at 5; Liska Decl. Ex. 4, at 4; Liska Decl. Ex. 5 at 3.) These meetings can be mandatory, and employees who do not attend risk adverse employment action. (Def. Opp'n at 1; Liska Decl. Ex. 1 at 4.) The Legislature expressed serious concern about such retaliation and the potential for coercion given than employees may feel compelled to adopt their employer's viewpoints on political and/or religious matters. (Def. Opp'n at 2–3; Liska Decl. (ECF

No. 19-1) Ex. 1, at 5; Liska Decl. Ex. 4, at 4; Liska Decl. Ex. 5 at 3.) To those ends, SB 399 provides that:

> [A]n employer, except as provided in subdivisions (g) and (h), shall not subject, or threaten to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because the employee declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters. An employee who is working at the time of the meeting and elects not to attend a meeting described in this subdivision shall continue to be paid while the meeting is being held.

Cal. Lab. Code § 1137(c). "Political matters" are defined as "matters relating to elections for political office, political parties, legislation, regulation, and the decision to join or support any political party or political or labor organization." *Id.* § 1137(b)(3). Religious matters are "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association." *Id.* § 1137(b)(4).

Defendants highlight several exceptions to SB 399. First, SB 399 does not restrict an employer from conveying information related to an employee's job duties. *See Id.* §§ 1137(g)(1); 1137(h)(5); 1137 (g)(4); 1137 (g)(4). Additionally, SB 399 exempts situations involving circumstances that do not implicate the Legislature's concerns over coercion present in the mandatory meeting scenario. *See Id.* §§ 1137(h)(1)–(4), (h)(6). Lastly, Defendants note that SB 399's definition of "employee" is not limited based on union-status. *See id.* § 1137(b)(1).

Plaintiff California Chamber of Commerce (CalChamber) is a nonprofit business association with approximately 13,000 members in California and represents the interests of the business community in a broad range of legislative, regulatory and legal issues. (Mot. PI at 6; Decl. of Ben Golombek ("Golombek Decl.") (ECF No. 13-2)

¶ 3.) Plaintiff California Restaurant Association is a member of CalChamber and is the "uniting voice" of the restaurant industry and a non-profit organization that promotes and protects industry interests through lobbying, monitoring the legislative process, initiating grass roots campaigns, and establishing a membership network across California. (Mot. PI at 6; *See* Decl. of Jot Condie (ECF No. 13-4) ¶ 3; Golombek Decl. ¶ 3.) Plaintiff Western Growers Association is also a non-profit organization and member of CalChamber, and has a membership of nearly 2,400 family farmers, and advocates for industry interests through lobbying, monitoring the legislative process, and advocacy initiatives across the Western States. (Mot. PI at 6–7; *See* Decl. of Cory Lunde (ECF No. 13-3) ¶ 3; Golombek Decl. ¶ 3.) Together, these Plaintiffs seek to preliminarily enjoin Defendants Robert Bonta, Lilia Garcia-Brower and the Division of Labor Standards Enforcement of the California Department of Industrial Relations from enforcing SB 399. (Mot. PI at 1.) Additionally, the California Federation of Labor Unions, the California Coalition for Worker Power, the California Rural Legal Assistance Foundation, California Employment Lawyers Association, Warehouse Worker Resource Center, and Equal Rights Advocates have filed an Amici Curae Brief opposing Plaintiffs' Motion. (Am. Opp'n (ECF No. 22).)

Plaintiffs contend that SB 399 unlawfully regulates non-coercive speech of employers through implementing a "sweeping" limitation on speaking to employees about religious and political matters. (Mot. PI at 1.) In particular, Plaintiffs are concerned about the inclusion of "the decision to join or support any . . .labor organization" within the list of topics included within the definition of "political matters." (*Id.*) Plaintiffs allege that in enacting such a statute, the Legislature has placed its thumb on the scale in favor of labor. (*Id.*at 15.) Plaintiffs argue that relief is proper because SB 399 violates the First and Fourteenth Amendments by discriminating against employers' viewpoints on political and religious matters, regulating the content of employers' communications with their employees, and by chilling and prohibiting employer and union-related speech. (*Id.* at 1–2.) Additionally,

SB 399 is alleged to be preempted by the National Labor Relations Act, because it "intrudes" into the NLRA's express protection of employer speech concerning unionization, provided the employer does not threaten or promise employees benefit in the exercise of their protected concerted activities. (*Id.* at 2.)

Defendants and the Amici argue that Plaintiffs are distorting the description of SB 399 in defining it as a law that regulates non-coercive speech of employer. Rather, SB 399 is an anti-retaliation law that does not prohibit employers from speaking on matters of religious or political issues but prevents employers from punishing employees with adverse employment action who do not wish to attend such meetings. (*See* Def. Opp'n at 6; Am. Opp'n at 2.) Defendants discuss the "tremendous power" that employers hold over their employees and the concern about employers using such a power to compel an employee to adopt the employer's view on religious or political matters out of fear of employment repercussions. (Def. Opp'n at 2–3.) Moreover, the Amici contend that California has a long-standing history of protecting employees' autonomy in making their decisions about political and religious matters, and SB 399 is in lockstep with its taxonomy of anti-retaliation provisions that regulate the employment relationship. (Am. Opp'n at 4.)

Plaintiffs first filed suit against Defendants in December 2024. A few months later, Plaintiffs filed the instant Motion for Preliminary Injunction. The Defendants filed an Opposition, as did the Amici, and Plaintiffs filed a Reply (Reply (ECF No. 23)). The Court heard oral argument on May 22, 2025, and allowed the Parties to submit additional briefing. (ECF Nos 28, 29.)

LEGAL STANDARD

Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm absent preliminary relief, (3) the balance of equities tips in their favor, and (4) and injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit employs a sliding scale approach to the *Winter* factors, under which a

strong showing on the balance of hardships may compensate for a lesser showing of likelihood of success. *See Where Do We Go Berkeley v. California Dep't of Transp.*, 32 F.4th 852, 859 (9th Cir. 2022).

For cases arising under the First Amendment, showing a likelihood of success on the merits often results in finding that the remaining *Winter* factors are also satisfied. *See Am. Beverage Ass'n v. City & Cnty. of San Francisco,* 916 F.3d 749, 757–78 (9th Cir. 2019). When a plaintiff has "a colorable First Amendment claim, they have demonstrated that they likely will suffer irreparable harm if the [law] takes effect." *Id.* at 758. Further, finding a plaintiff has raised serious First Amendment questions compels a finding that the balance of hardships tips sharply in their favor. *See id.* Lastly, there is a "significant public interest in upholding First Amendment principles" and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (internal quotation marks and citations omitted).

DISCUSSION

I. Standing

The Amici argue that Plaintiffs lack standing to seek injunctive relief. (Am. Opp'n at 5.) Particularly, they contend that Plaintiffs cannot bring a pre-enforcement challenge because they have not adequately alleged a "concrete plan" to violate SB 399. (Mot. PI at 5–6.) Plaintiffs contend that they have adequately pled standing and ripeness. (*See* Reply 10–14.)

At the preliminary injunction stage, Plaintiffs "must make a clear showing of each element of standing, relying on the allegations in their complaint and whatever other evidence they submitted in support of their preliminary-injunction motion to meet their burden." *LA All. for Hum. Rts. v. County of Los Angeles,* 14 F.4th 947, 956–57 (9th Cir. 2021) (cleaned up). Further, plaintiffs must demonstrate standing for each form of relief sought and the remedy must be narrowly tailored to redress their particular injury. *See id.* at 957 (cleaned up). Plaintiffs allege a theory of associational standing, which requires at least one of their members to have suffered (1) an injury in

fact, (2) caused by the defendant's challenged conduct and (3) is likely redressed by a favorable judicial ruling. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560–61 (1992); *see NetChoice, LLC v. Bonta,* ---- F.4th ----, 2025 WL 260007, at *6 (9th Cir. 2025) (explaining that associational standing requires showing its members have standing to sue on their own). An injury in fact must be "concrete, particularized, and actual or imminent[.]" *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 409 (2013) (internal quotation marks omitted. When the First Amendment is at issue, there are unique standing considerations such that "the inquiry tilts dramatically toward a finding of standing." *Libertarian Party of L.A., Cnty. v. Bowen,* 709 F.3d 867, 870 (9th Cir. 2013) (citation omitted). This is because "a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Id.* (citation omitted).

To state a pre-enforcement injury, a plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony v. Driehaus,* 573 U.S 149, 159 (2014). The Ninth Circuit typically relies on a three-factor inquiry (the *Thomas* factors) to determine whether a threat of enforcement is genuine enough to confer Article III injury. *See Tingley v. Ferguson,* 47 F.4th 1055, 1067 (9th Cir. 2022). Specifically, (1) whether the plaintiff has a concrete plan to violate the law; (2) whether the enforcement authorities have communicated a specific warning or threat to initiate proceedings; and (3) whether there is a history of past prosecution or enforcement. *Id*. Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies this test. *Id.*

The Court finds that Plaintiffs have adequately stated an injury in fact for purposes of a pre-enforcement injury. The Court agrees that the pleadings do not thoroughly express an intent to violate SB 399. However, the Complaint does indicate that Plaintiffs' membership seeks to engage in the types of communications that it fears are proscribed under SB 399. (*See* FAC (ECF No.12) ¶¶ 10–11, 19.) That said, given the government's failure to disavow enforcement of SB 399 and the allegations

of chilled speech that Plaintiff plausibly makes, it appears that a pre-enforcement injury exists. The final factor regarding the enforcement of history is not dispositive one way or another, as the statute became effective on January 1, 2025. *See Tingley,* 47 F.4th at 1069. Thus, Plaintiffs have adequately alleged standing for purposes of this Motion.

II. Likelihood of Success on the Merits

A. NLRA Preemption

The NLRA serves as the "federal architecture" that governs the relations between labor and management. *Am. Hotel and Lodging Ass'n v. City of Los Angeles,* 834 F.3d 958, 963 (9th Cir. 2016). The NLRA itself contains no express preemption provision. *Id.* That said, the Supreme Court has recognized two forms of defensive, implicit preemption – known as *Garmon* preemption and *Machinists* preemption – to safeguard the implementation and substance of federal labor policy. *See id.* Plaintiffs contend that both forms of preemption apply to SB 399 such that an injunction is proper. (Mot. PI at 13.) Defendants largely argue that SB 399 is not preempted by the NLRA because SB 399 is a minimum labor standard deeply rooted in the States' power to protect individual employees' autonomy. (*See* Def. Opp'n at 17–18.) The Court will address both forms of preemption and any relevant exceptions.

1. NLRA Background

Congress's enactment of the NLRA reflects its determination that protecting the right of employees to organize and bargain collectively is necessary to address "[t]he 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." 29 U.S.C. § 151. Section 7 of the NLRA protects employees' rights "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." *Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters Loc.*

Union No. 174, 598 U.S. 771, 775 (2023) (citing 29 U.S.C. § 157). Section 8 prohibits employers and unions from engaging in certain "unfair labor practice[s]," including employees' exercise of the rights outlined in Section 7. *Id.* (citing 29 U.S.C. § 158).

To support the enforcement of the NLRA, Congress also established the National Labor Relations Board. *Id.* The NLRB has the authority "to prevent any person from engaging in any unfair labor practice" that "affect[s] commerce." *Id.* (citing 29 U.S.C. § 160(a)). This "authority kicks in when a person files a charge with the agency alleging that an unfair labor practice is afoot." *Id.* (citing 29 C.F.R. § 101.2 (2021)). Even so, not all parties seeking to resolve a labor dispute go directly to the NLRB. Instead, parties might first to the courts, thereby creating situations where state law resolves a labor dispute one way, while the NLRA says something different. *See id.* at 776 (citations omitted).

2. *Garmon* Preemption

i. *Garmon* Background

Recognizing the danger of state interference arising from conflicting court and NLRB decisions, the Supreme Court has held that "[w]hen an activity is arguably subject to [section] 7 or [section] 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the NLRB." *S.D. Bldg. Trades Council v. Garmon,* 359 U.S. 236, 245 (1959), This form of preemption, referred to as *Garmon* preemption, may exist even where state law and the NLRA "only *arguably* conflict." *Glacier Northwest,* 598 U.S. at 776 (emphasis in original).

Although broader than other forms of preemption, *Garmon* preemption is not a standard without "teeth." *Id.* There must be more than a "conclusory assertion" that conduct is protected or prohibited by the NLRA. *Id.* (citing *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S 380, 394 (1986)). Instead, the moving party "must advance an interpretation of the [NLRA] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Id.* (citing *Int'l Longshoremen's Ass'n,* 476 U.S. at 395). Upon making this showing, the party must

"put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Id.* Failure to meet either of these tests will not support a finding of *Garmon* preemption. *See id.* at 779 (finding that the moving party did not meet its burden where it "passe[d] the first test but fail[ed] the second"). Once the burden of showing that "there is an arguable case for pre-emption" is met, the court must await the Board's resolution of the legal status of the conduct. *Id.* at 777. For it is only if the NLRB decides that conduct is not protected or prohibited [by the NLRA] that a court may entertain the litigation. *Id.*

The difference between conduct protected by Section 7 or prohibited by Section 8 is relevant as it relates to the animating concern behind the need for *Garmon* preemption. Where laws regulate conduct protected by Section 7, the concern is that the state court will improperly restrict conduct actually protected under the NLRA. *Sears, Roebuck & Co. v. S.D. Cnty. Dist. Council of Carpenters,* 436 U.S. 180, 203 (1978). As such, "pre-emption follows not as a matter of protecting [the] primary jurisdiction [of the NLRB], but as a matter of substantive right." *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union, Loc. 54,* 468 U.S. 491, 503 (1984). But where the state law regulates prohibited conduct under Section 8, the concern is rooted in ensuring the NLRB's "primary jurisdiction to enforce the statutory prohibition against unfair labor practices" under the NLRA. *See Sears,* 436 U.S. at 198.

Garmon preemption is not "inflexible" or "mechanical" such that it applies at any time to state law that regulates the workplace. *Id.* at 188. In fact, there several recognized exceptions. First, a court is allowed to resolve a claim if the party raising such claim lacks a "reasonable opportunity" to secure a Board decision on the legal status of the conduct at issue. *Glacier Northwest,* 598 U.S. at 777 n.1 (citation omitted). Next, a court may entertain litigation where that conduct is "a merely peripheral concern" of the NLRA. *Id.* (citation omitted). The last exception exists, "where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction" a court

cannot conclude that Congress "deprived the States of the power to act." *Id.* (citation omitted).

This Court also recognizes that in many circumstances, *Garmon* preemption is invoked as shield. *See, e.g.*, *Glacier Northwest,* 598 U.S. 771 (2023); *Moreno v. UtiliQuest, LLC,* 29 F.4th 567 (9th Cir. 2022). Here, however, Plaintiffs seek to use *Garmon* as a sword to strike down SB 399. In *Idaho Building and Construction Trades Council v. Inland Pacific*, 801 F.3d 950, 954 (9th Cir. 2015), the Ninth Circuit addressed a facial challenge brought by two unions seeking to enjoin an Idaho statute banning "job targeting" or "market recovery programs" because it was preempted by the NLRA. The Ninth Circuit affirmed in relevant part the district court's grant of injunction and grant of summary judgment because the NLRB made clear that the conduct at issue was at least arguably protected by the NLRA and thus preempted under *Garmon*. *Id.* at 962. As to the facial nature of the challenge, the Ninth Circuit applied the standard outlined in *United States v. Salerno*[1], 481 U.S. 739 (1987), and found that the "[a]ll of the conduct prohibited by the Act is either actually or arguably protected under § 7, and no exception to preemption applies." *Idaho Bldg.,* 801 F.3d at 967. This Court will apply a similar framework to this matter, recognizing that "we must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 (2008) (citation and internal quotation marks omitted).

With these principles in mind, the Court now addresses whether Plaintiffs have met their burden of invoking *Garmon* preemption and if they have, whether Defendants are correct that an exception applies. The Court will then address *Machinists* preemption.

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[1] The Ninth Circuit applied this standard without deciding whether it was the appropriate standard. But in *Puente Arizona v. Arpaio,* the Ninth Circuit stated that the *Salerno* standard applies in typical facial challenges. 821 F.3d 1098, 1104 (9th Cir. 2016).

ii. *Garmon* Analysis

Plaintiffs argue that SB 399 is preempted by the NLRA because SB 399's proscription of union-related messages when conducted during a mandatory meeting directly conflicts with Section 8(c). Plaintiffs also argue that while the conduct here may be preempted by the NLRA, the responsibility for making that decision rests with the NLRB, not the State, such that *Garmon* preemption still exists. Lastly, Plaintiffs argue that SB 399 nevertheless "stymies" employees' ability to learn about the advantages and disadvantages of unionization, which interferes with Section 7 of the NLRA.[2] Defendants do not meaningfully contest that *Garmon* preemption exists in this case but focus their arguments on the exceptions described above. That said, the Court first assesses whether Plaintiffs have met the burden of invoking *Garmon* preemption before turning to the exceptions advanced by Defendants.

As the party invoking *Garmon,* Plaintiffs must "advance an interpretation of the [NLRA] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the [NLRB] and [ ] offer enough evidence to enable the Court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation." *Moreno,* 29 F.4th at 577 (citations omitted). Since *Garmon* preemption looks to what the NLRA actually or arguably protects or prohibits, "we look principally to the decisions of the NLRB to decide whether *Garmon* preemption applies." *Idaho Bldg.*, 801 F.3d at 962.

Here, Plaintiffs point to the NLRB's decision in *Amazon.com Servs. LLC,* 373 NLRB No. 136, 2024 WL 4774441 (Nov. 13, 2024), to argue that *Garmon* preemption exists. In the *Amazon* decision, the Board overruled its holding in *Babcock & Wilson*, which had held that "captive-audience meeting[s] [were] not unlawful" based on the language of Section 8(c) of the [NLRA], and its legislative history. *Id.* at *17. A captive-audience meeting in this context is a mandatory meeting urging employees to reject

[2] While Plaintiffs' position is somewhat inconsistent as to whether the conduct is ultimately permissible under the NLRA, it is consistent in that the Plaintiff believes that the issue is one for the NLRB to decide.

union representation. *See id.* at *2. In revisiting the *Babcock* decision, the Board explained that "[n]either Section 8(c) nor the First Amendment precludes the Board from finding captive-audience meetings unlawful" because nothing in Section 8(c) permitted employers to compel employees to listen to their speech. *Id.* at *19. The Board also explained that captive-audience meetings interfered with employees' Section 7 rights because (1) they impinged on the Section 7 right to choose, free from employer coercion, the degree to which they will participate in the debate concerning representation; (2) gave employers the ability to observe and surveil employees as they address the exercise of employees' Section 7 rights; and (3) were essentially coercive because it compelled attendance at the risk of discharge or discipline. *Id.* at *20. Ultimately, because captive-audience meetings "impermissibly demonstrate to employees that their employer's power over them in the workplace extends to the denial of the exercise of the rights guaranteed by Section 7" the Board found that these meetings violate Section 8(a)(1) of the NLRA. *Id.* at *23.

Plaintiffs' citation to *Amazon* is counterintuitive, because the content of the decision contradicts Plaintiffs' argument that the types of mandatory meetings at issue here are protected under Section 8(c), at least as it pertains to unionization. Thus, Plaintiffs' interpretation of Section 8(c) is not reasonably supported, at least as to the NLRA. However, Plaintiffs alternatively argue that "even if mandatory meetings to discuss unionization in the workplace are prohibited" that *Garmon* preemption still applies. (Mot. PI at 14.) The *Amazon* decision indicates that to the extent that mandatory meetings discussing unionization are proscribed by SB 399, such meetings constitute activity that is prohibited under Section 8 of the NLRA. Thus, *Garmon* preemption has been properly invoked here because there is an interpretation of the NLRA that has not been rejected and evidence to show that the conduct is, in fact, prohibited. *See Glacier Northwest,* 598 U.S. at 777.

Defendants do not outright dispute the fact that *Garmon* applies. Rather, they point to two of the three recognized exceptions to *Garmon* in arguing that

preemption is improper. First, Defendants argue that this case does not involve a situation where a party could have raised a claim before the Board itself. Given the lack of opportunity or attempt to bring an identical claim before the Board such that it could exercise its primary jurisdiction, Defendants argue, *Garmon* preemption does not apply. Second, Defendants argue that SB 399 involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction" and the court cannot conclude that Congress deprived the States of the power to Act. The Court considers each exception in turn.

a. Reasonable Opportunity Exception

Under the reasonable opportunity exception, where the party raising a preemption claim lacks a reasonable opportunity to secure a NLRB decision on the legal status of the conduct at issue, *Garmon* may not apply. *Glacier Northwest,* 598 U.S. at 777 n.1. This exception exists because concerns around protecting the Board's primary jurisdiction are inapplicable when the aggrieved party may not bring a charge to the NLRB, nor induce his opponent to do so. *See Sears,* 436 U.S. at 201("In this case, Sears could not directly obtain a Board ruling on the question whether the Union's trespass was federally protected."). Although, a "lack of recourse [does not] automatically render[] the preemption doctrine invalid," the court, "must reconsider any rote application of the doctrine." *John S. Griffith Const. Co. v. United Broth. of Carpenters & Joiners of S. Cal.,* 785 F.2d 706, 710 (9th Cir. 1986) (citations and quotation marks omitted). The purpose of this exception is ultimately to protect the Board's jurisdiction while also ensuring that parties are able to seek reasonable recourse. *See Sears,* 436 U.S. at 201.

The Supreme Court's decision in *Sears v. San Diego County,* 436 U.S. 180 (1978), provides helpful context for this exception. There, the question was whether a state court was barred from hearing a trespass action stemming from a labor dispute that was, in turn, governed by federal law. *Id.* at 199. The employer, Sears, had brought the trespass action against the defendant union. *Id.* at 183. Because Sears

could not invoke the Board's jurisdiction to determine whether the union's trespass was federally protected, and because the opposing union did not invoke the Board's jurisdiction, the Court held that the state court's jurisdiction was not preempted. *Id.* at 202. As the Court explained, the primary jurisdiction rationale "unquestionably" requires that where the same controversy may be presented to the state court or the NLRB, it must be presented to the Board. *Id.* However, that rationale is not sufficient where the party who could have presented the issue to the Board did not do so, and the other party could not do so.

Here, Plaintiffs are organizations that represent employers and employers' interests across California, and the Defendants are State representatives. Defendants correctly note that Plaintiffs have nowhere alleged that they had a reasonable opportunity to invoke the NLRB's jurisdiction, or that either party here even could go to the Board. However, the "reasonable opportunity" exception appears to be concerned with conduct that has an unknown legal status. *See Sears,* 436 U.S. at 203, n.34 (explaining that the employer did not know whether the union's picketing was perhaps protected under Section 7 and the employer himself could not seek a decision from the NLRB on this issue). This case does not present those same concerns. First, it has been established that issues of employer speech are subject to the NLRB's jurisdiction. *Chamber of Com. of U.S. v. Brown,* 554 U.S. 60, 67–69 (2008) (detailing the NLRA's evolution in covering debate surrounding matters of unionization – including addressing the scope of employer speech on these matters). Second, the *Amazon* decision confirms that the conduct here may be prohibited by the NLRB such that the Board's jurisdiction should be protected in this case. At a minimum, and in contrast to *Sears*, the *Amazon* decision shows that the Board can decide the specific issue being raised by Plaintiffs. Thus, the Court does not find that this exception applies.

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b. Deeply Local Feeling Exception

Under the "local feeling" exception, *Garmon* preemption is inapplicable when the conduct at issue touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived states of the power to act. *Glacier Northwest,* 598 U.S. at 777, n.1. This exception is rooted in principles of federalism, *see Garmon,* 359 U.S. at 243 (explaining the need for exceptions to ensure "due regard for the presuppositions of our embracing federal system"), and recognizes States' historic responsibility for maintaining domestic peace, *see id.* (stating that states have a compelling interest in maintaining domestic peace absent clearly expressed congressional direction). Thus, *Garmon* does not "sweep[] away state-court jurisdiction over conduct traditionally subject to state regulation." *Sears,* 436 U.S. at 188. This exception has typically included laws protecting private property, bodily security, and preservation of the public order. *Davis v. Benihana, Inc.,* 772 F. Supp. 3d 524, 535, (D.N.J. 2025) (citing N.Y. *Tel. Co. v. N.Y. States Dep't of Lab.,* 440 U.S. 519, 550–55 (1979) (Blackmun, J., concurring)). Notably, however, the exception does not extend to local interests in labor policy, except to the extent permitted by Section 14(b) of the NLRA. *Idaho Bldg.,* 801 F.3d at 966.

To determine whether the local feeling exception applies, a court first determines whether adjudicating the state-law claims would present a "risk of interference with the regulatory jurisdiction of the Labor Board." *Sears,* 436 at 196. Then, it must determine whether the state law regulates a significant state interest so deeply rooted in local feeling and responsibility. *Id.* at 194–95. Lastly, a court balances the two together: comparing the significant, deeply rooted state interest, with the risk of interference with the NLRB's ability to adjudicate a controversy. *Belknap, Inc. v. Hale,* 463 U.S. 491, 498–99 (1983).

Turning first to the risk of interference, courts typically look to whether the factual and legal proofs necessary to establish an unfair labor practice charge under

the NLRA are the same as those necessary to prove the state law cause of action. *See Moreno,* 29 F.4th at 576 (finding that the state claim was identical to the NLRA charge because the facts alleged in the complaint could also support a finding that the defendant violated the NLRA). When the facts alleged in support of finding the state law cause of action could also support finding that there was a NLRA violation, the claims are identical and there is a risk of interference with the NLRB's primary jurisdiction.

Here, as demonstrated by the *Amazon* decision, there appears to be a risk of interference with the NLRB's primary jurisdiction. A cause of action under SB 399 would require showing that an employer took adverse action against an employee for failing to receive the employer's communications pertaining to certain political and/or religious topics. Thus, there appears to be overlap with an unfair labor charge that would be filed, at least as it pertains to unionization, because determining whether the employer's actions were appropriate would depend on if the speech was coercive. Although SB 399 has a broader scope than a charge on this issue would, there is still a substantial chance that there would be overlap with federal labor law. Thus, the Court finds that sufficiently identical controversies exist.

The Court next determines whether deeply rooted state interests exist and balance those interests against the risk of interference with the NLRB's primary jurisdiction. Defendants contend that SB 399 falls into the local feeling exception because it is a minimum labor standard that does not impact collective bargaining but is designed to protect all employees from potential coercion on religious and political matters and protect each individual's right to individual autonomy. Moreover, Defendants point out that SB 399 includes carveouts for meetings and communications relevant to an employees' work thereby avoiding interference with employee-employer regulations and only protecting the deeply rooted local concern of protecting workers from coercive speech on non-workplace matters in a setting where there is an imbalance.

Within their police powers, states have the ability to protect workers in the employment relationship. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Here, Defendants argue that the state seeks to protect individual autonomy particularly when it comes to expression related to core political and religious values in a setting with a power imbalance, that is, the workplace. However, the fact that this law expressly targets communications related to the decision to join a union renders the deeply held feelings exception inapplicable. Significantly, Defendants do not point to any California laws protecting other populations from captive meetings. Moreover, this is not an area where states have a long tradition of regulating behavior, which would give more weight to the argument that this is a deeply held local feeling, and that interference with this law would implicate the purposes of federalism. Rather, the body of case law that discusses the application of the local feeling exception has traditionally applied to situations involving violent tortious behavior. *See Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25,* 430 U.S. 290, 299 (1977) ("Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute, . . . and thus there is no risk that state damages actions will fetter the exercise of rights protected by the NLRA."); *see also Casala, LLC v. Kotek,* --- F. Supp. 3d ---, 2025 WL 1442792, at *8 (D. Or. May 2025) (collecting cases finding the local feeling exception applied where violence occurred). Thus, the Court finds that the deeply local exception does not apply here.

Accordingly, SB 399 is preempted under *Garmon* to the extent that it expressly covers meetings relates to whether or not to join a labor organization.

3. *Machinists* Preemption

i. *Machinists* Background

The Supreme Court also established a second form of preemption, known as *Machinists* preemption, to ensure that areas left intentionally unregulated by the NLRA remain "controlled by the free play of economic forces." *Brown,* 554 U.S. at 65. Under *Machinists* preemption, states and municipalities are prohibited from imposing

restrictions on economic weapons of self-help, unless such restrictions were contemplated by Congress. *Golden State Transit Corp., v. City of Los Angeles,* 475 U.S. 608, 614–15 (1986). This doctrine is rooted in "preserv[ing] Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993) (internal quotation marks and citation omitted).

While courts must often interpret which areas in particular are left unregulated, Congress has clearly expressed that states are barred from "regulating non-coercive labor speech by an employer," *Interpipe Contracting, Inc. v. Becerra,* 898 F.3d 879, 887 (9th Cir. 2018), to "permit[] the fullest freedom of expression by each party [to] nurture[] a healthy and stable bargaining process," *Intertape Polymer Corp. v. NLRB,* 801 F.3d 224, 238 (4th Cir. 2015). The protection of noncoercive speech is outlined through a few different amendments to the NLRA. First, Sections 8(a) and 8(b) provide that when Congress has "sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so." *Brown,* 554 U.S. at 68. Additionally, Section 7 of the NLRA was amended to "call[] attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization." *Id.* Lastly, the addition of Section 8(c) clearly precludes regulating speech relating to unionization "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co,* 395 U.S. 575, 618 (1969).

That said, state labor laws setting minimum labor standards are not subject to *Machinists* preemption. *See Metro. Life Ins. Co.,* 471 U.S. at 756. These types of laws include minimum and other wage laws, child labor laws, and laws involving occupational health and safety. *Id.* Although "minimum labor standards do technically interfere with labor-management relations and may impact labor or management unequally . . . these standards are not preempted because they do not

regulate the mechanics of labor dispute resolution." *Assoc. Builders & Contractors of Cal. Coop. Comm., Inc., v. Becerra,* 231 F. Supp. 3d 810, 820 (S.D. Cal. 2017), *aff'd sub nom. Interpipe Contracting Co.,* 898 F.3d 879. Instead, they make up the "backdrop" for negotiations. *Metro Life Ins. Co,* 471 U.S. at 757. Typically, minimum labor standards neither encourage nor discourage the collective bargaining processes that are the subject of the NLRA. *Id.* at 755. They also do not have any but the most indirect effect on the right of self-organization established in the NLRA. *Id.*

In assessing NLRA preemption cases "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Brown,* 554 U.S. at 69 (citation omitted). Thus, while a state cannot directly regulate noncoercive speech about unionization via an express prohibition, a state may not indirectly regulate such conduct through alternative mechanisms. *See id.* ("California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.").

ii. *Machinists* Analysis

Plaintiffs argue that *Machinists* preemption applies because SB 399 limits free debate on labor issues. Further, by limiting employers' speech, Plaintiffs contend that the State Legislature has put its thumb on the scale in favor of unionization. Defendants argue that SB 399 is not preempted because it is a minimum labor standard and is not a regulation of noncoercive speech, but rather of employers' conduct.

Plaintiffs rely on *Brown* to support their argument that SB 399 intrudes on an area that Congress intended to leave unregulated. There, the Supreme Court analyzed whether a California law prohibiting certain employers from using state subsidies "to assist, promote, or deter union organizing" was preempted under *Machinists*. *Brown,* 554 U.S. at 62. The Court ultimately held that the law was

preempted because it infringed on Congress's mandate not to regulate non-coercive labor speech." *Id.* at 68. In reaching its conclusion, the Court explained that the law exempted activities that promoted unionization. *Id.* at 70–73. Additionally, the law established a "formidable" enforcement scheme involving presumptions against employers, permitted suit by the attorney general and any private taxpayers. *Id.* at 72. Relevant here, in *Interpipe Contracting v. Becerra,* the Ninth Circuit interpreted *Brown* to stand for "straightforward proposition that § 8(c) means what it says: the government may not regulate[ ] non-coercive labor speech." 898 F.3d at 889.

Here, SB 399 provides that employers may not subject their employees to adverse employment action where employees do not wish to receive communications, unrelated to their work duties, on matters of the employers' religious or political speech – including specifically whether or not to join labor organizations. Given the statute's focus on taking adverse employment action against employees, the Defendants contend that SB 399 does not implicate the concerns outlined in *Brown* since SB 399 is a regulation of conduct. However, the Court is not convinced that SB 399 is limited to just employer conduct.[3] An individual seeking to enforce SB 399 following an adverse employment action would have to point to an employer's speech related to whether or not to join a labor organization in determining whether such adverse action was appropriate.

Defendants also argue that employers are not restricted from sharing their views and instead are only prevented from taking adverse action against those employees who do not wish to listen. Mandatory meetings infringing on employee Section 7 rights are considered coercive and the Court agrees that coercive speech is not protected by the NLRA. *See Garten Trucking LC v. NLRB,* 139 F.4th 269, 279 (4th Cir. 2025) (explaining that Section 8(c) makes speech designed to effectuate an explicit or implicit threat or agreement for a course of action). However, SB 399 also

[3] *See also*, discussion *infra* at p. II.B.1.

creeps into the realm of regulating noncoercive speech because it does not distinguish between the two. The legislative history of SB 399 shows that the primary concerns underlying SB 399 are captive audience meetings. However, SB 399 expands beyond those circumstances and applies to "any communications with the employer or its agents or representatives" where the purpose "is to communicate the employer's opinion about religious or political matters." Cal. Lab. Code § 1137(c). By not limiting penalties to coercive speech, SB 399 risks interfering with employers' statutory and First Amendment rights to express their opinions on whether or not to join a labor organization, or from otherwise engaging in noncoercive speech. *See Overstreet v. Shamrock Foods Co.,* 679 Fed. Appx. 61, 564–65 (9th Cir. 2017) (affirming a district court's injunction because it prohibited only coercive speech and recognizing that the injunction did not infringe on Section 8(c) because defendant employer could express its opinions regarding union representation). It was also evident during oral argument that the line between where employer speech falls into the prohibited categories such that a communication may no longer be mandatory is not entirely clear. SB 399 ultimately risks chilling one side of the debate between labor and management, and thus infringes on noncoercive employer speech.

Defendants also argue that SB 399 is a minimum labor standard, such that *Machinists* preemption does not apply. SB 399 applies generally to all individual employees – regardless of unionization status. *See Metro Life Ins. Co.,* 471 U.S. at 755. The fact that the law applies to individual workers rather than to employees who are members of a union weighs in favor of finding a minimum labor standard. However, it is unclear that SB 399 will have only "the most indirect effect" on negotiations between labor and management. SB 399 sets the backdrop for negotiations in that it limits what actions employers may take against employees who do not wish to engage in certain conversations about unionization. However, given the impact it is likely to have on debates regarding unionization, and particularly the

strain on employers noncoercive speech, the Court finds that it is not a minimum labor standard. Thus, the Court finds that *Machinists* preemption also applies.

* * * * *

The Court concludes that it is likely that both *Garmon* and *Machinists* preemption applies, and that Plaintiffs have thus established a likelihood of success on their arguments that SB 399 is preempted by the NLRA.

B. First Amendment

Plaintiffs also bring a facial challenge to SB 399 on First Amendment grounds. Plaintiffs argue that SB 399 is a content and viewpoint-based restriction on employer speech. Defendants contend that SB 399 is a classic regulation of conduct, akin to antidiscrimination laws and whistleblower protection laws. As a result, the Defendants argue, the First Amendment is not implicated, and rational basis is met.

In a typical facial challenge, a plaintiff only succeeds where "he establish[es] that no set of circumstances exists under which the [law] would be valid, or he shows that the law lacks a plainly legitimate sweep." *Moody v. NetChoice, LLC,* 603 U.S. 707, 723 (2024) (internal citations and quotation marks omitted). That said, in the First Amendment context, the Supreme Court has "substituted a less demanding though still rigorous standard." *Id.* (citation omitted). A plaintiff succeeds "if the law's unconstitutional applications substantially outweigh its constitutional ones." *Id.*at 724. A First Amendment facial analysis has two parts: first, the courts are to assess the state laws' scope, and second, the courts must decide which of the laws applications violate the First Amendment and measure them against the rest." *Id.* at 724–25. Here, SB 399 is alleged to prohibit employers' speech in the same way, such that a facial challenge is appropriate. *See X Corp. v. Bonta,* 116 F.4th 888, 899 (9th Cir. 2024), 116 F.4th at 899 (explaining that a facial challenge was permissible where the challenged Content Category Report raised the same First Amendment issues in every application to a covered social media company).

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1. Expressive Conduct

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (quoting U.S. Const., Amdt. 1). Under the Free Speech Clause, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citation omitted). Although the government is limited in its regulation of speech, it has broad authority to regulate conduct. However, regulation of conduct may not be done as a "smokescreen" for regulating speech. *Honeyfund.com Inc. v. Governor,* 94 F.4th 1272, 1278 (11th Cir. 2024) (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 385 (1992)). In determining whether the First Amendment applies, courts ask the "threshold question [of] whether conduct with a significant expressive element drew the legal remedy or the ordinance has the inevitable effect of singling out those engaged in expressive activity." *HomeAway.com v. City of Santa Monica,* 918 F.3d 676, 685 (9th Cir. 2019) (internal quotations and citations omitted). The court may consider the "inevitable effect of a statute on its face," as well as a statute's "stated purpose." *Id.* (citation omitted). But a court typically "may not conduct an inquiry into legislative purpose or motive beyond what is stated within the statute itself." *Id.* (citation omitted).

Beginning with the statute's text, SB 399 provides, in part, that employers

> [S]hall not subject, or threaten to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because the employee declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters. . . .

Cal. Lab. Code. § 1137(c). The stated purpose of the statute is to protect employees who were forced to attend "captive-audience" meetings and subjected to adverse employment action where they declined participation. Here, SB 399 does not facially prohibit employers from expressing their religious or political views. Rather, it prohibits certain measures, specifically, taking adverse employment action against an employee who does not wish to hear the employer's communications. However, SB 399's prohibition applies where an employee "(1) declined to attend a meeting or receive or listen to a communication, (2) the purpose of which was to communicate the employer's opinion, (3) about religious or political matters." (Def. Opp'n at 13.) Thus, while the Court agrees with Defendants' contention that taking an adverse employment action is not expressive conduct, SB 399 has the inevitable effect of being directed toward employers who chose to engage in core expressive activity – sharing their opinions on religious and political matters.

Consider the circumstances that arise where an employee sues her employer for violating SB 399. A decision maker would necessarily have to consider the content of the employer's speech to determine whether taking the adverse employment action was appropriate. Because the "conduct regulated depends on – and cannot be separated from – the ideas communicated" SB 399 regulates speech such that the First Amendment is implicated. *See Honeyfund.com,* 94 F.4th at 1278 (rejecting a conduct-not-speech claim where the only way to discern which mandatory trainings were prohibited was to find out whether the speaker expressed a particular viewpoint). Further, in *R.A.V. v. City of St. Paul*, the Supreme Court explained that "the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element[.]" 505 U.S. at 386. The government may not regulate speech "based on hostility—or favoritism—to the toward the underlying message expressed." *Id.* Here, SB 399 would prohibit an employer from taking an adverse action against an employee who refused to receive mandatory employer communications based solely

on the type of speech in which an employer engaged. And more than that, the inquiry would focus on whether the speech was related to certain political or religious matters.

In opposing this conclusion, Defendants cite to Title VII, and other anti-discrimination laws, which prohibit employers from taking adverse employment action against employees in certain scenarios. Specifically, Title VII makes it unlawful for an employer to "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). Title VII no doubt holds a significant place in our legal landscape. But while Title VII is typically understood to target discriminatory conduct, it is not immune from the demands of the First Amendment where expressive conduct is targeted. *See Rodriguez v. Maricopa Cnty. Cmty. Coll.*, 605 F.3d 703, 710 (9th Cir. 2010) ("Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment."). Moreover, some of the reach of Title VII is justified with respect establishing an illegal motive and evidence of differential treatment, (Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, § 13:5 (2025)), or as the mechanism by which prohibited discrimination can be carried out, *Rumsfeld v. Forum for Acad. and Inst. Rts., Inc.,* 547 U.S. 47, 62 (2006) or as an attempt to engage in conduct that is illegal in creating a quid pro quo (*Smolla,* § 13:7), all of which are far afield from SB 399. In other cases where anti-discrimination laws involve core expressive conduct, moreover, courts often justify those results with reference to the compelling state interest in preventing discrimination on the basis of protected characteristics like race and gender. *See, e.g., Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (noting that even if California's Unruh Act "does work some slight infringement on [the] right of expression association, that infringement is justified because it serves the State's compelling interest in eliminating

discrimination against women); *see also 303 Creative LLC v. Elenis*, 600 U.S. 570, 590 (2023). Whether SB 399 likewise serves a compelling interest will be addressed later in this Order. The point for now is that the notion that SB 399 regulates conduct just like Title VII and thus is exempt from First Amendment scrutiny is an overstatement of the law, and an incorrect analogy. Accordingly, the Court rejects the argument that SB 399 regulates conduct alone and addresses the nature of the speech regulation.

2. Determining the Appropriate Level of Scrutiny

Having concluded that SB 399 regulates speech, the Court turns to the appropriate level of scrutiny. Plaintiffs contend that SB 399 constitutes improper viewpoint discrimination because the law targets employers and prohibits them from sharing their viewpoints on political matters of public concern. At oral argument, Plaintiffs elaborated on this issue, explaining that because employers as a whole were targeted by the law, SB 399 discriminates against the broader "employer viewpoint." Embedded in the legislative history, Plaintiffs argued, is an assumption that there will be conflict between the employer and employee perspective. Because this tension exists, and because SB 399 applies to employers, SB 399 is viewpoint discriminatory. The Court disagrees.

Viewpoint-based restrictions exist where the government targets not just subject matter, but also "particular views taken by speakers" on that subject matter. *Rosenberger,* 515 U.S. at 829. "A regulation engages in viewpoint discrimination when it regulates speech based on the specific motivating ideology or perspective of the speaker." *First Resort, Inc. v. Herrera,* 860 F.3d 1263, 1277 (9th Cir. 2017) (internal quotations and citations omitted). Where the challenged provisions does not "target[] . . . particular views taken by speakers on a subject", there is no viewpoint discrimination. *See Boardman v. Inslee,* 978 F.3d 1092, 1110 (9th Cir. 2020).

SB 399's prohibition applies to all employers, regardless of the viewpoints they express on political or religious matters. *See Honeyfund.com*, 94 F.4th at 1247 (explaining that the law at issue only allowed mandatory meetings where the speaker

expressed viewpoints the state agreed with). Here, employers are no more subject to SB 399 if they express pro-labor views than they would be if they expressed anti-labor views. At least on its face, the Court rejects Plaintiff's argument that SB 399 discriminates on the basis of viewpoint.

Next, Plaintiffs argue that SB 399 is a content-based regulation because what an employer says during a meeting impacts whether SB 399 applies. A law is considered content-based where the government targets speech based on its topic, idea, or message. *Boyer v. City of Simi Valley,* 978 F.3d 618, 621 (9th Cir. 2020) (citation omitted). Content-based regulations are presumptively invalid under the First Amendment unless they are shown to be "narrowly tailored to serve compelling state interests." *Boyer,* 978 F.3d at 621 (citation omitted). A law is considered content-based on its face if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed,* 576 U.S. at 163. A law that is facially content neutral will still be subjected to heightened scrutiny if it cannot "be justified without reference to the content of the regulated speech." *Id.* at 156 (internal quotations and citations omitted).

Here, SB 399 involves political and religious speech. Political speech, in particular, is at the core of the First Amendment. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). Religious speech has also been recognized as a matter of public concern protected under the First Amendment. *See, e.g., Tucker v. State of Cal. Dept. of Educ.* 97 F.3d 1204, 1210 (9th Cir. 1996) (rejecting the argument that an employee's religious speech is not protected workplace speech because it not a matter of public concern).

The Court finds that SB 399 is a subject-matter based restriction on speech. Defendants are correct that SB 399 encapsulates two discrete acts: hosting a meeting or other form of mandatory communication and sanctioning employees for not

attending or receiving the communication. But as explained above, enforcing SB 399 would require referencing the content of the employer's speech in determining whether the adverse employment action was proper. For example, if an employer required employees to attend a mandatory meeting to discuss charitable giving, the employer could fire an employee for not attending, but could not take such action if the meeting were about a measure to increase the minimum wage. That is to say, the subject matter of the speech dictates whether the law applies. The fact that SB 399 subjects categories of speech to different limitations compels the conclusion that it is a content-based regulation. *See Reed,* 576 U.S. at 164 (explaining that the sign code at issue was content based on its face in part because the restrictions depend entirely on the communicative content of the sign).

Defendants alternatively contend that the First Amendment does not encompass a right to force a listener to hear one's speech. To support their argument, Defendants cite to several lines from cases that outline the "captive audience doctrine." Specifically, Defendant argue that California may protect vulnerable employees who would be forced by their employers, under the threat of losing their jobs or suffering adverse employment action, from listening to their employer's religious or political opinions.

The captive audience doctrine has historically been applied by the Supreme Court "only sparingly to protect unwilling listeners from protected speech." *Synder v. Phelps,* 562 U.S. 443, 459 (2011). This narrow application stems from the principle that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer[,]" because "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 210–11 (1975) (internal quotation marks and citations omitted). Typically, there must be a "showing that substantial privacy

interests are being invaded in an essentially intolerable manner" for the captive audience doctrine to apply. *Cohen v. California,* 403 U.S. 15, 21 (1971).

That said, this is not an impossible standard to meet. The Supreme Court has found such an invasion of substantial privacy interests in several instances. One example is in the quiet enjoyment of one's home. *See Rowan v. United States Post Office Dep't,* 397 U.S. 728, 738 (1970) (recognizing a heightened privacy interest within an individual's home that may justify certain content-based restrictions on speech); *Frisby v. Schultz,* 487 U.S. 474, 487 (1988) (reaffirming that residential privacy is entitled to special consideration under the First Amendment and recognizing that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech."). Additionally, a substantial privacy interest exists in "the psychological [and] physical well-being of the [hospital] patient held 'captive' by medical circumstance." *Berger v. City of Seattle,* 569 F.3d 1029, 1054 (9th Cir. 2009) (quoting *Madsen v. Women's Health Ctr.,* 512 U.S 753, 768–71 (1994) and citing *Hill v. Colorado,* 530 U.S. 703, 728-30 (2000)).

The captive audience doctrine has also been applied to other instances outside of the home, , *see Lehman v. City of Shaker Heights,* 418 U.S. 298, 303–304 (1974) (plurality opinion) (explaining that public transit riders are a "captive audience" unable to easily avoid advertisements when commuting), but these applications have been limited given that individuals in public places can avoid unwanted speech, *see Erznoznik,* 422 U.S. at 211; *Cohen,* 403 U.S. at 22 (discussing how those who find speech offensive can "avert their eyes"); *Berger,* 569 F.3d at 1029 (rejecting the application of the captive audience doctrine in a public park and noting that individuals offended by speech can avert their eyes or walk away). While the Court appreciates the practical difficulties of leaving a mandatory meeting organized by one's employer, it is simply not the case that employees are "captive" in the same sense as one who is riding a bus.

In analyzing a law that bears some resemblance to SB 399, the Eleventh Circuit in *Honeyfund.com* declined to find that employees were a captive audience where they were subjected to speech they did not want to hear. 94 F.4th at 1283 n.5. In that case, the court analyzed a challenge to a provision of Florida's Individual Freedom Act that banned mandatory workplace trainings endorsing certain viewpoints. *Id.* at 1275–76. The State's arguments were mostly based on a conduct-not-speech theory, arguing that the law restricted only the meeting that was held rather than the speech itself. *Id.* at 1277. The court rejected this argument, explaining that "[t]he only way to discern which mandatory trainings are prohibited is to find out whether the speaker disagrees with Florida." *Id.* As here, the state also attempted to justify the law on a captive audience basis. *Id.* at 1283 n.5. Dismissing the argument in a footnote, the court explained that outside the context of the home or where the degree of captivity makes it impractical for the unwilling listener to avoid exposure, "enduring speech we dislike is a necessary price." *Id.*

The Court recognizes the imbalance between employers and employees and does not minimize the challenges that employees face in these circumstances. However, "we are often captives outside the sanctuary of the home and subject to objectionable speech." *Cohen,* 403 U.S. at 21 (citation omitted). The Supreme Court has repeatedly explained that the captive audience doctrine is to be applied narrowly given the serious consequences that come from limiting speech because an individual does not wish to hear it. *See Snyder,* 562 U.S. at 459. Nor have Defendants pointed to any authority suggesting that employees have a right to privacy in the workplace that is akin, for example, to the right of privacy an abortion patient has in one's home or in attending a doctor's appointment. Given that the invasion of some privacy interest has served as the basis for expanding the captive audience doctrine, Defendants failure to articulate one here is detrimental to its claim. Moreover, given size of the American workforce, applying the captive audience line of cases to the employment context would greatly expand its application. *Cf. 303 Creative LLC*, 600

U.S. at 592 (observing the expansion of non-discrimination laws and noting that such statutes can "sweep too broadly when deployed to compel speech.") Defendants have not adequately shown that this expansion is warranted. Further, while Defendants argue that there is a strong state interest in protecting individual employees' autonomy, there are no other California state laws that they point to which protect any group of vulnerable individuals through a captive audience rationale. Given that no Court has expanded the captive audience line of cases to the employment context, the Court does not find that the captive audience doctrine applies to SB 399. Accordingly, the Court will apply strict scrutiny to SB 399.

3. Strict Scrutiny

To survive strict scrutiny, a state must show that the statute "furthers a compelling governmental interest and is narrowly tailored to that interest." *Reed,* 576 U.S. at 171 (citation omitted). "If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp., Inc.,* 529 U.S. 803, 813 (2000). In the briefing, Defendants do not explicitly address the issue of strict scrutiny and maintain the argument that SB 399 is a regulation of conduct, not speech. However, the Amicus Brief and Defendant's counsel during oral argument discussed the captive audience argument in the context of serving as a compelling interest.

For similar reasons stated above, the Court does not find the desire to protect captive audiences in the employment context to constitute a compelling interest. And to the extent that the parties compare this law to civil rights legislation, the interest in protecting a captive audience is unlike the recognized compelling interest in protecting groups that have historically been subjected to discrimination. *See Roberts v. United States Jaycees,* 468 U.S. 609, 623 (recognizing that the public accommodations law's interest in eradicating discrimination against its female citizens justified the law's application on the male organization's associational rights). And the Defendants offer no other compelling justification for the enactment of SB 399.

And even if a compelling interest had been established, the Court does not find that SB 399 is narrowly tailored to serve that compelling interest. In the context of the First Amendment, ""[b]road prophylactic rules" are generally disfavored. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.,* 487 U.S. 781, 801 (1988). Even in instances where the captive audience doctrine has been found applicable, the Supreme Court emphasized that the remedy in question must be narrowly tailored. In *Madsen v. Women's Health Center, Inc.,* the Court held that a limitation on preventing petitioners from approaching any person seeking services of the clinic unless such person indicates a desire to communicate in an area within 300 feet of the clinic unnecessarily burdened more speech than necessary to prevent intimidation and ensure access to the clinic. 512 U.S. at 774. The Court reasoned that justifying a prohibition of "all uninvited approaches" was difficult and unless the petitioners' speech was independently proscribable or infused with violence so as to be indistinguishable from a physical harm, it could not stand. *Id.*

Here, Defendants argue that SB 399 would only reach discussions forced onto unwilling employees. That said, the Court is not convinced that the scope of SB 399 is as limited as Defendants claim. To the extent that the legislature is concerned about captive audience meetings, SB 399 expands beyond that situation – covering meetings along with "any communications with the employer or its agents or representatives . . . ." Cal. Lab. Code § 1137(c). Thus, SB 399 applies to communications that do not involve meetings at all. This expansive reach creates a stronger likelihood of chilling speech, as employers who seek to avoid litigation may also refrain from using methods other than meetings to share their views. Moreover, it is not apparent that the Legislature's concerns surrounding the captivity or coercion are present in the meeting context exists in the context of receiving a newsletter or walking by a flyer in the workplace hallway. Accordingly, the Court finds that SB 399 is not narrowly tailored.

For the reasons discussed above, the Court finds that the Plaintiffs have shown a likelihood of success on the merits on their First Amendment argument.

III. Remaining *Winter* Factors

Lastly, the Court considers the remaining *Winter* factors: irreparable harm, the balance of equities and the public interest. Defendants concede that if Plaintiffs were able to show that SB 399 likely violated their constitutional rights, that would constitute irreparable harm. Since the Court has found that there is a likelihood of success on the merits, this factor is satisfied. Additionally, where the government is the opposing party, the last two factors of the preliminary injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell,* 747 F.3d 1073, 1092 (9th Cir. 2014). Defendants again concede that where a constitutional violation is met, particularly in light of the First Amendment claim, these factors would be satisfied.

CONCLUSION

For the reasons discussed above the Court GRANTS Plaintiffs Motion for Preliminary Injunction (ECF No. 13). Defendants Bonta, Garcia-Brower, the Division of Labor Standard Enforcement, and their officers, agents, servants, employees, and attorneys – and others in active concert or participation with any of them – who receive actual notice of this injunction by personal service or otherwise, are ENJOINED from enforcing California Labor Code section 1137 pending further order of this Court.

IT IS SO ORDERED.

Dated: **September 30, 2025**

Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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