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The Honorable Peter B. Robb
General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: Labor-Peace Agreements, Mandatory Collective Bargaining and State Interference with Employees' Fundamental Section 7 Rights

Dear General Counsel Robb:

I am writing to bring to your attention a recent disturbing trend in state licensing regulation that, if left unchecked, will cause permanent damage to employees' fundamental Section 7 rights under the National Labor Relations Act.

As part of the growth of the lawful medicinal cannabis industry, a number of states have enacted laws that directly infringe upon employees' Section 7 rights to choose or refrain from union representation. In New Jersey, the law goes so far as to *require a private sector employer to enter into a collective bargaining agreement within 200 days of commencing operations*, or forfeit their right to do business.[1] This requirement pays no heed to individual employees' representational desires, in gross violation of the NLRA's core principles. In other states, such as California and New York, the licensing regulations require employers to enter into so-called "labor peace agreements" (LPAs) as a condition of maintaining their license. These agreements run roughshod over employees' rights of privacy and free choice under the NLRA. In yet other states, such as Illinois and Pennsylvania, state bureaucrats award "points" to license applicants that have LPAs, effectively granting preferential treatment to employers who select a union for their employees.[2]

[1] N.J. Stat. Ann. § 24:6I-7.2(e).

[2] *See* Alex Ebert, et al., *Unions Elbow into Pot Industry with State-Backed 'Peace' Deals*, Bloomberg Law (Feb. 18, 2020) (Exhibit A).

This, of course, is directly contrary to the NLRA's core principle that "under Section 9(a), the rule is that the employees pick the union; the union does not pick the employees."[3]

State and local governments regulate and license a wide variety of businesses and occupations that employ employees subject to the jurisdiction of the NLRB. Irrespective of one's policy position on state legalization of medicinal cannabis,[4] one cannot ignore the fact that this trend, if allowed to continue, has the potential to spread to other private sector industries licensed by state and local governments. Worse, state and local regulatory infringement on Section 7 rights will be that much more possible if the trend becomes an established precedent. In fact, late last year the United Food and Commercial Workers Union sent an open letter to the governors of the five New England states and New York seeking to have them all mandate that private employers sign LPAs.[5] After reminding the governors about how many workers the union represents in their states, and its continuing willingness to "partner" with state legislators, it "strongly encouraged" the governors to "consider requiring labor peace agreements for cannabis licensing in … [these] states."[6] Once this practice of dragooning workers into forced union representation and forced dues becomes established, it will be that much more difficult to overturn.

The National Labor Relations Board has clear authority to act against state and municipal governments whose regulations infringe on the rights of employees to join or not to join labor organizations. "It has long been held that the Board, though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purpose of the Act."[7] As such, there is an "implied authority of the Board … to enjoin state action where its federal power preempts the field."[8] The Board has exercised that authority successfully many times in the past. Here, the need for Board intervention in all states is important, but is most critical in New Jersey because employees' rights under Section 7 to form, join or assist a labor organization—and to refrain as well—are at grave risk.

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[3] *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

[4] The NLRB has already asserted jurisdiction over employers in the cannabis industry. *See*, *e.g., Virio Health of N.Y. LLC*, 29-RC-228861 (Decision & Direction of Election, Nov. 26, 2018) (Exhibit B); *N.E. Patients Group LLC*, 1-CA-104979, 1-CA-106405 (Advice Mem., Oct. 25, 2013) (Exhibit C).

[5] Letter from UFCW Int'l President Anthony Perrone, et al., to N.Y. Governor Andrew Cuomo, et al. (Nov. 6, 2019) (Exhibit D).

[6] *Id.*

[7] *NLRB v. Nash Finch*, 404 U.S. 138, 142 (1971).

[8] *Id.* at 144.

In the following pages we suggest the legal arguments that support such challenges to state and local governments' attempts to infringe on the Board's jurisdiction. We urge the NLRB to sue to enjoin the laws in the States of New Jersey, New York and California described above. Such actions, once successful, will send a powerful message to state and local regulators nationwide that they cannot interfere with the basic Section 7 rights Congress gave to employees "to form, join or assist a labor organization, or refrain from doing so."

I. BACKGROUND

The National Right to Work Legal Defense Foundation, Inc., is a nonprofit, charitable, legal aid organization. Through its staff attorneys, the Foundation provides pro bono representation to individual employees in litigation challenging the abuses of compulsory unionism arrangements and in exercising their rights concerning the imposition of union monopoly "exclusive representation" in their workplaces. From its beginning in 1968, the Foundation has provided free legal assistance in virtually all of the United States Supreme Court cases involving employees' right to refrain from joining or supporting labor organizations as a condition of employment.[9] The Foundation also advances its mission through public information and education programs.

In recent years, a number of states have passed laws legalizing medicinal cannabis. Several of these states have sought to compel unionization through regulatory and licensing schemes.

The worst offender is New Jersey. In 2019, the state amended its medicinal cannabis laws to require license applicants to sign "labor peace agreements."[10] Applicants must maintain and comply with an LPA as a condition of keeping their license.[11] Worse, these private sector employers must also sign collective-bargaining agreements within 200 days of opening.[12] If they fail to do so, they forfeit their right to do business in the state.[13] In effect, the state pressures employees to sign up for unionization solely to keep their employers afloat.

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[9] *E.g.*, *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Commc'ns Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984).

[10] N.J. Stat. Ann. § 24:6I-7.2(e).

[11] *Id.*

[12] *Id.*

[13] *Id.*

New Jersey also goes so far as to give priority to license applicants that favor unions, indirectly imposing union representation on employees irrespective of their wishes. When choosing among applicants for a license, the New Jersey regulatory authorities give "priority" to applicants who already have a collective-bargaining agreement with a bona fide labor organization in New Jersey or elsewhere; or who attest that they will use their "best efforts to utilize union labor in the construction or retrofit of the facilities associated with the permitted entity."[14] No consideration is given to employee preferences or choice.

Other states impose similar requirements. New York requires cannabis businesses to maintain labor peace agreements as a condition of registration.[15] The New York law's definition of an LPA includes a requirement that employers let unions into their workplaces and restrict the use of economic weapons, such as picketing.[16] California imposes similar requirements, though it limits the requirements to businesses with at least fifteen employees.[17] Several California localities, including Los Angeles and San Francisco, also impose LPA requirements as a condition of operating within the municipality.[18] Copies of the relevant laws are attached as Exhibit E.

II. ANALYSIS

a. The NLRA preempts state laws interfering with Congress's scheme for regulating union organizing and collective bargaining.

For more than half a century, courts have recognized that the NLRA creates a uniform national system for governing union organizing, collective bargaining, and employees' right to refrain from those activities. The Act preempts any state activity that interferes with Congress's chosen scheme.

There are two types of preemption. First, under *San Diego Building & Trades Council v. Garmon*,[19] federal law exclusively governs all activity "arguably" prohibited or protected by the NLRA. Second, under *Lodge 76, International Ass'n of Machinists & Aerospace Workers v.*

[14] N.J. Stat. Ann. § 24:6I-7.2(e)(1), (4).

[15] N.Y. Pub. Health Law § 3665(1)(D)(iii).

[16] N.Y. Pub. Health Law § 3660(14) (defining an LPA for purposes of cannabis-licensing regime).

[17] Cal. Lab. & Prof Code § 26051(a)(5); *see also* Cal. Code Regs. tit. 16, § 5600 (cannabis event organizers); Cal. Code Regs. tit. 16, § 5023 (cannabis manufacturers).

[18] Los Angeles Mun. Code § 104.10; S.F. Police Code § 1609(b)(12) (proposed).

[19] 359 U.S. 236, 245 (1959).

Wisconsin Employment Relations Commission,[20] federal law forbids state regulation of any conduct Congress intended to leave unregulated. These types of preemption are known respectively as *Garmon* and *Machinists* preemption.

The Supreme Court has applied *Garmon* and *Machinists* to preempt a wide array of state action, including state regulatory and licensing schemes. For example, in in *Golden State Transit Corp. v. City of Los Angeles,*[21] the Court held that a city could not condition a taxi company's continued operation on its agreement to settle a union strike.[22] Similarly, in *Chamber of Commerce v. Brown*,[23] the Court held that a state could not stop private developers from using state funds to assist, promote, or deter union organizing.[24] That preemption was found necessary in part because "Section 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization."[25]

Lower courts also have applied preemption principles to limit state interference in the labor field. For example, in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*,[26] the U.S. Seventh Circuit Court of Appeals struck down a county ordinance requiring government contractors to enter into labor peace agreements. The court found that the law interfered with both employees' rights and employers' Section 8(c) right to express its opinions.[27]

b. The cannabis licensing laws of New Jersey, New York and California regulate subjects governed by the NLRA and, thus, run afoul of *Garmon* preemption.

The case for *Garmon* preemption is clearest in New Jersey, where the state's law directly contradicts the NLRA in at least three ways.

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[20] 427 U.S. 132, 149 (1976).

[21] 475 U.S. 608, 619 (1986).

[22] *Id.* ("A local government . . . lacks the authority to 'introduce some standard of properly "balanced" bargaining power' . . . or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'" (quoting *Machinists*)).

[23] 554 U.S. 60 (2008).

[24] *Id.* at 68.

[25] *Id*. at 68.

[26] 431 F.3d 277 (7th Cir. 2005).

[27] *Id.* at 278.

First, the law directly infringes on employees' Section 7 right to refrain from joining, forming or assisting a labor organization and their Section 9(c) right to decertify representation by a union. Just as Section 7 of the NLRA protects the right to form and join unions, so too does it protect the right not to do those things.[28] Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all."[29] And Section 9(c) provides that employees may oust an incumbent union by Board-conducted secret-ballot election if they so choose.[30] By requiring employers to enter into a collective-bargaining agreement as a condition of maintaining a state-issued license, the law requires that employees must be represented by a labor organization. *The New Jersey law takes away the very choice Congress gave employees when it enacted Sections 7 and 9(c).*[31] Because that choice is guaranteed by federal law, New Jersey's attempt to eliminate it through the licensing requirement is preempted under *Garmon* and unlawful.

The New Jersey law also indirectly interferes with employees' basic Section 7 rights because it favors license applicants that have an established collective-bargaining agreement with a labor organization; or who attest that they will use their "best efforts to utilize union labor in the construction or retrofit of the facilities associated with the permitted entity."[32] These statutory preferences totally disregard the fact that Section 7 leaves it to *the employees* to make the decision whether or not to have a labor organization represent them. By favoring license applicants that have a collective bargaining agreement, or use union labor in construction of their facilities, the State of New Jersey rewards employees who have selected union representation, and penalizes those who have not.

Second, the law contradicts the NLRA by destroying the right to free negotiation afforded by Section 8(d). Section 8(d) of the NLRA requires employers and unions to negotiate in good faith once a majority of employees has legitimately selected a union.[33] However, Section 8(d) ensures that the parties have no legal obligation to come to an agreement if they cannot do so. It states that the obligation to bargain "does not compel either party to agree to a proposal or require the making

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[28] 29 U.S.C. § 157 (employees "shall also have the right to refrain from any or all of such activities").

[29] *Baltimore Sun v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001).

[30] 29 U.S.C. § 159(c).

[31] *See* N.J. Stat. Ann. § 24:6I-7.2(e).

[32] N.J. Stat. Ann. § 24:6I-7.2(e)(1), (4).

[33] 29 U.S.C. § 158(d).

of a concession."[34] By including the foregoing passage in Section 8(d), Congress left the terms of the agreement—including whether there will be an agreement at all—to private negotiation.[35]

The New Jersey law imposes an obligation that directly contradicts a right conferred by Section 8(d), by requiring the parties to agree on a final contract.[36] Parties can no longer withhold consent at the bargaining table in an attempt to secure an agreement with better terms, as is their right under Section 8(d). Thus, employers must either sign a contract or lose their license to operate as a business.[37] By doing this, the New Jersey law completely undermines the framework established by Congress for private negotiation.38 Moreover, because New Jersey does not have a Right to Work law, the contracts into which employers will be forced to keep their licenses are very likely to include clauses requiring employees to join or pay union fees as a condition of employment.

Finally, the New Jersey law interferes with free-speech rights conferred upon employers by Congress. Section 8(c) of the Act protects an employer's right to express arguments, opinions, or views about unions and unionization, and also protects employees' right to hear such views and opinions.[39] This problem is common to all of the laws requiring labor peace agreements, including those in New York and California.[40] Implicit in an LPA is a requirement that employers waive their rights under Section 8(c), which means that employees do not hear their employer's opinions about unionization. As a purely practical matter, employers must waive their 8(c) rights―and their employees' interests―to secure an LPA with a labor organization because they lack any meaningful leverage to insist on better terms.[41] The state's requirement that an employer has an LPA as a condition of maintaining a state license to do business in an industry presents a Hobson's choice, either waive one's Section 8(c) rights to speak to employees or forgo the right to do business.

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[34] *Id.*

[35] *Id.*

[36] N.J. Stat. Ann. § 24:6I-7.2(e).

[37] *Id.*

[38] *See Brown*, 554 U.S. at 68 (holding that state law enforcing policy contrary to Congress's chosen scheme was preempted).

[39] *Id.* § 158(c); *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008).

[40] Cal. Lab. & Prof Code § 26001(x) (defining LPAs); N.Y. Pub. Health Law § 3660(14) (same).

[41] *See id.* (requiring an LPA as a condition of licensure); N.Y. Pub. Health Law § 3665(1)(D)(iii) (same); Cal. Lab. & Prof Code § 26051(a)(5); *see also* Cal. Code Regs. tit. 16, § 5600 (cannabis event organizers); Cal. Code Regs. tit. 3, § 8102 (cannabis cultivators); Cal. Code Regs. tit. 16, § 5023 (cannabis manufacturers).

For these reasons the NLRA preempts the New Jersey, New York and California laws under *Garmon*.

c. The New Jersey, New York and California requirements, that force license holders to enter into "labor peace agreements" regulate conduct Congress meant to leave unregulated. Those laws are therefore preempted under the *Machinists* doctrine.

The laws of each of the three states that require business license holders to enter into a labor peace agreement to force unionization on their employees are also preempted under the *Machinists* doctrine because they limit unions' and employees' access to economic weapons such as strikes, picketing, work stoppages, and other lawful economic action available to them under the NLRA.

When it passed the NLRA, Congress intentionally left certain features of labor relations unregulated so as to enable these issues to be resolved by market forces.[42] In particular, Congress allowed the parties access to economic weapons to leverage their respective positions at the bargaining table.[43] Because of this, Congress expected that parties would have access to these tools when negotiations failed, and that economic strength would thus dictate the outcome of some disputes.[44]

Laws mandating that employers enter into a labor peace agreement to make it easier to unionize their employees essentially legislate away the economic weapons Congress left employees and labor organizations free to use. In New York and California, the laws requiring that a business license holder have an LPA necessitate inclusion of a term that prohibits a labor organization or its members from striking, picketing, engaging in work stoppages or otherwise disrupting the employer's business.[45] Although New Jersey's law contains no explicit requirement,[46] that requirement is implicit in the nature of an LPA. After all, a "labor peace" agreement is meaningless if it does not mandate labor peace as a quid pro quo for easing unionization.

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[42] *Machinists*, 427 U.S. at 149.

[43] *See Golden State*, 475 U.S. at 619 (holding that the state could not coerce a private business into surrendering its right to use economic weapons as condition of permission to continue operating).

[44] *See id.*

[45] Cal. Lab. & Prof Code § 26001(x) (defining LPAs); N.Y. Pub. Health Law § 3660(14) (same).

[46] *See* N.J. Stat. Ann. § 24:6I-7.2(e) (requiring LPA but not defining that term).

The laws that require LPA's in these three jurisdictions effectively outlaw for employees and their unions in the medical cannabis industry economic weapons that Congress left them free to use under the NLRA.[47] Those prohibitions are preempted under *Machinists*[48] and therefore unlawful.[49]

d. The General Counsel can enforce preemption principles by suing for declaratory and/or injunctive relief.

Courts have long recognized that the Board has implied power to challenge state regulations on preemption grounds. In *NLRB v. Nash-Finch Co.*,[50] the Supreme Court held that the Board has implied authority to sue to enjoin state action when federal law "preempts the field."[51] This authority includes the power to sue for declaratory relief. In *NLRB v. North Dakota*[52] the Board sued for a declaratory judgment that Board law that nonmembers cannot be charged for union grievance handling preempted a state statute requiring nonmembers in a Right to Work state to reimburse such expenses. The court held that it had jurisdiction because "a conflict between a state statute and federal regulations presents a justiciable controversy."[53] It then granted the requested declaratory judgment.[54]

The Board also has sued for injunctions based on preemption. In NLRB *v. Arizona*,[55] the Board sued to enjoin a state constitutional amendment banning "card checks" and protecting the right to

[47] *Cf. Golden State*, 475 U.S. at 619.

[48] *Brown*, 554 U.S. at 68 (holding that state law enforcing policy contrary to Congress's chosen scheme was preempted).

[49] The states may argue that preemption principles do not apply because the states are acting as "market participants." That argument would fail under longstanding Supreme Court case law. The Court has recognized that although states enjoy more freedom when they act like normal purchasers of goods or services, these states are not acting as normal purchasers. Rather, they are acting as regulators performing a traditional state function—licensing businesses. They therefore cannot qualify for the market-participant exception. *See, e.g.*, *Golden State*, 475 U.S. at 619 (holding that a city was not acting as a market participant when deciding whether to renew taxi franchises).

[50] 404 U.S. 138, 144 (1971).

[51] *See id.* ("We conclude that there is also an implied authority of the Board . . . to enjoin state action where its federal power preempts the field.").

[52] 504 F. Supp. 2d 750 (D.N.D. 2007).

[53] *Id*. at 754.

[54] *Id*. at 756–59

[55] No. CV 11-00913-PHX-FJM, 2011 WL 4852312, at *6 (D. Ariz. Oct. 13, 2011).

secret-ballot elections. In *NLRB v. Florida Department of Business Regulation*,[56] the Board sued to enjoin a state regulation requiring unions to give 15 days' notice before striking. In both cases, the courts recognized that the Board may sue to vindicate federal preemption principles and protect its jurisdiction to enforce the NLRA.[57]

Most relevant here, courts have recognized that states may not force employers into collective-bargaining agreements, which is what the statutes requiring labor peace agreements effectively do. In *NLRB v. California Racing Board*,[58] a state law required any "satellite racing facility" to enter an agreement with the union representing employees at the primary facility. Acting under that law, a state agency ordered United Tote, a company providing services to racing facilities, to enter an agreement with a union. The Board sued to restrain the state agency's order, and a U.S. district court granted an injunction. On appeal, the Ninth Circuit affirmed because the state agency's order was preempted by the NLRA; and once a court satisfies itself that the state action is preempted, it must protect the Board's jurisdiction.[59]

Recently, on February 7, 2020, the NLRB sought declaratory relief in *NLRB v. State of Oregon* to overturn a state law that penalizes employers for discriminating against employees for nonparticipation in employer-sponsored meetings about religious or political matters.[60] Because the term "political matters" includes "the decision to join, not join, support or not support any lawful political or constituent group," and a "constituent group" includes a labor organization, the Board contends there that the Oregon statute "conflicts with the NLRB's regulation of employer conduct during a union election campaign and the NLRB's ability to regulate unfair labor practices, with respect to employers under the jurisdiction of the NLRA."[61]

In sum, suits to enjoin the labor peace requirements imposed on the cannabis industry in New Jersey, New York and California can and should be pursued to vindicate the various provisions of the NLRA that protect employees with which those state requirements conflict.

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[56] 868 F.2d 391 (11th Cir. 1989).

[57] *See id.* at 396–97; *Arizona*, 2011 WL 4852312, at *6.

[58] 940 F.2d 536, 541 (9th Cir. 1991).

[59] *See id.* ("The district court satisfied itself that the NLRA authorized the Board's jurisdiction over United Tote, and none of the parties disputes that conclusion on this appeal. That is the end of the matter, then, because that conclusion supports, indeed requires, the district court's corollary ruling that CHRB's order is preempted.").

[60] Case No. 6:20-CV-00203-MK (filed Feb. 7, 2020)(Exhibit F).

[61] *Id.,* Complaint at ¶ 11.

III. CONCLUSION

We urge the NLRB to take immediate action to preempt these laws. Obviously, the most egregious violator of the NLRA is the State of New Jersey, which brazenly requires employers to enter into collective bargaining agreements that will almost certainly contain forced dues clauses.[62] It is difficult to imagine a case better suited for Board intervention.

However, the laws of New Jersey, New York and California that impose labor peace requirements as a condition of licensure all are ripe for challenge on preemption grounds. They all make it more difficult for employees to exercise their rights under the NLRA to resist unionization or hear all sides of that issue. Every day these requirements remain in place is another day in which basic rights afforded by the NLRA are at risk.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.

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Vice President & Legal Director
For the Foundation

[62] N.J. Stat. Ann. § 24:6I-7.2(e).