

Workers Un-Gagged: Federal Labor Preemption of State Data Trespass Laws

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Abstract

The North Carolina Property Protection Act creates a civil cause of action against “Any person who intentionally gains access to the nonpublic areas of another’s premises and engages in an act that exceeds the person’s authority to enter those areas ...”. The statute specifically targets employees who engage in unauthorized recording or other data collection on the employer’s premises. At least some of the employee activity subject to civil liability under these statutes is protected under federal labor and employment laws. The Supremacy Clause dictates that this conflict must be resolved in favor of federal law. To ensure that the prospect of costly litigation and damages does not penalize employees for, or deter them from, exercising their rights under federal law, preemption should apply to any NCPPA claims arising from employee conduct that is even arguably protected.

*Progress is born of agitation. It is
agitation or stagnation.*

Eugene V. Debs
The Issue (1908)

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1. Introduction

At least eleven states have enacted laws against unauthorized photography, recording, or other data collection on private property.¹ Among the most recent examples is the North Carolina Property Protection Act (“NCPPA”).²

The NCPPA represents a new approach to state laws against data trespass,³ differing from previous ag-gag laws in three significant respects. First, unlike laws limited to agricultural facilities, the NCPPA applies more broadly to any private property.⁴ Second, while previous laws typically imposed criminal liability,⁵ the NCPPA creates a civil cause of action for

¹Animal Welfare Institute, *Anti-whistleblower (“Ag-Gag”) Legislation*, ANIMAL WELFARE INSTITUTE, awionline.org/content/anti-whistleblower-legislation (last visited Feb 27, 2023); Center for Constitutional Rights, *Ag-Gag Across America: Corporate-Backed Attacks on Activists and Whistleblowers* 10 (2017). States that have adopted such laws include (in chronological order): Kansas, Montana, North Dakota, Alabama, Iowa, Missouri, Utah, Idaho, Wyoming, North Carolina, and Arkansas. Center for Constitutional Rights, *supra* note 1 at 10, 13, 15–16, 18–20. The earliest of these laws applied specifically to agricultural facilities, giving rise to the sobriquet “ag-gag” laws. See Center for Constitutional Rights, *supra* note 1 at 2–3; Shaakirrah R. Sanders, *Ag-Gag Free Nation*, 54 WAKE FOREST L. REV. 491, 493–94 (2019).

²N.C. Gen. Stat. § 99A-2 (2016). Arkansas has adopted a similar statute. Ark. Code § 16-118-113 (2017); see *Animal Legal Defense Fund v. Vaught*, No. 4:19cv00442, 4 (E.D. Ark. Feb. 14, 2020) (“Representative Vaught ... explained in introducing the Arkansas Ag-Gag law to the House Judiciary Committee that it ‘is modeled after a newly enacted law in North Carolina in 2016.’”).

³I use the term “data trespass” to encompass laws imposing criminal or civil liability for unauthorized recording or data collection, whether limited to agricultural facilities or (as in North Carolina, Arkansas, and Wyoming) covering other premises and facilities as well. See Hannah Solomon, *Wyoming’s Data Trespass Laws Trample First Amendment Rights: A Preview*, VERMONT JOURNAL OF ENVIRONMENTAL LAW: ECOPERSPECTIVES BLOG (2016), vjel.vermontlaw.edu/wyomings-data-trespass-laws-trample-first-amendment-rights-preview (last visited Mar 1, 2023) (describing Wyoming statutes as “data trespass laws”); Lauren Kurtz, *Wyoming Federal Court Upholds Law Criminalizing “Unlawful Collection of Resource Data”*, CLIMATE LAW BLOG (2016), blogs.law.columbia.edu/climatechange/2016/07/28/wy-federal-court-upholds-law-criminalizing-resource-data-collection/ (last visited Mar 1, 2023) (same).

⁴N.C. Gen. Stat. § 99A-2. The Arkansas statute similarly prohibits unauthorized recording on “commercial property”, which is defined to include any “business property”, “Agricultural or timber production operations”, and “Residential property used for business purposes”. Ark. Code § 16-118-113. Wyoming’s resource data collection statutes also apply to any “private land”, but their prohibitions are limited to unauthorized collection of “resource data” (defined as “data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species”). Wyo. Stat. § 6-3-414 (2015) (imposing criminal liability) and Wyo. Stat. § 40-27-101 (2015) (establishing civil cause of action).

⁵See Center for Constitutional Rights, *supra* note 1 at 6, 10–11, 14, 17–18.

acts exceeding the scope of authorized entry to the premises.⁶ Third, the NCPPA specifically targets unauthorized recording and other data collection by employees.⁷

The focus of this article is on this last issue. At least some of the employee activity subject to civil liability under the NCPPA and other state data trespass laws⁸ is protected under the National Labor Relations Act (“NLRA”)⁹ and other federal laws.¹⁰ The Supremacy Clause dictates that this conflict must be resolved in favor of federal law under the preemption doctrine.¹¹

The NCPPA and other state data trespass statutes have faced legal challenges on constitutional grounds.¹² However, the courts have not addressed the issue of federal preemption.¹³ Existing scholarship on state data trespass laws has likewise focused primarily on the First Amendment and other constitutional problems, with little attention to the impairment of work-

⁶N.C. Gen. Stat. § 99A-2; Ark. Code § 16-118-113. Some other states’ laws also authorize private civil actions by the owner or operator of the facility.

⁷N.C. Gen. Stat. § 99A-2(b)(1)–(3); Ark. Code § 16-118-113(c)(1)–(3). Some ag-gag statutes contain specific provisions aimed at so-called “employment fraud” for the purpose of gaining access to an agricultural facility. See, e.g., Idaho Code § 18-7042 (2014) (imposing liability on one who “Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury”); Iowa Code § 717A.3A (2012); Ala. Code § 13A-11-150 (2002); see also Center for Constitutional Rights, *supra* note 1 at 2, 10–11.

⁸See Part 2.

⁹29 U.S. Code § 151 et seq. (1935).

¹⁰See Part 3.

¹¹See Part 4.

¹²*Peta v. North Carolina Farm Bureau Federation*, (Court of Appeals, 4th Circuit Feb. 23, 2023) (North Carolina); *Animal Legal Defense Fund v. Vaught*, 8 F.4th 714 (8th Cir. 2021) (Arkansas); *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021) (Kansas); *Animal Legal Defense Fund v. Reynolds*, 591 F. Supp. 3d 397 (S.D. Iowa 2022) (Iowa); *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (Idaho); *Western Watersheds Project v. Michael*, 353 F. Supp. 3d 1176 (D. Wyo. 2018) (Wyoming); *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017) (Utah).

¹³In at least two cases, labor organizations filed amicus briefs arguing that the imposition of employee liability under state ag-gag statutes would conflict with and undermine protections under federal labor and employment law. See United Farm Workers of America brief as amicus curiae in *ALDF v. Wasden*; Idaho Building Trades Council & Idaho AFL-CIO brief as amicus curiae in *ALDF v. Wasden*; United Farm Workers of America, brief as amicus curiae in *ALDF v. Kelly*; United Food & Commercial Workers International Union, brief as amicus curiae in *ALDF v. Kelly*. In *Kelly*, *supra* note 12, at n.6, the 10th Circuit explicitly declined to consider whether the Kansas ag-gag statute violated the NLRA, because the parties themselves had not presented the issue. In *ALDF v. Wasden*, *supra* note 12, the 9th Circuit held that parts of the Idaho ag-gag statute violated the 1st Amendment, without mentioning federal labor preemption at all.

ers' rights under federal labor and employment law.¹⁴

This article aims to address this gap. Focusing on the NCPPA because of its explicit targeting of employee activity, it offers guidance to courts in recognizing and avoiding conflicts between employee liability under state data trespass laws and employee protections under the National Labor Relations Act and other federal labor law. To ensure that the prospect of costly litigation and damages does not penalize employees for, or deter them from, exercising their rights under federal law, I argue that preemption should apply to any state data trespass claims against employees who make recordings or otherwise collect information in the workplace pertaining to their terms and conditions of employment.

2. Prohibited Activity Under the NCPPA

2.1 *Statutory Provisions*

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2.2 *Constitutional Challenge*

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2.3 *Other Cases*

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3. The NCPPA and Other State Data Trespass Laws Subject Employees to Liability for Conduct that is Protected Under Federal Labor Law

The NCPPA expressly targets employee activity.¹⁵ Most notably, this includes unauthorized recording or other data collection on the employer's premises. It may also include union "salting", communicating with co-workers and the public about working conditions, and providing infor-

¹⁴ONE PREVIOUS PIECE ON THE NCPPA; NUMEROUS ARTICLES ON AG-GAG. MOSTLY FOCUSED ON THE CONSTITUTIONAL ISSUES.

¹⁵N.C. Gen. Stat. § 99A-2; see also, Ark. Code § 16-118-113. Some Ag-Gag statutes also specifically apply to employee activity. CITES. Others would implicitly apply to employees engaged in the types of activity generally subject to liability. CITES.

mation and evidence about possible legal violations to federal agencies. These activities are (at least in some circumstances) protected under federal labor law.

As a threshold matter, the protections of federal labor law apply only to those who fit within the statutory definition of an employee. Certain categories of employees are excluded from coverage, notably agricultural laborers.¹⁶ While this exclusion might appear to alleviate any conflict with state laws that apply only to agricultural facilities, that is not necessarily the case. The agricultural laborer exclusion applies only to those engaged directly in farming,¹⁷ or who “perform tasks which are incidental to or in conjunction with [the employer’s] farming operations,”¹⁸ such as “processing agricultural products ... grown on the premises of the farm itself.”¹⁹ However, it does not apply to those who are not employed by a “farmer,”²⁰ nor to those who process, distribute, or otherwise handle agricultural goods not grown or raised by the employer for use in its own farming operations.²¹

In contrast, ag-gag laws define agricultural facilities more broadly, to include not just farms but also other operations along the production, processing, and distribution chain.²² Consequently, the NLRA applies to at

¹⁶29 U.S. Code § 152(3).

¹⁷*Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1274 (9th Cir. 1994), (quoting *Camsco Produce Co.*, 297 N.L.R.B. 905 (N.L.R.B. 1990)).

¹⁸*Bud Antle, Inc.*, *supra* note 3.

¹⁹*NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336 (5th Circuit 1993).

²⁰See *Bud Antle, Inc.*, *supra* note 3 at 1274 (agricultural laborer exclusion does not apply to employees of vegetable cooling and packing facility where employer did not grow vegetables itself but purchased them from independent growers); *NLRB v. Monterey County B. & C. Trades Council*, 335 F.2d 927 (9th Circuit 1953) (agricultural laborer exclusion does not apply to employees of contractor hired to construct buildings and install equipment on poultry farm).

²¹*Holly Farms Corp. v. NLRB*, 517 U.S. 392 (U.S. 1966) (employees who collect live chickens from independent growers and deliver them to employer’s processing plant not excluded); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (U.S. 1977) (truck drivers who deliver poultry feed produced at employer’s mill to independent poultry farms under contract with employer not excluded); *NLRB v. Cal-Maine Farms, Inc.*, *supra* note 5 (egg processing facility employees who regularly handle products purchased by employer from outside sources not excluded); *Camsco Produce Co.*, *supra* note 3 (mushroom processing facility employees who regularly handle products purchased by employer from outside sources not excluded).

²²See, e.g. Idaho Code § 18-7042(2)(a) & (b) (defining “Agricultural production” and “Agricultural production facility” to include “Construction, expansion, use, maintenance and repair of an agricultural production facility,” “Processing and packaging agricultural products, including the processing and packaging of agricultural products into food and other agricultural commodities,” and “Manufacturing animal feed,” along with activity more directly connected to raising crops and animals.); accord OTHER STATES.

least some employees of agricultural facilities covered by state ag-gag laws.

3.1 *Protected Activity Under the NLRA*

Section 7 of the NLRA “protect[s] the right of workers to act together to better their working conditions”:²³

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection²⁴

It is an unfair labor practice under Section 8(a)(1) for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7”.²⁵

Concerted activity pertaining to “terms, tenure or conditions of employment”²⁶ is protected under Section 7 regardless of whether employees have organized or are seeking to organize in a labor union, and even absent “a specific demand upon their employer to remedy a condition they find objectionable”.²⁷ Activity aimed at protecting the rights or advancing the interests of multiple employees is “concerted” for purposes of Section 7, even if undertaken by a single employee acting alone.

Nor can we accept the company’s contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable “cause” for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant. Section 10(c) of the Act does authorize an employer to discharge employees for “cause” and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects.²⁸

Under current Board law, an employer’s facially neutral work rule that might apply to some protected Section 7 activity does not necessarily vi-

²³*NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (U.S. 1962).

²⁴29 U.S. Code § 157.

²⁵*Id.* § 151 et seq.158(a)(1).

²⁶*Washington Aluminum*, *supra* note 9, (quoting NLRA Section 2(9), 29 U.S.C. sec. 152(a), defining “labor dispute”).

²⁷*Washington Aluminum*, *supra* note 9.

²⁸*Washington Aluminum*, *supra* note 9.

olate Section 8(a)(1).²⁹ However, it is an unfair labor practice for an employer to enforce such a rule against an employee for conduct protected under Section 7.³⁰

3.1.1 Recording & Other Data Collection

Section 7 protects employees who take photographs, make audio or video recordings, or use other means to collect information about workplace conditions, communications, or activity for the purpose of mutual aid and protection.³¹ Employees may also use “surreptitious” or otherwise unauthorized recordings as evidence in administrative or judicial proceedings to vindicate their legal rights.³²

Employees are subject to liability under the NCPPA for recording or data collection in the non-public areas of the workplace “without authorization”. It is unclear whether “without authorization” simply means that the employee violates an employer’s rule prohibiting or restricting such activity, or if it means the employee must obtain the employer’s affirmative permission even where there is no general anti-recording rule in place. Either way, there is a conflict with the protection that the NLRA extends to employees who make recordings or otherwise collect information in the workplace in the exercise of their rights under Section 7.

3.1.2 Salting

The NCPPA imposes liability on unauthorized data collection or recording by “An employee who enters the nonpublic areas of an employer’s premises *for a reason other than a bona fide intent of seeking or holding em-*

²⁹*The Boeing Company*, 365 N.L.R.B. No. 154 (N.L.R.B. 2017).

³⁰*AT&T Mobility, LLC*, 370 N.L.R.B. No. 121 (N.L.R.B. 2021) (employer’s facially neutral work rule against workplace recording was lawful under NLRA; but employee’s recording of disciplinary meeting, in violation of work rule, was protected under Section 7, and employer committed unfair labor practice by threatening employee with reprisals for future violations of the rule)

³¹*White Oak Manor*, 353 N.L.R.B. 795, 798–99, n.2 (N.L.R.B. 2009) (finding that photography was part of the *res gestae* of employee’s protected concerted activity in documenting inconsistent enforcement of employer dress code); *Sullivan, Long & Hagerty*, 303 N.L.R.B. 1007, 1013 (N.L.R.B. 1991) (finding employee’s use of tape recorder in workplace to aid federal government investigation to be protected).

³²*Whole Foods Market, Inc.*, 363 N.L.R.B. No. 87 (N.L.R.B. 2015), citing *Times-Herald Record*, 334 N.L.R.B. 350, 354 (N.L.R.B. 2001); *Arrow Flint Electric Co.*, 321 N.L.R.B. 1208, 1219 (N.L.R.B. 1996); *Wellstream Corp.*, 313 N.L.R.B. 698, 711 (N.L.R.B. 1994); *McAllister Bros.*, 278 N.L.R.B. 601, 601 (N.L.R.B. 1986), n. 2, 605, n.3; *Algreco Sportswear Co.*, 271 N.L.R.B. 499, 505 (N.L.R.B. 1984); *East Belden Corp.*, 239 N.L.R.B. 776, 782 (N.L.R.B. 1978).

ployment or doing business with the employer.”³³

This provision could be construed to apply to union “salts”: union members who take jobs at non-union workplaces with the aim of organizing the employees.³⁴ Salts sometimes identify themselves as union members and organizers when applying for jobs,³⁵ but sometimes keep their affiliation and motive covert.³⁶ In the latter circumstance, the employer may very well regard the concealment as a misrepresentation. Employers wishing to avoid unions no doubt regard salting as harmful to their economic interests.³⁷

Employee protections under the NLRA apply to those engaged in salt-

³³N.C. Gen. Stat. § 99A-2(b)(1) & (2) (emphasis supplied); see also Ark. Code § 16-118-113. Some Ag-Gag laws similarly target those who gain entry to the premises under the guise of seeking employment. See, e.g., CITE (imposing liability on one who “Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury”).

³⁴See Carey Dall & Jonathan Cohen, *Salting the Earth: Organizing for the Long Haul*, NEW LABOR FORUM 36 (2002); Erik Forman, *Let’s Get to Work*, JACOBIN (2017), jacobinmag.com/2017/02/labor-unions-workers-salts-students-organizing/ (reviewing the history and practice of salting and describing the author’s own experience as a salt); James D. Walsh, *The Double Life of an Undercover Union Organizer*, NEW YORK MAGAZINE INTELLIGENCER (2016), nymag.com/intelligencer/2016/02/what-its-like-tobeasalt-for-the-unions.html (reviewing the history and practice of salting and describing the author’s own experience as a salt).

³⁵See, e.g., *Aerotek, Inc. v. N.L.R.B.*, 883 F.3d 725 (8th Cir. 2018); *Fluor Daniel, Inc.*, 311 N.L.R.B. 498 (N.L.R.B. 1993).

³⁶See, e.g., Bourree Lam, *Life as an Undercover Union Organizer*, THE ATLANTIC (2016), www.theatlantic.com/business/archive/2016/03/undercover-union-organizer/474387/ (describing experience as a covert salt).

³⁷The view that salting is a devious practice causing economic harm to employers is reflected in a congressional hearing on alleged “salting abuses”. *Examining Union “Salting” Abuses and Organizing Tactics That Harm the U.S. Economy: Hearing before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 108th Cong. (2004). In his opening statement, subcommittee chair Rep. Sam Johnson contended that “Certain unions use ‘salts’ to cause deliberate harm to businesses by increasing their costs and forcing them to spend time, energy, and money to defend themselves against frivolous charges, and sometimes, to run employers out of business.” *Examining Union Salting Abuses*, *Id.* at 2. A parade of employer witnesses then gave anguished testimony about the alleged harms they suffered as a result of salting campaigns. *Examining Union Salting Abuses*, *Id.* at x. In similar vein, a “Fact Sheet” in support of proposed legislation to outlaw salting, issued by a prominent anti-union organization, decried the practice as “an organized conspiracy on the part of Big Labor bosses” and “an instrument of economic destruction aimed at non-union companies”. National Right to Work Committee, *Salting: Coercive Big Labor Scheme to Increase Forced Unionism* (2003). See also, Nick Johnson, *No Salt Added*, JACOBIN (2017), jacobinmag.com/2017/03/salts-union-organizing-nlrb-obama-trump-labor (discussing legislative efforts to reverse Town & Country and outlaw salting); CURRENT ANTI-SALTING BILL.

ing,³⁸ whether overt or covert,³⁹ as long as they are “genuinely interested in seeking to establish an employment relationship with the employer.”⁴⁰

MIGHT BE OK IF LIABILITY UNDER NCPPA & OTHER STATE LAWS IS LIMITED TO THOSE WHO OBTAIN EMPLOYMENT FOR THE SOLE PURPOSE OF CAUSING INJURY, OR WITH NO Bona Fide INTEREST IN THE JOB ITSELF. NOTE AMBIGUITY IN LANGUAGE OF NCPPA.⁴¹ But, as written, “employment fraud” provisions in these statutes at least plausibly cover those with mixed motives, who would be regarded as statutory employees under the NLRA. This is particularly true of the NCPPA, which explicitly identifies those subject to liability as “employees” and further predicates their liability on the use of recordings or other information “to breach the person’s duty of loyalty to the employer.”

3.1.3 Communication with Co-Workers & Public

Employees under the NLRA also have a right to communicate with co-workers and the public about working conditions and disputes.⁴²

3.1.4 Providing Information and Evidence to Federal Agencies

The NLRA protects the right of employees to petition for a union representation election, file complaints of unfair labor practices with the NLRB, and testify at NLRB proceedings.

By impairing the ability of employees to document workplace conditions and activity, the NCPPA undermines the NLRB’s procedures for vindicating employee’s rights under the NLRA.⁴³

³⁸*NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (U.S. 1995) (holding job applicants’ motive in seeking employment as part of union salting campaign did not deprive them of protection as statutory employee under NLRA)

³⁹CITES

⁴⁰*Toering Electric Co.*, 351 N.L.R.B. 225 (N.L.R.B. 2007); *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348 (N.L.R.B. 2007); see also Johnson, *supra* note 23 (discussing narrowed protection for salts under *Toering Electric* and *Oil Capitol Sheet Metal*).

⁴¹There might still be problems in relation to other federal employment laws. For example, the use of “tester” applicants is a common practice for identifying discriminatory hiring practices. CITES. Courts have upheld the practice even where the testers had no real interest in the job. CITES.

⁴²*Kinder-Care Learning Centers, Inc.*, 299 N.L.R.B. 1171 (N.L.R.B. 1990).

⁴³The NCPPA and other data trespass laws similarly undermine the enforcement of other federal laws that protect employees against health and safety hazards, discrimination, wage theft, and other harmful and abusive employment practices. Employers are hardly likely to grant employees permission to collect evidence of such violations, and may very well attempt to cover up the problems if alerted that employees are planning to do so. Consequently, to substantiate claims of unlawful working conditions or employer

Disclosure of information to state officials is exempt from liability under the NCPPA. However, the statute contains no exemption for disclosures to federal agencies or officials.

3.2 *Disloyalty Under the NLRA*

Concerted activity may lose protection under the NLRA if it amounts to disloyalty to the employer. For example, “sharp, public, disparaging attack[s] upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income” may be unprotected, even if made in connection with a labor dispute.⁴⁴

COMPARE/CONTRAST DISLOYALTY EXCEPTION UNDER NLRA WITH “DUTY OF LOYALTY” UNDER STATE LAW.

4. **Federal Law Preempts the NCPPA and Other State Data Trespass Laws to the Extent that They Impose Liability on Employees for Conduct Protected Under the National Labor Relations Act**

4.1 *NLRA Preemption*

4.1.1 Scope of Preemption

The preemptive sweep of federal labor law is particularly broad:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the

conduct, employees must frequently take photos, make audio-video recordings, or copy documents without the employer’s knowledge and consent. See United Farm Workers Amicus Brief.

⁴⁴*NLRB v. Electrical Workers*, 346 U.S. 464 (U.S. 1953) (affirming NLRB decision that employees’ distribution of handbills attacking quality of employer’s television programming, without reference to labor dispute, was unprotected); *Miklin Enterprises, Inc. v. NLRB*, (8th Circuit Submitted: September 19, 2016) (holding statements by union supporters in posters and press releases, suggesting employer’s customers faced health risk from eating food prepared by employees working while sick, were unprotected even though related to employees’ effort to gain paid sick leave).

central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.⁴⁵

If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is preempted by direct operation of the Supremacy Clause.⁴⁶

BASIS OF PREEMPTION: Protect national labor policy and preserve NLRB's exclusive original jurisdiction over labor disputes.

Cases that have held state authority to be preempted by federal law tend to fall into one of two categories: (1) those that reflect the concern that "one forum would enjoin, as illegal, conduct which the other forum would find legal" and (2) those that reflect the concern "that the (application of state law by) state courts would restrict the exercise of rights guaranteed by the Federal Acts." "(I)n referring to decisions holding state laws preempted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . , although the two are often not easily separable."⁴⁷

"Local interests" exception under Garmon.⁴⁸

If the state law regulates conduct that is actually protected by federal law, however, preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then "[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail."⁴⁹

⁴⁵*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (U.S. 1959). Federal law may also preempt state regulation of "conduct neither protected by § 7 nor prohibited by § 8," where "Congress intended [it] to be 'unrestricted by Any governmental power to regulate' because it was among the permissible 'economic weapons in reserve, . . . actual exercise (of which) on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.'" *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 141 (U.S. 1976) (citation omitted).

⁴⁶*Brown v. Hotel and Restaurant Employees and Bartenders Intern. Union Local 54*, 468 US 491, 501 (U.S. 1984).

⁴⁷*Machinists v. Wisconsin Employment Relations Commission*, *supra* note 1 at 138 (citations omitted).

⁴⁸*Garmon*, *supra* note 1 at 243–44.

⁴⁹*Brown v. Hotel and Restaurant Employees and Bartenders Intern. Union Local 54*, *supra* note 2 at 503 (citation omitted).

Why it doesn't apply to NCPPA.⁵⁰

Accordingly, if an employer sues an employee under the NCPPA or other state data trespass law, based on workplace recording or other conduct arguably protected under the NLRA, the claim will be preempted.⁵¹ A state court may not decide whether the conduct is indeed protected, as that question is within the exclusive original jurisdiction of the NLRB.⁵² Rather, as long as there is any colorable argument for NLRA protection, the state court should dismiss (or stay its proceedings pending a decision by the NLRB).⁵³

4.1.2 Procedure for Asserting Preemption

"A claim of Garmon preemption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of Garmon preemption is raised, it must be considered and resolved by the state court."⁵⁴ Federal courts also lack subject matter jurisdiction over claims within the NLRB's primary jurisdiction.^[^preemption5a] Accordingly, Garmon preemption is not a basis for removal.⁵⁵ But, since Garmon preemption is a question of federal law, "if the state court errs in determining whether Garmon principles deprive it of jurisdiction over a dispute, review of that decision may be had in the Supreme Court."⁵⁶

However, the employee may obtain more immediate relief from the NLRB or a federal court. It is an unfair labor practice for an employer to maintain a preempted suit against an employee or union for protected concerted activity.⁵⁷ Accordingly, an employee faced with such a suit may file an unfair labor practice charge with the NLRB, which may then order the employer to seek dismissal or a stay (pending the NLRB's disposition of the unfair labor practice charge) of the state court action.⁵⁸ The NLRB may also bring an action in a federal district court seeking an injunction for that purpose.⁵⁹

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⁵¹ See Part X, *supra*

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⁵⁴ *International Longshoremen's Ass'n. v. Davis*, 476 US 380, 393 (1986)

⁵⁵ *Bud Antle, Inc.*, *supra* note 3.

⁵⁶ *Bud Antle, Inc.*, *supra* note 3 at 1269, quoting *Ethridge v. Harbor House Restaurant*, 861 F. 2d 1389, 1399 (1988)

⁵⁷ *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003); *Associated Building Contractors, Inc.*, 331 N.L.R.B. 132 (N.L.R.B. 2000); *Manno Elec., Inc.*, 321 N.L.R.B. 297 (N.L.R.B. 1996).

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⁵⁹ *Can-Am Plumbing, Inc. v. NLRB*, *supra* note 14 at 151, citing *Bill Johnson's Restau-*

Alternatively, the employee may bring an action in federal court seeking declaratory and injunctive relief to block the state court action.⁶⁰ BUT DO THE ANTI-INJUNCTION ACT OR YOUNGER ABSTENTION APPLY WHERE A PRIVATE PARTY SEEKS TO ENJOIN A PREEMPTED STATE COURT SUIT, RATHER THAN A STATE ADMINISTRATIVE PROCEEDING (AS IN *Bud Antle*)?

4.2 *Preemption Under Other Federal Employment Laws*

Admissibility in agency actions and employee suits of recordings made or evidence otherwise collected without the employer's permission. The Wyoming statutes state that data collected in violation of those statutes is inadmissible in any proceeding. ANY OTHER AG-GAG STATUTES HAVE SIMILAR PROVISIONS? Even without such an explicit exclusionary provision, other ag-gag and data trespass statutes would have the practical effect of deterring employees from using unauthorized workplace recordings as evidence of employment law violations and subjecting them to criminal or civil liability for doing so.

5. Conclusion

Courts should dismiss suits on pre-emption grounds. The NLRB should seek injunctive relief and hold employers liable for unfair labor practices, consistent with established law. Legislatures should stop writing statutes that are illegal.

rants, Inc. v. NLRB, 461 U.S. 731, 744 (U.S. 1983); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (U.S. 1971).

⁶⁰*Bud Antle, Inc.*, *supra* note 3 (holding employer may obtain declaratory and injunctive relief in federal court against pending state administrative agency proceeding).