

September 2025

California Assembly Bill 288:

Enabling the State to Protect Labor Rights When the Federal Government Cannot

Catherine L. Fisk

Barbara Nachtrieb Armstrong Distinguished Professor of Law
Faculty Co-Director, Center for Law and Work
University of California, Berkeley

Assembly Bill (AB) 288,¹ which the California Legislature passed and Governor Newsom signed on September 30, provides a mechanism for prompt and effective resolution of disputes over unionization. It enables California to step up to enforce the rights to unionize and to resolve labor disputes when the federal government no longer can or will.

The problems that AB 288 seeks to address are serious. They reflect an effort by the Trump Administration to eliminate workers' rights by knee-capping the federal labor agency.

Under the National Labor Relations Act (NLRA), employees of private sector firms have rights to unionize and bargain collectively. The NLRA established an independent agency, the National Labor Relations Board (NLRB), to enforce those rights through investigation and quasi-judicial proceedings. When an employer commits an unfair labor practice in violation of the NLRA, an aggrieved employee or union can file a charge with a regional office of the NLRB, which investigates. If it finds merit to the charge, the Region prosecutes the case before an Administrative Law Judge. A party dissatisfied with the ALJ's ruling may appeal to a panel of the five-member NLRB. Neither the ALJ ruling nor an NLRB ruling is a legally enforceable order; a recalcitrant respondent can refuse to comply and force the prevailing party to seek review first in the NLRB and then review or enforcement in a federal court of appeals.

Cynical political leaders figured out 20 years ago that they could shut down enforcement of federal labor rights by failing to appoint new members of the NLRB because that blocks an aggrieved employee from seeking court enforcement of an ALJ ruling. The conservative majority of the Supreme Court put its stamp of approval on the practice by holding that without a quorum, the NLRB cannot decide cases.² During the Obama Administration, Republican Senators kept the NLRB closed for more than two years by refusing to confirm President Obama's nominees, and the

¹ AB 288, 2025-2026 Reg. Sess. (Cal. 2025),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260AB288.

² *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

Supreme Court rejected the President's effort to do so through recess appointments.³ The politics of killing the NLRB were great for Republicans but terrible for workers. Although the regional offices can keep prosecuting cases, without a quorum, the NLRB cannot decide them and aggrieved employees cannot get enforceable orders.

The attacks on the NLRB have ramped up in 2025. In January, Trump fired National Labor Relations Board member Gwynne Wilcox without cause. He thereby deprived the NLRB of a quorum. The Board has not decided cases since then, except just one during one short week in which Member Wilcox had been returned to office by a federal court, before the U.S. Supreme Court stayed that ruling and shut the NLRB down again.⁴ The Senate has so far failed to confirm replacements. I have heard management lawyers say that a defunct NLRB is bad for their clients because it prevents prompt resolution of disputes. But some business groups may not be eager to re-open the NLRB because they don't need it for protection. They engage in self-help by illegally firing workers who unionize or go on strike. And in those instances where collective action by workers threatens any real harm—such as a strike the employer cannot break by firing strikers—the law allows them to sue unions directly in court on a tort or secondary boycott theory.⁵

But some employers have succeeded in shutting down the prosecution of unfair labor practice cases long before they reach the defunct quorum-less Board. In August 2025, the U.S. Court of Appeals for the Fifth Circuit granted an injunction against the NLRB prosecuting unfair labor practice cases charging Elon Musk's rocket company SpaceX with firing employees in retaliation for their collective action. The Fifth Circuit accepted the company's arguments that the structure of the NLRB is unconstitutional because all unfair labor practice proceedings are conducted before ALJs whom the President cannot fire at will.⁶ While the Fifth Circuit decision applies only in Louisiana, Texas, and Mississippi, it reflects a nationwide trend of employers arguing that the entire NLRA is unconstitutional.

Clearly, federal labor law is in a crisis. California needs to act.

Under AB 288, when the NLRB fails to act on an unfair labor practice case for six months or is defunct, workers or businesses can ask the California Public Employee Relations Board (PERB) to enforce their rights under federal or state labor law. Opening the doors of the state labor agency serves the interests of business, workers, and the public in resolving disputes without litigation, lockouts, or strikes. And it protects workers who are unlawfully fired from having to wait years for the NLRB to be revived so that it can resolve their case.

There is no question that California and other states can regulate unionization and collective bargaining among employers and workers who are not covered by the National Labor Relations Act. California has done so since 1961 for employees of state and local government and public

³ *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

⁴ *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (mem.)

⁵ *Glacier Northwest, Inc. v. Int'l Bhd. Teamsters Local Union No. 174*, 598 U.S. 771 (2023); *ICTSI v. Int'l Longshore & Warehouse Union*, 442 F. Supp. 3d 1329 (D. Or. 2020); *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

⁶ *Space Exploration Technologies Corp. v. NLRB*, ___ F.4th ___, 2025 WL 2396748 (5th Cir. Aug. 19, 2025).

universities and schools,⁷ and since 1975 for agricultural workers.⁸ More recently, California and many other states have created legal frameworks for collective bargaining for home care workers and independent contractors, two groups who are excluded from the protections of federal labor law.⁹ AB 288 follows on this well-trodden legal path in providing a legal mechanism to protect union rights and resolve negotiating disputes for workers unprotected by the federal labor agency.

The big issue that skeptics about state enforcement of labor rights raise is whether the NLRA preempts state labor laws like AB 288 that seek to provide a mechanism to enforce federal labor rights by employees covered by the NLRA. There are three major reasons why it does not.

First, it is beyond dispute that if Congress were to repeal the National Labor Relations Act or the Supreme Court were to declare it unconstitutional, California could step into the void. As noted, in the states in the Fifth Circuit, because the court of appeals declared the NLRA's ALJ adjudication system unconstitutional and enjoined its enforcement, states (if there were any so inclined) could regulate private sector labor relations. Many large California employers, including Amazon, SpaceX, Trader Joe's, and the University of Southern California, currently claim that the NLRA is unconstitutional on the very grounds that the Fifth Circuit accepted, and have refused to comply with it. If the NLRA is unconstitutional, then state law can certainly apply. Indeed, it would raise grave federal constitutional issues if the *absence* of federal legislation or federal enforcement of rights were held to divest states of their police power to regulate in areas where there is no federal regulation.

It is for this reason that the U.S. Court of Appeals for the Fourth Circuit held that when a federal agency "is not functioning as Congress intended" because the president has fired its members and left it without a quorum, the agency is no longer the exclusive forum in which workers can assert claims.¹⁰ In that case, the issue was whether the federal Merit Systems Protection Board (MSPB) remains the only entity that can adjudicate claims of federal employees. Under the federal Civil Service Reform Act (CSRA), federal employees who suffer adverse employment actions must assert their claims in the Office of Special Counsel and/or the MSPB before seeking review in a court.¹¹ On the same day he fired NLRB Member Wilcox, President Trump also fired MSPB Member Cathy Harris and the Special Counsel Hampton Dellinger, thus depriving the MSPB of a quorum and the Office of Special Counsel of its single leader.¹² In numerous cases brought by tens of thousands of federal

⁷ More than half a dozen laws apply to public employee labor relations statewide, and several more apply to county and city employees. The laws enforced by PERB are listed on its website: <https://perb.ca.gov/laws-and-regulations/>.

⁸ Cal. Lab. Code §§ 1140-1166.3.

⁹ For an explanation of the home care worker bargaining system and assessment of proposals for reform, see Nari Rhee, et al., Analysis of the Potential Impacts of Statewide or Regional Collective Bargaining for In-Home Supportive Services Providers (Berkeley Labor Center Jan. 2, 2025), <https://laborcenter.berkeley.edu/ihs-statewide-bargaining/>. Assembly Bill 1340, which provides unionization and bargaining rights for app-based drivers, has passed the Legislature and is awaiting Governor Newsom's signature. See Levi Sumagaysay, California Uber and Lyft drivers closer to being able to unionize after crucial vote, CALMATTERS (Sept. 10, 2025), <https://calmatters.org/economy/2025/09/gig-worker-union-bill-passes/>.

¹⁰ *National Association of Immigration Judges v. Owen*, 139 F. 4th 293, 304 (4th Cir. 2025).

¹¹ 5 U.S.C. §§ 1214, 2301 et seq., 2501 et seq. *United States v. Fausto*, 484 U.S. 439 (1988).

¹² See *Dellinger v. Bessent*, 768 F. Supp. 3d 33 (D.D.C. 2025), stay granted, 2025 WL 717383 (D.C. Cir.), appeal dismissed as moot and district court opinion vacated, 2025 WL 935211 (D.C. Cir. 2025); *Harris v. Bessent*, 775

employees challenging the groundless mass firings of civil servants, the government has argued that district courts have no jurisdiction to hear their claims because the CSRA directs all such claims to the MSPB, even though the MSPB, like the NLRB, cannot act without a quorum.¹³ The Fourth Circuit held that courts should determine whether the agency's system for adjudication is functioning as Congress intended before concluding that the statute strips courts of authority to decide cases.¹⁴ The same reasoning should apply to the NLRA: because the NLRB is not functioning as Congress intended, states should be able to open the doors of their agencies and courts as AB 288 authorizes.

The second reason why the NLRA does not preempt AB 288 builds on the NLRB's practice for handling cases at the margin of its regulatory authority. As noted above, states can create and enforce labor laws for employees who are not covered by the NLRA, including domestic and farm workers, independent contractors, and public employees. In cases where a charging party is arguably not covered by the NLRA, the NLRB may need to coordinate its efforts with a state agency. Section 10(a) of the NLRA explicitly contemplates that some private sector workers can be protected by state labor law and state agencies by allowing the NLRB to cede jurisdiction to states.¹⁵ The NLRB has used this process for small employers and, more recently, for student athletes who are paid by their universities. The NLRA covers these employees and their employers, but the NLRB has decided that its limited enforcement resources are better spent elsewhere and, because most private university sports teams compete in conferences against public universities, it is advisable to cede the field of student-employee athlete labor relations to the states. Thus, there is precedent for state agencies to protect the NLRA rights of some private sector employees.

Finally, AB 288 is not preempted by federal law under the principles that were well established for the first 25 years of the NLRA, and under newer rules that the U.S. Supreme Court is developing.

The U.S. Supreme Court held in 1942 that state labor relations boards could adjudicate claims under the federal labor law or similar state labor laws.¹⁶ So did the high courts of New York, Wisconsin, and Massachusetts.¹⁷ The law was clear that, unless or until the NLRB had taken a case, a state labor board could adjudicate the case so long as its resolution was not inconsistent with the substantive protections of federal law.

F. Supp. 3d 164 (D.D.C. 2025), stay denied, 2025 WL 1021435 (D.C. Cir. 2025) (en banc), stay granted sub nom. *Wilcox v. Trump*, 145 S.Ct. 1415 (2025).

¹³ Jon O. Shimabukuro & Jennifer A. Staman, Merit Systems Protection Board (MSPB): A Legal Overview (Congressional Research Service Report R45630 (Mar. 25, 2019), <https://www.congress.gov/crs-product/R45630#:~:text=Without%20a%20quorum%2C%20the%20Board,initial%20decision%20has%20been%20appealed.&text=As%20of%20December%2031%2C%202018,cases%20pending%20before%20the%20Board.&text=The%20absence%20of%20a%20quorum,legislative%20changes%20involving%20the%20MSPB.&text=In%202018%2C%20President%20Trump%20nominated,Vice%20Chairman%2C%20and%20Board%20member.&text=A%20confirmation%20hearing%20for%20these,adjournment%20of%20the%20115th%20Congress.&text=On%20January%2016%2C%202019%2C%20the,consideration%20by%20the%20116th%20Congress.&text=On%20February%2C%202013%2C%202019%2C,prior%20to%20the%20committee's%20vote.&text=The%20committee's%20chairman%20has%20indicated,committee%20supports%2C%20a%20third%20member.>

¹⁴ 139 F.4th at 313.

¹⁵ 29 U.S.C. § 160(a).

¹⁶ *Allen Bradley v. Wisconsin Emp. Rels. Bd.*, 315 U.S. 740 (1942).

¹⁷ *Davega City Radio v. State Labor Relations Board*, 281 N.Y. 13 (1939); *IBEW Local 953 v. Wisc. Emp. Rels. Bd.*, 245 Wis. 532 (1944); *R.H. White v. Murphy*, 310 Mass. 510 (1942).

The era's leading labor law scholar, Professor Archibald Cox of Harvard, who later became one of the most highly regarded Solicitors General of the United States, agreed. Professor Cox said state agencies had authority to handle labor cases when it was clear that the NLRB would not assert jurisdiction over them, such as those involving very small employers or workers who were not covered by the NLRA. "NLRB appropriations and personnel are insufficient to permit prompt and careful disposition of every case to which its power might be extended," Professor Cox wrote, and it is better to allow states to handle these.¹⁸ Today's labor law scholars agree. Professor Benjamin Sachs, also of Harvard, has written that the NLRA does not preempt state enforcement of labor rights when the NLRA lacks a quorum.¹⁹

The U.S. Supreme Court expanded federal authority over labor matters in the late 1950s, the heyday of large corporations and large national unions. In *San Diego Bldg. Trades Council v. Garmon*, it ruled that states could not adjudicate any case within the "primary jurisdiction" of the NLRB, but it also was clear that states retain authority to regulate matters of local responsibility.²⁰ Many lawyers came to believe that only the federal labor board can enforce federal labor law and, therefore, without a functioning NLRB, federal labor law cannot be enforced. They simply forgot the way things worked before.

But the Court has recently reduced the scope of the federal labor board's exclusive authority. In a 2023 case involving a strike at the Glacier Northwest cement company, the Court held that state courts may adjudicate claims for damages caused by labor actions, even where an unfair labor practice charge regarding the actions was pending in the NLRB.²¹ The Court's majority emphasized the importance of allowing states to protect workers and businesses in their state so long as the application of state law does not conflict with federal law.²² And two justices (Thomas and Gorsuch) each concurred, calling for reconsidering federal supremacy over state labor law entirely.²³

Under the *Glacier Northwest* decision, states have authority to protect workers and businesses under state law *even where an unfair labor practice charge is pending in the NLRB* when the state seeks to address matters deeply rooted in local responsibility. Here in California, where companies are flouting the fundamental rights of employees to associate in unions, to advocate for improved labor standards and safer work, and to seek redress of their grievances, California has the authority to step in. AB 288 opens the door to our state labor relations board to resolve these cases.

To revive the practice of joint federal-state responsibility for enforcing labor rights will require coordination between California's labor board and the national labor board. But coordination between state and federal agencies is nothing new. State and federal labor boards confer about which should handle cases when it is unclear whether federal law applies, as in the case of very small businesses or workers who might be excluded from federal labor protections because they

¹⁸ Archibald Cox & Marshall Seidman, *Federalism and Labor Relations*, 64 Harv. L. Rev. 211, 216 (1950).

¹⁹ Benjamin Sachs, *Going, Garmon, Gone: Why States May Now Be Free to Redesign Labor Law*, ONLABOR.ORG (Jun. 4, 2025).

²⁰ *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957).

²¹ *Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, 598 U.S. 771 (2023).

²² *Id.* at 776 (noting that *Garmon* preemption "requires more than a conclusory assertion that the NLRA arguably protects or prohibits conduct").

²³ *Id.* at 788 (Thomas, J., concurring, joined by Gorsuch, J.).

work in agriculture or domestic work. Other state and federal agencies share enforcement authority, including in matters of civil rights and criminal justice. AB 288 provides that if the federal NLRB is proceeding in a matter, the case will stay in there. But if the NLRB is not handling a case the state labor board will be there to enforce the law. The goal is to ensure employee and business rights are enforced in the most efficient, expeditious, and effective manner.

In sum, AB 288 will protect California workers and businesses if the Trump Administration succeeds in its effort to have core parts of the federal labor enforcement regime declared unconstitutional. The U.S. government has argued in the Fifth Circuit that the NLRA's adjudication mechanism is indeed unconstitutional. Although the decision does not apply in California, it signals that the United States no longer believes the NLRB as currently structured can enforce federal law. It's time for California to act.

Many large California employers, including Amazon, SpaceX, Trader Joe's, and the University of Southern California, currently claim that the NLRA is unconstitutional, at least in part, and have refused to comply with it. Many also insist that their workers are not employees covered by the NLRA or that they are not the workers' employer, and therefore the NLRB does not have jurisdiction over that aspect of their labor relations. They cannot be heard to complain that AB 288 will provide a mechanism to enforce labor rights while also complaining that the existing federal mechanism cannot be used.

AB 288 protects fundamental constitutional rights of Californians at a time when the federal government is failing. It is a commonsense measure that builds on the established practice enabling unions and employers to come together under a stable and predictable set of rules to bargain collectively. And it reflects our state's commitment, enshrined in the California constitution, to protect fundamental rights of freedom of speech and freedom of association, and freedom to assemble for the common good.²⁴

²⁴ Cal. Const. § 3.