Memorandum

TO: Senator Margarita Prentice, Chair, Senate Ways & Means Committee
Senator Rodney Tom, Vice Chair
Senator Joe Zarelli, Ranking Member

FROM: Kris Tefft, General Counsel, Association of Washington Business

DATE: March 2, 2010

RE: Invalid union neutrality provisions in proposed Supplemental Operating Budget, Engrossed Substitute Senate Bill 6444

The purpose of this memorandum is to alert you to instances in the Senate Supplemental Operating Budget document that contain provisions related to labor union neutrality that are on their face invalid in light of the United States Supreme Court's decision in *United States Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008). A copy of the *Brown* case is transmitted with this memorandum.

Notably, these provisions were not proposed by the Senate in the original or substitute form of SB 6444, but rather inserted by the House in its striking amendment. Specifically, at sections 205 and 206 (pp. 73 and 81-82 respectively) of ESSB 6444, the following language is inserted:

> No employer, provider, or entity receiving state funds to provide long-term care services or services to the developmentally disabled may use these funds to assist, promote, or deter union organization.

In *Brown*, the U.S. Supreme Court invalidated a California statute (A.B. 1889) that prohibited private employers receiving state program funds of more than $10,000 in any program year from using the funds "to assist, promote, or deter union organizing."

Labor-management relations in the private sector are governed by the National Labor Relations Act ("NLRA"), and enforced by the National Labor Relations Board ("NLRB"). In creating a uniform federal policy for organizing and bargaining rights, the NLRA has been interpreted to pre-empt state laws or regulations that regulate conduct Congress intended "be unregulated

because left 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L.Ed.2d 396 (1976). The *Machinists* pre-emption doctrine is based on the premise that "'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.' " 427 U.S., at 140, n. 4, 96 S. Ct. 2548.

In *Brown,* the U.S. Supreme Court held that the **precise language** at issue in these budget provisos is "pre-empted under *Machinists* because [it] regulate[s] within 'a zone protected and reserved for market freedom.'" *Brown*, 128 S. Ct. at 2412 (internal citation omitted). Specifically, the prohibition was held to run afoul of section 8(c) of the NLRA, which provides:

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

Under this provision, the court found the California statute "unequivocally pre-empted." *Brown*, 128 S. Ct. at 2414. It made no difference to the court that the mechanism for regulation on employer speech regarding unionization was a prohibition on the use of state funds. *Id*.

The same is true with the identical language in these budget provisos. They are pre-empted by the NLRA and invalid on their face. AWB does not support them and would ask you to remove them in the final 2010 Supplemental Operating Budget.

I am available at (360) 943-1600 or KrisT@AWB.org should you have any further questions or concerns about the foregoing.