Nos. 18-1065, 18-1092

In the Supreme Court of the United States

INTERPIPE CONTRACTING, INC.,

Petitioners,

v.

XAVIER BECERRA, ET AL.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMBINED BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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Additional Caption Listed on Inside Cover

ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC.,

Petitioners,

v.

XAVIER BECERRA, ET AL.,

Respondents.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act impliedly preempts a state law preventing employers from unilaterally counting amounts they contribute to an employer-chosen "industry advancement fund" as part of the prevailing wage that they are legally required to pay to employees working on certain public works projects.

2. Whether a facially neutral state law preventing that conduct discriminates on the basis of viewpoint in violation of the First Amendment.

3. Whether the court of appeals departed from this Court's precedents when it analyzed the state law in part as a permissible limitation on state facilitation of private speech, rather than as a restriction on the First Amendment rights of "industry advancement funds" that wish to receive payments from employers.

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STATEMENT

1. California, like most States and the federal government, requires that employers pay workers a "prevailing wage" for their work on public works projects. *See, e.g.*, Cal. Lab. Code §§ 1770 *et seq*. "[P]revailing wage laws are based on the … premise that government contractors should not be allowed to circumvent locally prevailing labor market conditions by importing cheap labor from other areas." *State Bldg. and Constr. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th 547, 555 (2012) (citations omitted). "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." *Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 985 (1992).

To satisfy California's statutory requirement to pay the "prevailing wage" to employees working on public projects, contractors in California may pay their employees the minimum prevailing wage in full in the form of hourly cash wages, or they may provide a combination of hourly wages and benefits, such as contributions to pension funds, healthcare, paid vacation, or travel reimbursements, provided that the combination of hourly wages and value of the benefits meets the minimum prevailing wage. *See* Cal. Lab. Code §§ 1771, 1773.1(c). Payments made for these benefits "are a credit against the [employer's] obligation to pay" the prevailing wage. *Id.* § 1773.1(c).

In 2004, California expanded available prevailing wage credits (i.e., amounts that could be deducted from the minimum prevailing wage otherwise due to the worker in cash wages) to include payments to "industry advancement funds," if such payments were required by an applicable collective bargaining agree-

ment. Cal. Lab. Code § 1773.1(a)(8). Industry advancement funds are advocacy funds "designed to benefit the industry as a whole," *Joint Admin. Comm. of Plumbing & Pipefitting Indus. in Detroit Area v. Wash. Grp. Int'l, Inc.*, 568 F.3d 626, 628 (6th Cir. 2009) (citations and internal quotation marks omitted); and they may advocate on a range of issues, *see* ABC Pet. App. G7 (one industry advancement fund works on "promoting public education on construction-related topics" and "promoting job targeting programs"). [1] Support for such funds is a permissive, not mandatory, subject of collective bargaining. *See N.L.R.B. v. Sheet Metal Workers Int'l Ass'n*, 575 F.2d 394, 397-398 (2d Cir. 1978). Collective bargaining agreements thus may, but need not, include a provision permitting contributions to an industry advancement fund to count as an employee benefit that may be credited against the required prevailing wage.[2]

After the 2004 statutory amendment to California's prevailing wage law, employers and the state Department of Industrial Relations interpreted a separate catch-all provision in the statute—permitting prevailing wage credit for payments made for "[o]ther purposes similar to those specified" in the law—as allowing employers to take credits against the

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[1] This brief is a combined response to two petitions. Citations to a particular petition or lower court document include the petitioner's name, abbreviating Associated Builders and Contractors of California Cooperation Committee, Inc. as ABC and Interpipe Contracting, Inc. as Interpipe.

[2] *See, e.g.*, pages 44 and 47 of http://www.agc-ca.org/uploadedFiles/Member_Services/Industrial_Relations/Southern_California/MLA/2012-2016%20Carpenters%20MLA-AGC.pdf (contract between several contractors' associations and carpenters' unions providing for $0.08 per-hour deduction for carpenter industry advancement fund). (last visited May 16, 2019).

required employee wages for contributions to employer-selected industry advancement funds not specified in a collective bargaining agreement, so long as the fund was "similar" to one identified in an agreement. *See* ABC Pet. App. A9; Cal. Lab. Code § 1773.1(a)(9).

In 2016, the California Legislature enacted Senate Bill 954 to prohibit employers from making deductions from employee wages to fund payments to industry advancement funds unless the deductions were agreed to in a collective bargaining agreement. The Legislature was concerned that the law's previous wording had permitted employers to divert employee wages unilaterally to a purpose favored by the employer. *See* ABC Pet. App. H12 (legislative committee report).

To address this concern, SB 954 clarified that employer payments for "other purposes similar to" industry advancement are eligible for prevailing wage credit only if they are "made pursuant to a collective bargaining agreement to which the employer is obligated." Cal. Lab. Code § 1773.1(a)(9); *see also id.* § 1773.1(c) ("[C]redit shall not be granted … for payments for industry advancement … if those payments are not made pursuant to a collective bargaining agreement to which the employer is obligated."). The Legislature applied the same limitation to employer payments to programs similar to specified "[a]pprenticeship or other training programs" and "[w]orker protection and assistance programs or committees." *Id.* § 1773.1(a)(6)-(7), (9).

2. Petitioners Associated Builders and Contractors of California Cooperation Committee, an industry advancement fund, and Interpipe Contracting, an employer that had used prevailing wage credits to make contributions to ABC prior to SB 954, filed suit against

respondents the California Attorney General, the Director of the state Department of Industrial Relations, and the California Labor Commissioner. ABC Pet. App. A10-A11, n.1. Interpipe and ABC claimed that SB 954 interfered with labor-related speech by preventing employers from taking prevailing wage credit for contributions to their chosen industry advancement funds, and thus conflicted with the NLRA's protection for noncoercive labor speech. *Id.* at A11, A17, G9. ABC claimed that SB 954 violated its First Amendment rights by burdening its ability to obtain funding for its expressive activities and by discriminating based on viewpoint. *Id.* at G8-G10. The district court dismissed the claims. *Id.* at B1-B32.

3. The court of appeals affirmed. ABC Pet. App. A1-A50.

a. As to Interpipe's NLRA preemption claim, the court explained that the NLRA contains no express preemption provision, but impliedly preempts state laws that regulate in an area that Congress intended to leave unregulated. ABC Pet. App. A14-A15 (discussing *Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976)). The court further noted that the NLRA generally does not preempt state laws that set minimum labor standards, such as state laws regulating wages, health, and safety. *Id.* at A15-A17 (discussing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). The court recognized that both Interpipe and respondents had agreed that SB 954, a law regulating the payment of employee wages, reflects such a minimum labor standard. *Id.* at A17; *see also* A21-A22.

The court rejected Interpipe's claim that SB 954 is nevertheless preempted because it regulates noncoercive labor speech in a way that impermissibly favors

the expressive activities of some industry advancement funds—those designated in a collective bargaining agreement. ABC Pet. App. A17-A22. The court explained that state laws that permit collective bargaining agreements to set employment terms and conditions that differ from otherwise-applicable labor standards have long been viewed as consistent with the NLRA. *Id.* at A17-A18. A statute like SB 954, which permits unions and employers to negotiate to allow prevailing wage credits for industry advancement purposes, while denying such credits outside of that context, is likewise not preempted. *See id.*

The court further concluded that SB 954 does not conflict with NLRA Section 8(c), which provides that the expression of views on labor issues is not an unfair labor practice unless the speech contains a threat of reprisal or promise of benefit. 29 U.S.C. § 158(c); ABC Pet. App. A19. In particular, the court rejected Interpipe's reliance on *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), which held that Section 8(c) preempted a state law that prohibited employers from using state funds to assist or deter union organizing. ABC Pet. App. A19-A22. The statute there was preempted because its "complex and severe enforcement scheme chilled employers' use *of their own money* to engage in protected labor speech." *Id.* at A20 (emphasis in original). In contrast, "SB 954 does not—either directly or indirectly through coercion—limit employers' use of their own funds to engage in whatever labor speech they like." *Id.* at A21 (emphasis omitted).

b. The court also held that SB 954 does not infringe ABC's First Amendment rights. ABC Pet. App. A22-A47. At the outset, the court observed that ABC "does not dispute that SB 954 leaves it free to speak and express itself at will." *Id.* at A23. "Nor does

ABC[] suggest that SB 954 prevents employers (and employees for that matter) from contributing to ABC[]." *Id.* Instead, ABC asserted a "novel First Amendment theory: that it has a protected First Amendment right to *receive* … employee-subsidized funds from Interpipe and other employers." *Id.* (emphasis in original).

The court rejected that theory. As an initial matter, it held that SB 954 regulates conduct, not speech. ABC Pet. App. A30-A33. The court explained that SB 954 is "a generally applicable wage law that targets employer use of employee wages." *Id.* at A32. "A law regulating wages does not target conduct that communicates a message nor does such conduct contain an expressive element." *Id*. at A31.

The court further reasoned that, even if SB 954 regulated speech, it was not a burden on ABC's expressive activities but rather a permissible withdrawal of state facilitation of those activities. ABC Pet. App. A34-A38. SB 954 reflects the Legislature's decision to limit use of "a state-authorized entitlement allowing employers to reduce their employees' wages to support the employers' favored" industry advancement fund. *Id.* at A38. "It does not restrict [industry advancement funds'] right to free speech." *Id.*

Finally, the court rejected ABC's theory of viewpoint discrimination. ABC Pet. App. A39-A47. The court of appeals recognized that a law unconstitutionally discriminates based on viewpoint when it regulates based on the motivating ideology or perspective of the speaker. *Id*. at A39. The court noted that if a law is facially neutral, courts "will not look beyond its text to investigate a possible viewpoint-discriminatory motive." *Id.* But if "the law includes indicia of dis-

criminatory motive, [courts] may peel back the legislative text and consider legislative history and other extrinsic evidence to probe the legislature's true intent." *Id.* at A39-A40. A law's under- or over-inclusiveness can indicate a discriminatory motive. *Id.* at A40.

The court concluded that SB 954 is not discriminatory under these principles. It explained that "SB 954 is indifferent to which [industry advancement funds]—if any—employees elect to subsidize." ABC Pet. App. A41. SB 954 is part of a broader statutory scheme setting a wage floor for employees on public works projects; it is aimed at ensuring that employers cannot reduce employee wages, or choose whether certain items will be treated as non-cash employee benefits for purposes of satisfying the required statutory minimum, unless the reduction or offset is agreed to through the collective bargaining process. *See id.* at A44-A46. No discriminatory motive, moreover, could be inferred based on ABC's claim that the law is under- or over-inclusive. *Id.* at A44-A47; *see also id.* at A45 n.17 (SB 954 "reasonably tailored to the objective of ensuring that employer credits taken against employee wages inure to the benefit of employees"). And although the court thought it unnecessary to examine the legislative record in light of SB 954's facial neutrality, the court discerned no "pro-union motivation by the California legislature." *Id.* at A47 n.18. The Legislature was concerned with "closing a loophole allowing employers to take a wage credit without their employees' consent." *Id.*

ARGUMENT

1. Petitioner Interpipe asks this Court to review the court of appeals' conclusion that the National Labor Relations Act does not impliedly preempt SB 954.

This ruling is consistent with this Court's precedents and, especially as Interpipe asserts it is raising an issue of first impression, does not warrant further review.

a. Interpipe principally contends that this Court should grant certiorari to consider whether the principles articulated in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), should be extended to preempt California's SB 954. *See* Interpipe Pet. 12-17. Interpipe acknowledges that no prior judicial decision has adopted its theory of preemption, but argues that this Court should grant review to consider the question. *Id.* at 13-14.

In *Brown*, this Court held that the NLRA displaced a state law that regulated speech by employers concerning labor issues. The law in question prohibited employers that received state funds through grants, state contracts, or other state programs from using those funds to "'assist, promote, or deter union organizing.'" 554 U.S. at 62. The prohibition included "any attempt by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" or "[w]hether to become a member of any labor organization." *Id.* at 63 (citation and internal quotation marks omitted, alterations in original). The state law established "a formidable enforcement scheme" that required employers to maintain records sufficient to show that no state funds were used for prohibited expenditures, including expenditures on overhead expenses like salaries. *Id.* at 63-64, 71-72. The law conclusively presumed that any expenditure to assist or deter union organizing made from commingled state- and non-state funds violated the law. *Id* at 72. And it authorized civil penalties for violations, enforcement actions by the state attorney

general, lawsuits by private parties, and the recovery of attorneys' fees by prevailing plaintiffs. *Id.* at 64.

This Court held that the law conflicted with the NLRA's intent to leave noncoercive labor speech about unionization unregulated. *Brown*, 554 U.S. at 68. The Court concluded that the state enactment indirectly regulated employers' ability to engage in speech about labor issues through its spending restrictions and enforcement mechanisms, which "put considerable pressure on an employer either to forgo his free speech right to communicate his views to his employees or else to refuse the receipt of any state funds." *Id.* at 73 (citation and internal quotation marks omitted). "By making it exceedingly difficult for employers to demonstrate that they [had] not used state funds and imposing punitive sanctions for noncompliance, [the state law] effectively reache[d] beyond" the use of state funds and controlled employers' use of their own resources to speak on labor-management issues. *Id.* at 71. "In so doing, the statute impermissibly predicat[ed] [state] benefits on refraining from conduct protected by federal labor law, and chill[ed] one side of the robust debate" that the NLRA protects. *Id.* (citations and internal quotation marks omitted).

In this case, the court of appeals correctly concluded that SB 954 is not preempted under *Brown*. ABC Pet. App. A19-A22. The law at issue in *Brown* conflicted with the NLRA because it had the effect of restricting employers' ability to use their own resources to speak about unionization. 554 U.S. at 63. SB 954 contains no similar restriction. The law provides only that an employer may not reduce the minimum wages otherwise paid to its *employees* and direct the reduced payments to an organization unilaterally in the absence of any agreement by employees that the

organization benefits them. Nothing in the law threatens to chill an employer's choices about using its own money to support any organization or cause. Further, while the statute in *Brown* had the effect of restraining employers' speech specifically about unionization, SB 954 regulates employers' diversion of wages to subsidize any industry advancement activity, including activities that have nothing to do with the issues of labor-management relations with which the NLRA is concerned. *See* ABC Pet. App. G7 (ABC "promot[es] public education on construction-related topics," among other things). Nothing in *Brown*'s holding or logic supports Interpipe's theory that SB 954 is preempted by the NLRA.

Interpipe errs in contending that NLRA Section 8(f), which allows for certain pre-hire agreements in the construction industry, supports extending *Brown* to laws like SB 954. Interpipe Pet. 13; *see* 29 U.S.C. § 158(f). One type of pre-hire agreement authorized by Section 8(f) and used in connection with large construction projects, including public works projects, is a "project labor agreement." Project labor agreements are "multi-employer, multi-union pre-hire agreement[s] designed to systemize labor relations at a construction site." *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 30 (D.C. Cir. 2002); *see also Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n*, 21 Cal. 4th 352, 359 (1999) (project labor agreements are used by both private businesses and public agencies and are "designed to eliminate potential delays resulting from labor strife, to ensure a steady supply of skilled labor on the project, and to provide a contractually binding means of resolving worker grievances"). Although Interpipe emphasizes its advocacy regarding project labor agreements authorized under Section 8(f), Interpipe never

pleaded a Section 8(f) theory in its operative complaint, and the decision below did not specifically address Section 8(f) in its preemption analysis. Section 8(f) does not, in any event, strengthen Interpipe's preemption claim, because SB 954 does not regulate employers' speech in any way that conflicts with the NLRA, including employers' speech addressing pre-hire collective bargaining agreements for public works projects.

Interpipe points to no court of appeals decision accepting its reading of *Brown*. Indeed, the petition admits that "there are no cases directly on point with respect to Interpipe's NLRA preemption claim." Interpipe Pet. 14. In the absence of any conflict in authority, there is no reason for review by this Court.

b. There is also no reason for this Court to address the second question presented in Interpipe's petition, involving the court of appeals' application of this Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). *See* Interpipe Pet. ii, 18-21. Interpipe acknowledges that the question of the application of *Metropolitan Life* to circumstances like those present here arises infrequently, but argues that the court of appeals erred in its reading of that decision. Interpipe Pet. 20-21.

Metropolitan Life construed the NLRA as not displacing state laws that set minimum labor standards where "the purpose of the state legislation is not incompatible with [the] general goals of the NLRA." 471 U.S. at 754-755. Interpipe first claims that SB 954 is not a "minimum labor standard" under *Metropolitan Life*. Interpipe Pet. 18-19. But Interpipe argued below that SB 954 *is* such a standard. ABC Pet. App. A17 ("Interpipe and the State agree that SB 954 is a minimum labor standard."); C.A. Dkt. No. 45 at 13 ("Interpipe has never disputed that SB 954 is a minimum

labor standards law."). That concession is correct because, as explained above, SB 954 is a regulation of employee wages and, in particular, the benefits that may be credited as wages. *See Metro. Life*, 471 U.S. at 756 (discussing state authority to enact laws regulating the employment relationship, including "minimum and other wage laws") (citation and internal quotation marks omitted).

Contrary to Interpipe's argument, moreover, it does not matter that SB 954 treats wage deductions differently depending on whether they are authorized by a collective bargaining agreement. *See* Interpipe Pet. 19. Payments to an employer-selected organization do not necessarily or even generally benefit employees, and it is therefore reasonable to refuse to treat such payments as employee benefits unless employees expressly have agreed to them. Courts routinely uphold state labor laws that impose baseline workplace standards on employers, while permitting employers and unions to negotiate departures from those standards through the collective bargaining process. *See*, *e.g.*, *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22 (1987) (rejecting preemption challenge to state law requiring employers to make severance payments unless employee-severance matters were addressed as part of collective bargaining agreement); ABC Pet. App. A18 (citing cases). SB 954 works in a similar way. It establishes a default rule barring employers from reducing employees' prevailing wages for industry advancement purposes, but allows employers and unions to negotiate for such deductions through the collective bargaining process.

Interpipe next argues that even if SB 954 is a minimum labor standard, it is inconsistent with the general goals of the NLRA because it upsets the balance

of labor speech in a way contrary to *Brown*. Interpipe Pet. 19-20. That argument is incorrect for all the reasons explained above. *Supra* at 8-11. Interpipe is also mistaken in construing the decision below as effectively holding that "state laws that purport to be minimum labor standards are never preempted." Interpipe Pet. 19. The court of appeals considered whether SB 954 interferes with the NLRA's policy of protecting labor speech and concluded that it does not. ABC Pet. App. A19-A22. There is no reason for further review of that conclusion—particularly given that Interpipe itself asserts that few state laws would be inconsistent with the NLRA even under its theory. Interpipe Pet. 20-21 (arguing that SB 954 is "among the relatively few minimum labor standards statutes" that would purportedly conflict with the NLRA).

c. Finally, Interpipe argues at some length that the court of appeals erred in characterizing its claim as a facial, rather than as-applied, challenge to SB 954. Interpipe Pet. 21-24. But its petition does not properly frame any question concerning the proper analysis of facial versus as-applied challenges in general. *See id.* at i-ii.

As to this case, the court below correctly concluded (ABC Pet. App. A13) that Interpipe pleaded a facial challenge to SB 954. *Id.* at G9-G13. The district court treated Interpipe's claim as a facial one (*id.* at B13), and Interpipe never urged the court of appeals to construe its claim differently. *See* C.A. Dkt. Nos. 9, 45. In this Court, Interpipe seems to argue that its case is an as-applied challenge because it alleged facts demonstrating individualized harm in its preliminary injunction motion. Interpipe Pet. 22. But the mere allegation of individual injury, while necessary to establish standing, does not convert a facial challenge

into an as-applied one. In any event, whether the lower courts correctly construed Interpipe's claim in light of the allegations pleaded in its complaint is not a matter warranting this Court's review.

2. There is likewise no reason for further review of the court of appeals' dismissal of ABC's claim alleging viewpoint discrimination under the First Amendment. ABC Pet. 11-24.

a. The court of appeals correctly rejected ABC's contention that SB 954 discriminates against industry advancement funds based on their open-shop viewpoint. To begin with, the court of appeals properly recognized that SB 954 regulates conduct, not speech. ABC Pet. App. A30-A33. As this Court has explained, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). SB 954 regulates the payment of wages by prohibiting employers from reducing workers' prevailing wages and diverting the resulting funds to an employer-selected organization unilaterally in the absence of any agreement by the employees to the payments. The law does not restrict anyone from speaking about any issue, whether directly or by providing financial support. It is no different from, for example, a statute barring employers from paying employees less than the minimum wage. The analysis does not change simply because the employer intends to use the money it saves to engage in speech.

Even if SB 954 regulates speech, the decision below correctly concluded that the statute does not discriminate based on viewpoint. As the court of appeals recognized, viewpoint discrimination is "the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker." *Reed v. Town*

of Gilbert, Ariz., 135 S. Ct. 2218, 2230 (2015) (citation and internal quotation marks omitted); *see* ABC Pet. App. A39. SB 954 does not draw distinctions based on the perspective or ideology of any speaker. The distinction drawn is between wage deductions authorized by a collective bargaining agreement and wage deductions that are not. No employer, whether unionized or not, may unilaterally take prevailing wage credit for industry advancement payments. And under SB 954, payments for industry advancement funds provided in a collective bargaining agreement are creditable against the prevailing wage regardless of what industry advancement activities are undertaken and what ideas or viewpoints—if any at all—are expressed or supported by the industry advancement fund.

No discriminatory motive can be inferred based on asserted over- or under-inclusiveness in the statute, as the court of appeals concluded. ABC Pet. App. A43-A47. The purpose of SB 954 is to prevent employers from unilaterally diverting employee wages and undercutting employee bargaining power. *See id.* at A44. The statute is not over-inclusive in not allowing credits based on individual employee consent, because a law that authorized individual employees to negotiate reductions to their own wages (*see* ABC Pet. 16-17) would effectively negate the wage floor. *See* ABC Pet. App. A44 (prevailing wage requirements prevent employers from denying an individual employment "because she is unwilling to negotiate down a minimum wage and instead hir[ing] an employee who is").

The law is also not under-inclusive in a way that reflects viewpoint discrimination, even though it does not require individual employee consent for wage reductions for industry advancement funds. ABC Pet. App. A46. SB 954 forbids employers from unilaterally

taking credits for payments to those funds. It thus assures "a greater degree of consent than if employers could—as they were doing—freely reduce employees' wages without *any* form of employee consent." *Id*. And while SB 954 does not require employee consent for wage credits for pension plans, health insurance, and other benefit programs, those payments are for conventional economic and other employee benefits that are provided directly to individual employees and that benefit them. ABC Pet. App. A46-A47. Treating those contributions differently from payments for industry advancement purposes makes sense in light of the objective of California's prevailing wage law of setting a compensation floor for workers on public works projects.

ABC misreads the decision below in claiming that it "eliminates" the ability of plaintiffs to bring a claim that a facially neutral law acts as a proxy for viewpoint discrimination. ABC Pet. 10. To the contrary, the court of appeals expressly recognized that if a facially neutral law "includes indicia of discriminatory motive, [courts] may peel back the legislative text and consider legislative history and other extrinsic evidence to probe the legislature's true intent." ABC Pet. App. A39-A40. The court further noted that a statute's under- or over-inclusiveness are relevant indicia of discrimination, explaining that "[t]he presence of either indicates potential viewpoint discrimination, which would prompt [a court] to consider extrinsic evidence to help determine whether the … legislature did, in fact, act with discriminatory intent." *Id*. at A40. As discussed above, the court then proceeded to analyze whether SB 954 is under- or over-inclusive, and concluded that it is not. ABC Pet. App. A40-A47. That the court of appeals rejected ABC's First Amendment

claim on the facts of this case does not foreclose "viewpoint discrimination by neutral proxy" theories in future cases. *See* ABC Pet. 14-21.

b. ABC's argument that the decision below conflicts with decisions of other circuits is premised on the same misreading of the court of appeals' ruling. *See* ABC Pet. 21-24. The petition likewise misreads the Sixth Circuit's decision in *Bailey v. Callaghan*, 715 F.3d 956 (6th Cir. 2013). *See* ABC Pet. 23-24. There, the court declined to look beyond a statute's text in an effort to discern an illicit legislative motive, but the court did not hold that a plaintiff can never establish viewpoint discrimination when a law is facially neutral. *Bailey*, 715 F.3d at 958. *Bailey* held only that the plaintiffs' viewpoint discrimination claim failed there, because the State's decision to deny access to payroll deductions to unions representing public school employees, but not other public employees, applied to any union, irrespective of its identity or point of view. *Id.* at 959. Neither *Bailey* nor the decision below foreclosed all viewpoint discrimination challenges to facially neutral laws.

In the other cases cited in the petition (ABC Pet. 21-23), the courts' conclusion that a facially neutral law reflected unconstitutional viewpoint discrimination turned on the circumstances of the particular case. *See Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 593-594 (7th Cir. 2002) (university's decision to distribute student activity fees based on length of time student group had been in existence and amount of funding received in past was not viewpoint neutral, because university's past funding criteria were based on viewpoint, including a prior prohibition on funding partisan and religious activities); *Amidon v. Student Ass'n of State Univ. of N. Y.*

at Albany, 508 F.3d 94, 102 (2d Cir. 2007) (basing funding for student groups on a student body referendum created "substantial risk that funding will be discriminatorily skewed in favor of [student organizations] with majoritarian views"); *see also Okla. Corrections Prof'l Ass'n v. Doerflinger*, 521 Fed. App'x 674, 679-680 (10th Cir. 2013) (permitting further consideration of whether law barring specific employee organization from participating in payroll deduction program discriminated on basis of viewpoint). These fact-bound decisions do not conflict with the decision below (or with *Bailey*).

3. ABC also challenges the court of appeal's reasoning that SB 954 reflects a permissible limitation of state assistance for speech rather than a restriction on the speech of any party, contending that the decision below misconstrued this Court's precedents. ABC Pet. 25-29. That contention is incorrect, because this Court has made clear that a State's decision not to aid an entity's speech is not the same as restricting that speech. For example, in *Davenport v. Washington Education Association*, 551 U.S. 177, 189 (2007), this Court upheld a state ban on unions' use for electoral purposes of agency fees collected from non-union employees, absent those employees' affirmative approval. Because the unions had no First Amendment right to collect agency fees from non-members in the first place, the limitation was simply a condition on the unions' state-conferred entitlement to collect those fees from non-members. *Id.* at 187; *see also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 361 (2009) (state law prohibiting payroll deductions for union political activities "does not suppress political speech but simply declines to promote it"); *Regan v. Taxation with Rep-*

resentation of Wash., 461 U.S. 540, 549 (1983) ("legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right").

Here, SB 954 limits employers' ability to credit certain payments against their state-law obligation to pay prevailing wages. The law does not restrict or regulate in any way how either employers or industry advancement funds use their own resources or express their positions on any issue. California's decision not to allow employers to unilaterally direct employee wage payments to ABC is not an abridgment of ABC's speech. ABC Pet. App. A38.

The court of appeals did not, as ABC contends, improperly extend this Court's precedents. ABC Pet. 25. ABC's argument seems premised on the theory that for a state law to be considered a withdrawal of or condition on state assistance rather than a direct regulation of speech there must be a direct or indirect receipt of funds from the public fisc. *See id.* at 28 (citing *Dep't of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm'n*, 760 F.3d 427 (5th Cir. 2014)). That overlooks that *Davenport*, for example, did not rely on costs incurred by the government. *Davenport*, 551 U.S. 177. In any event, even if some effect on the public fisc were required, SB 954 would qualify because it is a prevailing wage law that applies to construction projects funded with public resources. *See* Cal. Lab. Code §§ 1720 *et seq*.

Finally, even if the decision below incorrectly relied on cases involving the use of public funds or other public resources, the result in this case would be no different. As explained above, SB 954 regulates employers' payment of wages to their employees. Industry advancement funds like ABC have no constitutional entitlement to receive any share of those wages. The

court of appeals properly rejected that "novel" constitutional theory, and there is no reason for further review. ABC Pet. App. A23.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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