No. 18-1065

IN THE

Supreme Court of the United States

INTERPIPE CONTRACTING, INC.,
Petitioner,

v.

XAVIER BECERRA,
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ASSOCIATED GENERAL CONTRACTORS OF AMERICA'S MOTION TO FILE *AMICUS CURIAE* BRIEF, SHOULD THE *AMICUS CURIAE* BRIEF BE DEEMED LATE AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA IN SUPPORT OF PETITION

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May 20, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

AGC'S MOTION TO FILE *AMICUS CURIAE* BRIEF, SHOULD THE *AMICUS CURIAE* BRIEF BE DEEMED LATE

NOW COMES Amicus, The Associated General Contractors of America ("AGC"), by and through its undersigned attorneys, and respectfully requests leave to file the attached *amicus curiae* brief, should the brief be considered late, and states as follows:

The United State Supreme Court placed this matter on its docket on December 4, 2018 when Petitioner filed an application for an extension of time to file a petition for a writ of certiorari.

The Petitioner filed its writ of certiorari on February 12, 2019.

On March 19, 2019, the Court set the deadline for a response to the writ of certiorari for April 18, 2019.

On April 9, 2019, the Court extended the time to file a response to May 20, 2019.

Under Supreme Court Rule 37, an *amicus curiae* brief in support of a petitioner shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later. U.S. Sup. Ct. R. 37.2(a).

Therefore, AGC believes that pursuant to Rule 37, the latest date for AGC to file an *amicus curiae* brief is the date of the response deadline, May 20, 2019.

1. AGC submitted its *amicus curiae* brief for filing on May 20, 2019 and believes its filing is therefore timely.

2. However, in an abundance of caution, should the Court determine that AGC's filing of the *amicus curiae* brief should have occurred earlier, AGC respectfully requests that the Court accept AGC's *amicus curiae* brief for filing on May 20, 2019.

3. All parties of record have consented to the filing of AGC's *amicus curiae* brief on May 20, 2019.

4. Petitioner Interpipe Contracting, Inc. has no objection to the filing of this brief if deemed late.

5. Respondent, Attorney General of the State of California has taken no position in regard to the filing of this brief if deemed late, and therefore, has not expressly objected to a late filing.

WHEREFORE, AGC respectfully requests that the Court accept AGC's *amicus curiae* brief for filing on May 20, 2019, should the Clerk of the Supreme Court determine that the deadline for AGC's *amicus curiae* brief has passed.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Associated General Contractors of America ("AGC") is a nationwide trade association of construction companies and related firms. It has served the construction industry since 1918, and over time, it has become the recognized leader of the construction industry in the United States. The association now has more than 27,000 members in 89 chapters stretching from Puerto Rico to Hawaii. These members construct public and private buildings as well as work on major infrastructure projects.

In addition to serving all segments of the construction industry, AGC is perhaps the only association in the industry to serve both open shop and union contractors. Today, a majority of the AGC's members are open shop, meaning that they have no obligation to engage in collective bargaining and they choose not to do so. In the past, however, and for many decades, the opposite was true. In addition, AGC chapters have historically overseen much if not most of the multiemployer bargaining between the employers and the unions in the construction industry. A large plurality of the Association's members continue to engage in collective bargaining, and many AGC chapters continue to oversee that bargaining.

AGC has particularly deep insights into labor-management relations in the construction industry and appreciates the many benefits of a balanced industry.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the Associated General Contractors of America or its members made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief by express written consent.

AGC's century of experience leads it to believe that the construction industry is healthiest when open shop and union companies can freely engage in fair competition. Unlike the industry advancement fund to which the Petitioner contributed, AGC is not an advocate for open shop construction. Nor does AGC oppose project labor agreements *per se*. AGC respectfully submits this brief *amicus curiae* and urges this Court to grant the pending Petition because AGC considers it unhealthy, unwise and ultimately unlawful for state or local governments either to prohibit or to mandate such agreements, or to tilt the scale in any way in favor of either open shop or union construction.

BACKGROUND

California has long required construction contractors on public works projects to pay their employees the "prevailing wage" for their work. Cal. Lab. Code § 1770 (2017). To meet this requirement, employers may pay wages equal to that amount or combine the wages they pay with payments they make for fringe benefits, such as pensions and healthcare coverage. *Gomez v. Rossi Concrete, Inc.,* 270 F.R.D. 579, 584 (S.D. Cal. 2010); *see also* Cal. Lab. Code § 1773.1 (2017). For the contributions they make for such benefits, contractors receive a credit against their obligation to pay the general prevailing wage. Cal. Lab. Code § 1773.1(c) (2017).

Beginning in 2004, the state also gave contractors credit against the prevailing wage for contributions they made to Industry Advancement Funds ("IAFs"). As interpreted over time, the state's prevailing wage law extended that credit to all contributions to all IAFs, without regard to any role that collective bargaining may have played in the contractor's decision to contribute to such a fund. Cal. Lab. Code § 1773.1(a)(8), (9) (2004). In 2017 the state changed that. The state

enacted Senate Bill 954, amending the California Labor Code, to limit credit for contributions to IAFs to the contributions that employers make pursuant to a collective bargaining agreement. Cal. Lab. Code § 1773.1(a)(9) (2017). This litigation ensued.

IAFs regularly address a range of issues facing the construction industry. As the Petitioner has accurately noted, one of the bigger problems, particularly in California, is state interference in labor-management relations in the industry. Across the country, public officials regularly propose to mandate that the successful competitors for the contracts to construct their projects enter into project labor agreements (PLAs) with the unions representing the construction craft workers in the relevant area.[2] To make matters worse, such officials also propose to deprive the successful firms of the opportunity to negotiate the terms of these PLAs. Typically, public officials go so far as to specify the form that a particular PLA must take, including all of its terms and conditions. In most jurisdictions, a vigorous public debate over the merits of a government mandate for a PLA quickly follows its proposal.

PLAs are a special creature of construction labor law. They are "pre-hire agreements" primarily governed

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[2] Numerous states, including California, have expressly authorized their state agencies to mandate PLAs for public construction projects. *See, e.g.,* Cal. Pub. Cont. Code § 2500 (West 2012); Conn. Gen. Stat. § 31-56b (2012); 30 Ill. Comp. Stat. Ann. 571/10 (2013); N.J. Stat. Ann. § 52:38-4 (2013); N.Y. Lab. Law § 222 (McKinney 2008); N.Y. Pub. Auth. Law § 2591 (McKinney 2000). California has, however, gone even further. It has declared that neither state funding nor any other state financial assistance may be used to support the construction of any project for any charter city that limits or constrains its governing board's authority to mandate a PLA. Cal. Pub. Cont. Code § 2502 (West 2012), 2503 (West 2013).

by Section 8(f) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(f). PLAs are unique in that they apply only to the projects they specify. But otherwise, they are not distinct from other 8(f) agreements. For example, they often include restrictive subcontracting clauses that flow down to all of the subcontractors on the relevant project and thereby ensure that the entire project is union. While Section 8(e) of the NLRA, 29 U.S.C. § 158(e), generally prohibits such "hot-cargo" agreements, the construction industry proviso to Section 8(e) permits employers in the construction industry to include restrictive subcontracting clauses in their collective bargaining agreements.

Open shop contractors, such as Petitioner Interpipe Contracting Inc. ("Petitioner" or "Interpipe"), routinely if not always, oppose government mandates for PLAs. While union contractors may also oppose such mandates (depending on the circumstances), union contractors are far more likely than their open shop counterparts either to support or to take no position on such mandates. And of course, that would include the union contractors that contribute to IAFs pursuant to collective bargaining agreements. It follows that their IAFs are also far more likely to support or to take no position on such mandates.

As explained herein, all government mandates for PLAs are the product of a tacit if not written agreement between public officials and the unions in the construction industry. One provision commonly found in the PLAs that result from those interactions is a provision also found in many of the collective bargaining agreements that result from private negotiations between construction contractors and the same unions. That provision is one requiring the contractor to make contributions to the IAF that the union contractors

and the unions have established for the relevant area. Thus, the mandate extends to and includes a requirement that the successful competitor for the government contract contribute to that IAF, even if the owner of that firm opposes government mandated PLAs.

Petitioner challenged SB 954 on the grounds that the NLRA preempts it. The lower courts rejected that challenge on the grounds that SB 954 is a minimum wage standard that does not interfere with the comprehensive federal scheme for the regulation of labor-management relations in the construction industry. In support of Petitioner, *Amicus* AGC urges this Court to grant the Petition and to hold that SB 954 does interfere with that scheme and is, therefore, preempted by the NLRA.[3]

SUMMARY OF THE ARGUMENT

This brief highlights the unique nature of the federal scheme that comprehensively regulates labor-management relations in the construction industry. The brief then explains that the fairly debated questions about government mandates for PLAs are complex and many. It follows that public debates over their merits must be, in the words of this Court, "uninhibited, robust and wide-open." *Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60, 68 (2008) (citing *Letter Carriers v. Austin,* 418 U.S. 264, 272-73 (1974)).

This Court has held that the NLRA does not preclude state and local governments from entering into

[3] ABC-CCC, the industry fund to which Interpipe contributed, filed its own challenge to SB 954 on First Amendment grounds. That action was consolidated with the case brought by Interpipe and is the subject of a separate Petition for Certiorari.

agreements with the unions in the construction industry to mandate PLAs if and when such governments are acting as proprietors of public construction projects and not market regulators. *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. (Boston Harbor)*, 507 U.S. 218, 227 (1993). This has sparked a long and ongoing series of debates over the benefits of such agreements. The question that the Petition presents is whether the NLRA requires state and local governments to refrain from using their legislative power to tilt these public debates in favor of either side. Having decided in *Boston Harbor* that the NLRA permits state and local governments to engage in what is essentially hot cargo activity, AGC maintains that the Court must then ensure that the impacts on labor-management relations in the construction industry, and other public interests, are open for full, fair and free debate. As a practical matter, the risks of the government making an ill-advised decision are elevated in the absence of such debate.

As a matter of law, AGC maintains that SB 954 oversteps the carefully crafted statutory architecture of the NLRA concerning the construction industry and regulates speech that Congress intended, pursuant to the NLRA, to insulate from state regulation, that this Court's landmark decision in *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132 (1976) applies, and that this Court should hold, in accordance with *Machinists*, that SB 954 is preempted.

ARGUMENT

I. The Speech that SB 954 Regulates is Speech About and Relating to Labor-Management Relations in the Construction Industry and the NLRA Provides the Critical Context for that Speech.

A. The Speech that SB 954 Regulates is Speech About and Relating to Labor-Management Relations in the Construction Industry.

The state law at issue in this case, SB 954, applies only to California's public works projects, and more precisely, to the contractors and subcontractors that build such projects. The key provisions of the labor relations rulebook that Congress wrote for the construction industry lie in Sections 8(e) and 8(f) of the NLRA. Together, they provide the context for this case, and they underscore the great need for robust debate over government proposals to require PLAs. They also render it clear that the Ninth Circuit misconstrued the nature of the agreements that Section 8(f) authorizes and wrongly disregarded Section 8(e).

B. The NLRA Provides the Critical Context for the Speech that the State Regulates.

The NLRA comprehensively regulates labor-management relations throughout the United States. Section 8 of the statute (29 U.S.C. § 158) identifies and defines a series of practices that neither employers nor labor organizations may lawfully commit and Section 9 (29 U.S.C. § 159) sets the ground rules for the designation of bargaining representatives.

In two fundamental ways, Congress, chose to treat the construction industry differently. The first is found

in Section 8(f) (29 U.S.C. § 158(f)) which allows for a union whose members work in the building and construction industry and an employer "primarily engaged in the construction industry" to enter into a pre-hire agreement; that is, an agreement on the terms and conditions of employment of a unit of employees that the employer has yet to employ. A Section 8(f) or pre-hire agreement is a collective bargaining agreement that an employer in the construction industry and a union in the same industry may lawfully execute even in the absence of any evidence that a majority of the subsequently covered employees would choose to designate the union as their representative. This is unlike any other industry and unique to the employers and unions in the construction industry.

The second difference lies in Section 8(e) of the Act. 29 U.S.C. § 158(e) (2011). That section, sometimes referred to as the "hot-cargo" provision of the statute, declares unlawful any agreement between an employer and a union to cease doing business with any other employer. *Id*. The construction industry proviso to Section 8(e) creates an exception to that rule and renders lawful what would otherwise amount to an unlawful agreement to boycott any construction subcontractor that is not signatory to a labor agreement. The proviso permits a general contractor "in the construction industry" to agree to boycott a non-union subcontractor, provided that the subcontract is for work to be performed at the site of construction. Its manifest purpose is to permit general contractors to agree to ensure that certain projects are all union.

Much of the confusion that infects the public and inevitably political debates over government mandates for PLAs stems from these two provisions. All too few appreciate that such mandates are inevitably

if not necessarily the product of a prior "8(e) agreement" between the state or local government and the labor unions representing the construction workers in the relevant area. That public entity cannot unilaterally mandate a PLA, for it has to know, in advance of any invitation for bids or request for proposals that the unions will agree to enter into the mandated PLA with the winner of the competition for the work.

Pursuant to such an "8(e) agreement," and in consideration of the union's approval of the mandated PLA, the state or local government exerts secondary pressure on construction industry employers to make decisions that the free play of economic forces would not otherwise lead them to make. When a government proposes to mandate a PLA, it provokes just the sort of public debate that *Brown* requires it to refrain from any effort to skew. A PLA may be the right answer for a particular construction project. Even when it is the right answer, a government mandate may not be. The competitors for public construction projects are always free to seek a PLA from the relevant union(s), if they believe it necessary to lower their costs and win the work.

II. The Ninth Circuit Wrongly Relied on the Same Kind of Misinformation that is Likely to Confuse the Public in the Absence of the Robust Debate that *Brown* Contemplates.

A. Section 8(f) Authorizes Employers in the Construction Industry to Engage in "Top-Down" Organizing Which Undercuts Any Notion of Employee Consent.

The Ninth Circuit fundamentally misconstrued the nature of the labor agreements in the construction industry when it asserted that "SB 954 simply bars employers from diverting their employees' wages to

the employers' preferred IAFs without their employees' collective consent." *Becerra II*, 898 F.3d at 890. Unlike collective bargaining in other industries, collective bargaining in the construction industry is typically top-down and has little if anything to do with the "collective consent" of the employees in the industry.

The starting point for the analysis is Section 8(f). In all industries except construction, a union can only achieve the status of bargaining representative for a unit of employees if it has established that a majority of those employees have designated it as their representative. Accordingly, under traditional, non-construction industry rules set forth in Section 9(a) of the Act, a union must first achieve the status of a majority representative of the employer's employees before it can lawfully enter into a collective bargaining agreement with that employer. *See Int'l Ladies' Garment Workers' Union, AFL-CIO,* 366 U.S. 731 (1961).

The basic premise of Section 9 is that if a substantial number of employees wish to be represented by a union for the purposes of collective bargaining and the union is selected by a majority of such employees in an election or through other lawfully recognized means, such a union is then deemed the exclusive bargaining representative. As aptly stated recently by the Court of Appeals for the District of Columbia: "So under Section 9(a) the rule is that the employees pick the union; the union does not pick the employees." *Colorado Fire Sprinkler, Inc., v. NLRB*, 891 F. 3d 1031, 1038 (D.C. Cir. 2018).

The same is not true in construction. Because of the unique nature of the industry, Congress carved out an exception to the majority representation rule for employees who work in the construction industry.

Thus, under Section 8(f) of the NLRA, employers engaged primarily in the construction industry can enter into a collective bargaining agreement with a union even if that union has yet to evidence that it enjoys majority status. One can find the rationale for Section 8(f) in this Court's decision in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), where this Court stated:

> [O]ne factor prompting Congress to enact §8(f) was the uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry. Congress recognized that construction industry unions often would not be able to establish majority support with respect to many bargaining units. See S. Rep. No. 187, 86th Cong., 1st Sess., 55-56 (1959), 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 451-452 (Leg. Hist.). Congress was also cognizant of the construction industry employer's need to "know his labor costs before making the estimate upon which his bid will be based" and that "the employer must be able to have available a supply of skilled craftsmen for quick referral." H. R. Rep. No. 741, 86th Cong., 1st Sess., 19 (1959), 1 Leg. Hist. 777.

McNeff, 461 U.S. at 266; *see also NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (Iron Workers)*, 434 U.S. 335, 348-49 (1978).

Section 8(f), therefore, creates an exception to Section 9(a)'s general rule requiring a showing of majority support. In fact, it is presumed in the construction industry that a union and an employer intend their relationship to be governed by Section

8(f). *Allied Mechanical Services, Inc. v. NLRB,* 668 F.3d 758, 766 (DC Cir. 2012); *Casale Industries, Inc.,* 311 NLRB 951*,* 952 (1993).

Further, unlike 9(a) relationships, there is no statutory duty to bargain over an 8(f) contract, something that is true for both employers and unions. Thus, a union is under no obligation to grant an 8(f) agreement to an employer nor is it obligated to renew such an agreement when it ends. Thus, unlike a 9(a) relationship, an 8(f) relationship may be terminated by either the union or the employer on the expiration of the agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1386-87 (1987), *enf'd International Association of Bridge, Structural and Ornamental Iron Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

Against this backdrop, it is also of no surprise that the NLRB rarely conducts representation elections in the construction industry. In the period 2014 to 2018, less than 5% of all NLRB elections involved construction employers and employees. NLRB Elections Database, https://www.bloomberglaw.com/labw/display/labw_lpqb.adp (last visited May 17, 2019). Given the unique nature of the industry, the NLRB has also found it necessary to develop special rules for determining whether construction craft workers are eligible to vote for or against union representation. *See Daniel Construction Co.,* 133 NLRB 264 (1961); *Steiny & Co.,* 308 NLRB 1323 (1992) (generally finding that employees who may not be currently employed by the employer subject to the election are nonetheless eligible to vote if they previously worked for the employer within a designated time period).

The top-down nature of Section 8(f) agreements calls the Ninth Circuit's rationale for its decision into serious question. SB 954 has implications only for the

construction industry. Contributions to the IAFs in that industry rarely require employee consent, whether or not made pursuant to a collective bargaining agreement. As stated by this Court, pre-hire agreements cannot be portrayed as expressions of employees' organizational wishes. *Iron Workers*, 434 U.S. at 349. That is true of all pre-hire agreements, whether or not mandated by a public agency.

Moreover, unlike dues payments that implicate an employee's right to an accounting of how a union spends any dues that the employee pays (*see Communications Workers of America v. Beck,* 487 U.S. 735 (1988)) employees exert no controls over IAF contributions and expenditures.

Lastly, the legal framework for collective bargaining in the construction industry, the few number of union elections in the construction industry and the special rules on the employees eligible to vote in such elections, collectively belie any suggestion that the purpose of SB 954 was to ensure that construction workers can freely grant or withhold their consent to certain deductions from their wages.

B. The Narrow Exception of Section 8(f) Only Applies to Employers in the Construction Industry.

The NLRA permits employers and unions in the construction industry to engage in such "top down" organizing even though it is otherwise frowned upon. *See, e.g., Iron Workers*, 434 U.S. at 347 (holding that "[o]ne of the major aims of the 1959 Act was to limit `top down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees" (citing *Connell Const. Co. v. Plumbers & Steamfitters*

Local Union No. 100, 421 U.S. 616, 632). As noted by this Court: "privileging unions and employers to execute and observe pre-hire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes." *Iron Workers*, 434 U.S. at 349.

The construction industry exception to the general rule is an understandably narrow one and allowed only to employers "engaged primarily in the building and construction industry" and to unions whose members work in that industry. Not surprisingly, the phrase "engaged in the building and construction industry" is one the National Labor Relations Board has often been called upon to define. *See, e.g., Carpet, Linoleum and Soft Tile Local No. 1247 of the Brotherhood of Painters (Indio Paint and Rug Center),* 156 NLRB 951, n.1 (1966); *Animated Displays Co.,* 137 NLRB 999, 1020-21 (1962); *In re Zidell Explorations, Inc.,* 175 NLRB 887, 893 (1969).

The case law makes clear that despite numerous references to the "building and construction industry" within the statute's legislative history, the congressional proceedings reflect no precise definition of building and construction. The NLRB has concluded that it can be defined as follows: "each formulation with respect to the so-called building and construction concept subsumes the provision of labor whereby materials and constituent parts may be combined on the building site to form, make or build a structure." *Indio Paint and Rug Center*, 156 NLRB at 959.

Clearly, the state of California is not engaged in the business of building and construction. And that calls the State's direct involvement in collective bargaining

in the construction industry into serious question. That involvement is not in keeping with the statutory scheme of the NLRA that only employers primarily engaged in the construction industry should be involved in the negotiation and execution of such bargaining agreements.

III. Without Robust Debate, the Construction Industry Proviso to Section 8(e) of the NLRA Threatens to Become a Source of Great Confusion.

Congress treated the construction industry differently from all other industries in another fundamental way when it exempted construction industry employers, in limited circumstances, from Section 8(e) of the NLRA. Congress adopted Section 8(e) in 1959 when it passed the Landrum-Griffin Amendments to the NLRA. The apparent purpose of that provision was to plug certain loopholes in pre-existing law under which it was unlawful for a union to coerce an employer either to accept or to enforce a hot cargo agreement but not unlawful for a union and an employer voluntarily to make such an agreement. *Woelke & Romero Framing v. NLRB,* 456 U.S. 645, 655 (1982).

The text of the main body of Section 8(e) reads:

> (e) it shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or

> hereafter containing such an agreement shall be to such extent unenforceable and void . . .

29 U.S.C. § 158(e) (2011).

Importantly, Congress also wrote into the law what has become known as the construction industry proviso, making some agreements in the construction industry exempt from its proscription. This proviso reads, "nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . ." 29 U.S.C. § 158(e) (2011).

Thus, the proviso permits employers in the construction industry, and only such employers, to exert secondary pressure on other employers in the construction industry in limited circumstances. Not surprisingly, the phrase "an employer in the construction industry" is another one that the NLRB has been called upon to define many times. *See, e.g., Milwaukee & Southeast Wisconsin District Council of Carpenters (Rowley-Schlimgen),* 318 NLRB 714, 715 (1995).

The NLRB more carefully circumscribed the construction industry proviso in its seminal decision *Glens Falls Building & Construction Trades Council (Indeck Energy Services of Corinth, Inc.) (Indeck II),* 350 NLRB 417 (2007). In *Indeck II,* the question was whether a letter agreement between the private owner of the construction project (Indeck Energy) and the unions representing the construction craft workers in the relevant area violated Section 8(e). *Id*. at 417, 420. In the letter, the private owner agreed to make the project all-union. *Id*. at 418-19. As a threshold matter,

the Board determined that the letter agreement appeared to violate Section 8(e) because it committed the owner to refrain from doing business with any general or other contractor that subcontracted work to non-union firms. *Id*. at 420. That left the Board with one issue: whether the construction industry proviso exempted the letter agreement from Section 8(e). *Id*. at 420-21.

The Board concluded the proviso did not, and in so doing, the Board applied this Court's ruling in *Connell* that the construction industry proviso only applies to agreements reached in the context of a collective bargaining relationship.[4] *Indeck II*, at 421. Finding that the owner, Indeck Energy, had no employees in the building and construction trades, and no intention of employing those trades on the project, the Board concluded that the letter agreement was not reached within the context of a collective bargaining relationship and, therefore, was not protected by the construction industry proviso. *Id*.

Since California is neither an employer in the construction industry nor negotiating in the context of a collective bargaining relationship (whenever it may literally or figuratively sit down with the unions in the construction industry to discuss the possibility of mandating a PLA for a public project), any resulting agreement to mandate such a PLA would similarly fall outside the construction industry proviso.

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[4] To be sure, the *Connell* court also said that the proviso could provide protection if the agreements at issue were negotiated and executed to resolve the problems involved in permitting union and nonunion employees working side by side at a common construction site. However, this was suggested in *dicta* only. *Connell*, 421 U.S. at 633.

IV. Without Robust Debate, This Court's Landmark Ruling in *Boston Harbor* Also Threatens to Become Another Source of Great Confusion.

This Court has often had to address the unique characteristics of collective bargaining in the construction industry, including when and how a state government can mandate a PLA for a public project without running afoul of the NLRA. *See, e.g., Boston Harbor*. While *Boston Harbor* clearly held that a state agency acting in its proprietary capacity and not as a market regulator can lawfully mandate a PLA, *Boston Harbor* did not grapple with several underlying questions. The case did not, for example, explain how a state agency could become a party to, or otherwise acquire the right to enforce, an "otherwise lawful" 8(f) agreement. Nor did it explore the construction industry proviso to Section 8(e), or the judicial gloss that this Court had put on that provision. The court reasoned that "a public entity *as purchaser*" should be permitted to "choose a contractor based upon that contractor's willingness to enter into a prehire agreement" to the same extent that "a private purchaser may do so." *Boston Harbor*, 507 U.S. at 231 (emphasis added). But of course, *Indeck II* now renders it clear that a private employer cannot lawfully enter into an agreement with the unions in the construction industry to make that choice outside of any collective bargaining relationship. And without the prior agreement of those unions, neither a private employer nor a public one can, as a practical matter, mandate an 8(f) agreement, much less one that takes a particular form. The NLRA imposes no obligation on the unions in the construction industry to offer an 8(f) agreement to any contractor, much less a PLA specifying terms and conditions that do not meet with the union's approval.

In sum, the relationships between and among project owners, general contractors and the unions in the construction industry, and the legal principles that govern those relationships, are complex. That fact is important because any proposal to mandate a PLA for a public project will implicate both those relationships and those principles. Without robust public debate tilted in favor of neither side, the public will struggle, in turn, to determine whether such mandates are good public policy.

V. All too Easily Lost in the Public Debates over Government Mandates for PLAs is that Such Mandates Damage Collective Bargaining between Union Contractors and the Unions that Represent their Employees.

Pursuant to Section 8(f), employers primarily in the construction industry routinely engage in collective bargaining with the various unions that represent construction craft workers. Sometimes that bargaining is between an individual employer and several unions and sometimes that bargaining is limited to an individual project. Far more commonly, that bargaining is between a group of employers and only one union and is for an area-wide agreement that will cover all the work that the union's members perform in the designated area. Whatever their scope, such negotiations have historically been governed by the free play of economic forces – and little else. *Amicus* AGC considers it healthy for market forces to determine the parties' positions and their relative strengths and weaknesses, and to drive the ultimate bargain. *Amicus* AGC maintains that Congress intended the same.

Government mandates for PLAs do not merely coerce companies to sign 8(f) agreements that market

forces would not otherwise lead them to sign. Such mandates also bend and twist the economic forces that would otherwise drive the collective bargaining process. In many if not most cases, such mandates are the product of negotiations between public officials and the unions in the construction industry. Such negotiations leave the private employers who will actually employ the unions' members – and with whom the unions have historically had to negotiate – sitting on the sidelines. Such negotiations yield a set of requirements that the public officials will later impose on the successful competitor for the project, substituting those requirements for the terms and conditions of any area-wide agreements that would otherwise apply to the work. In the process, the negotiations also undermine those employers, weakening their position at the collective bargaining table and providing the unions with an alternative to negotiations with the actual employers of their members. Where they have that option, the unions can often get concessions that the employers themselves would not make, such as concessions on work rules that unnecessarily increase costs. Very few public officials have the experience and sophistication to appreciate how such things actually impact the work in the field.

Even if the public officials have that experience and sophistication, they remain insulated from the economic forces that drive collective bargaining between private parties. They remain free to prioritize social or political goals that would have little or no impact on private negotiations and may not even relate to the terms or conditions of the employment of construction craft workers. It is not, for example, uncommon for public official negotiations to include requirements for subcontracting portions of the work to preferred entities. However understandable and well-intentioned such

requirements may be, they remain the product of social or political choices and are not reflective of what private parties would negotiate on their own.

In the absence of free, open and fair debates over the merits of any proposal for a mandate for a PLA, the public is unlikely to learn of the negative impact that such mandates typically have on not only open shop contractors but also the collective bargaining process.

VI. The Facts of this Case Implicate *Chamber of Commerce v. Brown* in Unique Ways that are important for this Court to consider.

In *Brown*, this Court held that certain features of a California statute were unlawful because they impermissibly interfered with private employers' discretion to debate the merits of unionization. *Brown*, 554 U.S. at 71. In so doing, the Court highlighted Section 8(c) of the NLRA (29 U.S.C. § 158(c)) and underscored the neutrality that Congress sought to achieve in 1947, when it passed the Taft-Hartley amendments to the Wagner Act. *Id*. at 67-68. Since then, this Court has viewed Section 8(c) as not only implementing the First Amendment but also manifesting a "congressional intent to encourage free debate on issues dividing labor and management." *Id*. at 67 (quoting *Linn v. Plant Guard Workers,* 383 U.S. 53, 62 (1966)). The debate that is the subject of this Petition is just the sort of issue that divides labor and management and on which the NLRA requires California to remain neutral.

In the context of this case, *Amicus* AGC would hasten to add that Section 8(c) does not merely express a broad intention to insulate non-coercive speech about or relating to unionization from state regulation; in conjunction with Sections 8(e) and 8(f), it expresses a more particular and emphatic intention to

grant employers in the construction industry broad discretion to decide whether to execute collective bargaining agreements and to let the free play of economic forces both govern those decisions and drive the collective bargaining process in that industry. As SB 954 directly constrains non-coercive speech about or relating to unionization in the construction industry, it also seeks to limit the role that those economic forces will play in the future, and seeks to impose a non-neutral viewpoint through the instrumentality of sections 8(e) and 8(f).

Indeed, when it comes to government mandates for project labor agreements, California has abandoned any semblance of neutrality. In addition to enacting SB 954, the state has threatened to penalize municipalities that fail to consider such mandates. *See* Cal. Pub. Cont. Code § 2502 (West 2012), 2503 (West 2013).

In sum, unless this Court grants the Petition and reverses the decision below, the implications of its earlier decision in *Brown* will remain in serious doubt. The agreements that lead to and implement government mandates for PLAs – the 8(e) agreements between government agencies and unions in the construction industry to include mandates in the specifications for public projects and their related agreements on the terms and conditions of the mandated agreements - are often and easily misunderstood. That fact renders it necessary for this Court to ensure that the debates over their meaning and impact are open, free and fair.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant the Petition.

Respectfully submitted,

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May 20, 2019