No. ________

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**

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

*Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) holds that noncoercive labor speech is protected by the NLRA, and any state statute that interferes with such protected speech is preempted. Prior to the enactment of California's SB 954 in 2017, Interpipe, through its Industry Advancement Fund ("IAF"), lobbied against Project Labor Agreements ("PLAs"), which are pre-hire collective bargaining agreements imposed "top down" on employees without their vote or consent. In contrast to Interpipe's advocacy against PLAs, unions and IAFs that are funded by unionized employers lobby in favor of PLAs.

Interpipe and other open shop contractors made contributions to their IAF, ABC-CCC, from 2005 through 2016. In 2017, SB 954 changed California's prevailing wage laws to eliminate prevailing wage credits for contributions to IAFs unless they are required by a collective bargaining agreement. This effectively eliminated all of ABC-CCC's funding and silenced its advocacy against PLAs. Union funded advocacy in favor of PLAs is unchanged under SB 954.

The two issues presented by Interpipe include:

1. Does protected labor speech under *Chamber of Commerce v. Brown* include advocacy opposing "top down" union organizing campaigns that seek to impose project labor agreements (PLAs), thus providing a legal basis for Interpipe's "as applied" NLRA preemption challenge to SB 954?

**QUESTIONS PRESENTED** – Continued

2. If Interpipe's advocacy against PLAs is protected labor speech under *Brown*, does the Court's "minimum labor standards" exception to NLRA preemption under *Metropolitan Life v. Massachusetts* override that NLRA protection so as to warrant the dismissal of Interpipe's NLRA preemption claim?

## LIST OF PARTIES

The parties before this Court are petitioner Interpipe Contracting, Inc. and respondents Xavier Becerra in his official capacity as Attorney General of the State of California; Christine Baker in her official capacity as Director of the California Department of Industrial Relations; and Julie Su in her official capacity as California Labor Commissioner, Division of Labor Standards Enforcement. The Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC") was Interpipe's Co-plaintiff in District Court, and filed a separate appeal with the Ninth Circuit that was consolidated with Interpipe's appeal. ABC-CCC will file a separate Petition for Writ of Certiorari based on a First Amendment challenge to SB 954.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Interpipe Contracting, Inc. is a corporation organized under the laws of the state of California. Interpipe Contracting, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Interpipe Contracting, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California was issued on January 27, 2017, and is reported at 231 F. Supp. 3d 810. (See Appendix at 1 to 51). The opinion of the United States Court of Appeals for the Ninth Circuit was issued on July 30, 2018, and is reported at 898 F.3d 879. (See Appendix at 52 to 84).

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its order denying petitioner's request for a panel rehearing or rehearing *en banc* on September 21, 2018. (See Appendix at 85-87). On December 4, 2018, petitioner timely filed an application to extend the time to file a petition for certiorari from December 20, 2018 to February 19, 2019. On December 7, 2018, Justice Kagan granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION AND STATUTE AT ISSUE

The principal provisions involved are the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl.2, reprinted at App. 88; Section 8(f) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(f), reprinted at App. 89-101; and California Senate Bill No. 954 ("SB 954") as it appears in Cal. Labor Code Section 1773.1, reprinted at App. 102-106.

## STATEMENT OF THE CASE

This is a preemption case under the NLRA. Petitioner Interpipe seeks relief consistent with *Chamber of Commerce v. Brown*, which holds that noncoercive labor speech by employers, employees and unions during union organizing campaigns is protected by the NLRA and is therefore protected from state regulation. While *Brown* determined that California's AB 1889 was preempted because it interfered with protected labor speech during traditional union organizing campaigns under NLRA Section 9, Interpipe seeks a declaration that SB 954 is similarly preempted because it interferes with Interpipe's protected labor speech during "top down" organizing campaigns by unions seeking to impose project labor agreements ("PLAs") under NLRA Section 8(f) on public works projects.

### A. The NLRA and Project Labor Agreements (PLAs)

The NLRA specifies two approaches a union can follow to become the bargaining representative of employees in the construction industry. The first approach involves the union's demonstrating it has support of a majority of the bargaining unit employees. Such support is ultimately shown through a secret ballot election overseen by the NLRB under Section 9(a) of the NLRA, 29 U.S.C. §159(a). This traditional union organizing approach is ill-suited for construction industry unions because of transitory employment patterns. To address this, Congress created an exception to the traditional union certification process by allowing "pre-hire" agreements under Section 8(f) of the Act, 29 U.S.C. §158(f). This "Project Labor Agreement" or "PLA" approach to union organizing is unique to the construction industry. PLAs are described in *Building and Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002) as follows:

> A PLA is a multi-employer, multi-union pre-hire agreement designed to systemize labor relations at a construction site. It typically requires that all contractors and subcontractors who will work on a project subscribe to the agreement; that all contractors and subcontractors agree in advance to abide by a master collective bargaining agreement for all work on the project; . . . The implementation of a PLA on a project underwritten by the Government

> almost always is accomplished by making agreement to the PLA a bid specification, thereby allowing the contracting authority to ensure that firms at every level – from the general contractor to the lowest level of subcontractor – comply with the terms of the PLA.

*Building and Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d. at 30.

In sum, a public entity, such as a school board, acting in its capacity as owner of a public works project, can impose a PLA on construction industry employers and workers without an NLRB election ever being held to determine if workers actually want a union. *See Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 230 (1993).

PLAs result from "top down" union organizing that enables a union to avoid traditional union organizing campaigns. *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 632-633 (1975). When a government agency deliberates whether to impose a PLA, it may face lobbying by unions and their IAFs in favor of the PLA, and lobbying by IAFs supported by open shop contractors in opposition to the PLA. Interpipe's case is based on the proposition that, because union lobbying efforts to impose PLAs constitute a form of union organizing under the NLRA, the protections afforded labor speech under *Brown* should apply to advocacy for or against the imposition of a PLA.

### B. NLRA Preemption Under the *Brown* Case

This Court recognizes two types of NLRA preemption. The first, known as *Garmon* preemption, forbids States from regulating activity that the NLRA "protects, prohibits, or arguably protects or prohibits." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The second, known as *Machinists* preemption, forbids both the National Labor Relations Board ("NLRB") and States from regulating conduct that Congress intended be unregulated because it was meant to be left controlled by the free play of economic forces. *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). *Machinists* preemption 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. *Brown*, 554 U.S. at 65.

Because the Court in *Brown* determined that California's AB 1889 was preempted under *Machinists*, the Court did not reach the question whether the statute was also preempted under *Garmon*. *Brown*, 554 U.S. at 66. Interpipe's case has similarly focused on how *Machinists* preempts California's SB 954.

After reviewing the history of labor speech protection and "congressional intent to encourage free debate on issues dividing labor and management" (*id*. at 67), *Brown* reiterates the importance of free debate:

> We have characterized this policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.' *Id*. at 68 (quoting *Letter Carriers v. Austin*, 418 U.S. 264 (1974)).

*Brown* applied these principles to California's AB 1889, which attempted to prevent employers that received state funds from using any portion of those funds to deter union organizing. *Id*. at 62. *Brown* held AB 1889 was preempted under *Machinists* because it attempted to regulate labor speech within "a zone protected and reserved for market freedom." *Id*. at 66. Significantly, the *Brown* Court did not define the term "labor speech." It was only necessary to examine the statute's "real effect on federal rights." *Id.* at 69.

Significantly, *Brown* distinguishes labor speech cases from cases involving the attempted regulation of other types of conduct, noting that:

> Congress' express protection of free debate forcefully buttresses the pre-emption analysis in this case. Under *Machinists*, congressional intent to shield a zone of activity from regulation is usually found only "implicitly in the structure of the Act," [citation omitted] . . . In the case of noncoercive speech, however, the protection is both implicit and explicit. Sections 8(a) and 8(b) demonstrate that when Congress has sought to put limits on advocacy

> for or against union organization, it has expressly set forth the mechanisms for doing so. . . . [T]he addition of §8(c) expressly precludes regulation of speech about unionization "so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Gissel Packing*, 395 U.S. at 618.

*Brown*, 554 U.S. at 68.

The expansive scope of labor speech is easily discerned from *Brown*'s sweeping language regarding a "congressional intent to encourage free debate on issues dividing labor and management." *Id*. at 67. *Brown* then notes a national policy "'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" *Id*. at 68. *Brown* discusses "advocacy for or against unionization" and "speech about unionization." *Id.* The Court's choice of words throughout *Brown* consistently indicates that the Court's holding was not intended to be narrow or limited to the facts of that case in any way.

Equally significant is what *Brown* does not say. *Brown* does *not* say that labor speech is limited to only speech targeted at an audience of employers, employees or unions. *Brown* does *not* say that advocacy against PLAs is not labor speech, or that government agencies deciding whether to impose a collective bargaining agreement on workers through a PLA cannot be the target audience of labor speech. *Brown*

does *not* say that labor speech regarding union organizing is protected only if that organizing is conducted through a Section 9(a) employee election campaign overseen by the NLRB. *Brown* does *not* say that labor speech regarding union organizing is not protected if that organizing is conducted "top-down" through a Section 8(f) PLA campaign. Under a fair reading of *Brown*, Interpipe's advocacy against PLAs is clearly protected labor speech. The Ninth Circuit's holding to the contrary in this case establishes a bad precedent that calls for correction.

### C. SB 954 and Interpipe

Prior to SB 954, Interpipe, a non-union woman-owned business enterprise, received prevailing wage credit for its contributions to ABC-CCC, a tax exempt trade association that advocated for the interests of contractors like Interpipe in opposing the use of PLAs on public works projects. ABC-CCC is the open shop counterpart to industry advancement funds operated by employers that are signatory to collective bargaining agreements with labor unions throughout California. ABC-CCC is recognized as a bona fide Industry Advancement Fund ("IAF") by Respondent California Department of Industrial Relations.

Under SB 954, employers can take prevailing wage credits for contributions to IAFs, but only if the contributions are required under a collective bargaining agreement. Consequently, non-union employers are denied prevailing wage credits for

contributions to non-collectively bargained IAFs. California is the only state to restrict employer credits toward prevailing wages based on union signatory status.

### D. Summary of Interpipe's NLRA Preemption Challenge to SB 954

Interpipe's NLRA preemption challenge can be summarized as follows:

1. ABC-CCC's lobbying on behalf of Interpipe represents Interpipe's advocacy. Open shop contractors cannot conduct meaningful anti-PLA advocacy individually, so Interpipe must rely on an IAF (ABC-CCC here) to execute its anti-PLA lobbying. ABC-CCC's speech is Interpipe's speech.

2. IAFs like ABC-CCC receive virtually all of their funding in the form of employer prevailing wage contributions, i.e., contributions that count toward an employer's prevailing wage obligations.

3. Because public contracting is such a highly competitive industry, the credit an employer receives toward its prevailing wage obligation is a crucial incentive to contribute to an IAF. In the absence of a prevailing wage credit, employers cannot afford to contribute to IAFs.

4. Prior to SB 954, employers could receive prevailing wage credit for contributions

to an IAF regardless of whether the contribution was required by a collective bargaining agreement ("CBA").

5. SB 954 changed California law so employers now can receive prevailing wage credit for contributions to an IAF only if the contribution is required by a CBA.
6. ABC-CCC never received contributions that were required by a CBA, and realistically never will. Realistically, no CBA will ever provide for contributions to an IAF that advocates against union positions, including anti-PLA lobbying. SB 954 effectively stopped over 99% of ABC-CCC's funding, and eliminated the ability of Interpipe and other open shop contractors to use an IAF to execute their anti-PLA advocacy.
7. The sponsor of SB 954 designed the law to lead to this outcome.
8. State interference with protected labor speech is preempted under *Brown.*
9. Interpipe's lobbying against PLAs is protected labor speech under *Brown.* **(Issue of First Impression #1)**
10. Interpipe does not argue the NLRA guarantees employers the right to prevailing wage credits. Rather, Interpipe argues SB 954 regulates labor speech in a manner that impermissibly upsets the balance of pro-PLA and anti-PLA

advocacy that existed before SB 954. That imbalanced regulation of labor speech is preempted by *Machinists* under the NLRA.

11. The Minimum Labor Standards doctrine in *Metropolitan Life* presents a *presumption* against *Machinists* preemption that applies only where the labor standards at issue are not otherwise inconsistent with the NLRA.

12. State action that interferes with the balance of protected labor speech is inconsistent with the NLRA by virtue of *Brown*, and thus is preempted under *Machinists* because the two prongs of *Metropolitan Life* are not satisfied. **(Issue of First Impression #2)**

13. *Metropolitan Life's* presumption against preemption for minimum labor standards does not apply to SB 954 under the facts in this case because SB 954 impermissibly interferes with protected labor speech. Therefore, SB 954 is preempted by the NLRA as it applies to Interpipe.

The uncontested factual evidence supporting Interpipe's Motion for Preliminary Injunction must be assumed true for purposes of a motion to dismiss.

## REASONS FOR GRANTING THIS PETITION

### I. The Ninth Circuit Decision is Inconsistent with the Supreme Court's Decisions in *Brown* and *Metropolitan Life*. This Case Presents Two Issues of First Impression that Are of Exceptional Importance for Maintaining Uniformity of National Labor Law

The Ninth Circuit decision is inconsistent with two Supreme Court cases regarding NLRA preemption: *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

#### A. The Issue of Whether Interpipe's Anti-PLA Advocacy is Protected Labor Speech Under *Brown* is of Exceptional Importance to National Labor Policy

*Brown* broadly protects noncoercive labor speech, and prohibits states from interfering with the balance of debate in labor matters. The Ninth Circuit decision quoted language from *Brown* reflecting the expressly broad scope of that case. Nonetheless, the Ninth Circuit failed to apply *Brown* broadly. Interpipe argues protected labor speech under *Brown* includes advocacy regarding PLAs. The Ninth Circuit decision fails to even broach this issue, creating the troubling impression that Interpipe's advocacy regarding PLAs is not protected, and that states are free to intentionally upset the balance of pro-PLA and anti-PLA advocacy through manipulation of prevailing

wage laws in favor of one viewpoint and collective bargaining position.

In *Brown*, the Court analyzed a facial challenge to a California statute that regulated labor speech in the context of traditional union organizing. Interpipe urges this Court to now apply *Brown's* principles in the context of "top down" union organizing through PLAs under NLRA Section 8(f), 29 U.S.C. §158(f). The Ninth Circuit decision does not address or even mention Interpipe's detailed analysis of NLRA Section 8(f) or *Brown*'s protection of advocacy regarding these types of "top down" labor agreements which abrogate employee and employer rights.

The District Court expressly recognized this as a case of first impression regarding the scope of *Brown*, noting:

> SB 954 will have an indirect effect on speech, but *Brown* did not address how statutes that affect speech in a more remote way should be treated. Neither party points to the existence of a case discussing a statute similar to SB 954 – i.e., one that does not directly regulate speech but affects speech. (See Appendix at 73).

The reason neither party points to the existence of a case discussing how *Brown* applies to a statute like SB 954 is because there is no such case. Regarding Interpipe's argument that *Brown* should apply to PLA advocacy, the District Court noted "Plaintiffs point to no cases extending the interpretation of section 8(c)

that far, *and the Court's survey of applicable precedent has found none.*" (emphasis added) (See Appendix at 72).

As the District Court noted, there are no cases directly on point with respect to Interpipe's NLRA preemption claim. Interpipe asks this Court to fill the gap in the case law regarding how advocacy regarding PLAs should be protected as labor speech under *Brown.* By failing to address or even acknowledge this gap, the Ninth Circuit decision conflicts with fundamental concepts set forth in *Brown* and *Metropolitan Life*.

These are issues of exceptional importance. Billions of dollars in taxpayer funds are paid out under PLAs between unions and California government agencies. The significance of PLAs and disputes regarding their use will only grow in importance in California and other states. SB 954 is the first law in the country to place restrictions on prevailing credits based on an employer's union or non-union status, as confirmed in the Amicus Brief filed by the Associated Builders and Contractors of America. If the Ninth Circuit's decision is not reviewed and reversed in this case, other states are highly likely to enact laws similar to SB 954, as predicted in the 2008 Cato Institute article entitled *Chamber of Commerce v. Brown: Protecting Free Debate on Unionization*, 2008 Cato Sup. Ct. Rev. 189. Accordingly, the Court's decisions on these issues will be precedent setting and have far reaching effects.

A core purpose of NLRA preemption is to establish national uniformity of law on labor issues. Toward that end, Interpipe respectfully requests the two issues of first impression above be analyzed under the principles set forth in *Brown* and *Metropolitan Life*, in light of the specific facts alleged by Interpipe.

### B. The Ninth Circuit Decision Ignores and Evades This Important Issue Raised by Interpipe

The Ninth Circuit decision states that "Interpipe's reliance on *Brown* is misplaced" (see Appendix at 18), and then proceeds to distinguish Interpipe's facts from the facts in *Brown*. This effort to distinguish *Brown* reflects a fundamental mischaracterization of Interpipe's argument.

Interpipe does not rely on a simple application of *Brown*. Instead, Interpipe's Opening Brief asserts and explains (1) why advocacy against (or for) PLAs should be considered protected speech regarding union organizing; (2) how SB 954 regulates Interpipe's labor speech and should be held preempted on the facts; (3) why the Legislature's stated intent in enacting SB 954 is not relevant; and (4) why SB 954's effect on protected labor speech is the relevant issue. In sum, Interpipe argues SB 954's unequal treatment of pro-PLA advocates (union affiliated IAFs) versus anti-PLA advocates (open shop IAFs) constitutes indirect, effective regulation of protected labor speech, and interferes with the debate. The Ninth Circuit

completely ignores Interpipe's legal analysis and instead distinguishes Interpipe's facts from the facts in *Brown*.

Interpipe has never argued this case involves a simple, on point application of *Brown*. Interpipe acknowledges that *Brown* does not specifically address advocacy directed toward school boards and other government entities that are contemplating adopting a PLA. Interpipe simply argues that the courts should hold Interpipe's advocacy against PLAs is protected labor speech under the fundamental principles enunciated in *Brown*.

Interpipe's Opening Brief describes how PLAs under NLRA Section 8(f) result in "top down" union organizing that replaces the traditional NLRB election process which otherwise provides employees the right to vote for or against labor organizations. Since public works contracting agencies (like school boards) displace employees as the deciders of "unionization" under a PLA, labor speech (both union and employer, either directly or through IAFs) is directed to the deciding officials of those entities rather than to the employees. Employees of open shop employers like Interpipe have lost their ability to express their personal preference whether or not to be "unionized." Interpipe, through ABC-CCC as its advocate, speaks on behalf of those employees.

### C. The Worker Consent Justification for SB 954 is a Sham This Court Should Also Address

The Ninth Circuit decision goes to great lengths to distinguish *Brown* by repeatedly noting the statute in *Brown* regulated the employers' use of their own money to engage in labor speech, and then states "SB 954 simply bars employers from diverting their employees' wages to the employers preferred IAFs without their employees' collective consent." (See Appendix at 20). Again, this distinction completely side steps the issue of whether SB 954 frustrates or interferes with the ability of open shop employers, including Interpipe, to engage in anti-PLA advocacy, and thus interferes with the overall uninhibited, robust debate on the labor issue of whether or not PLAs should be established. The funding procedures for IAFs are the same regardless of whether an IAF engages in pro-PLA advocacy or anti-PLA advocacy. Interpipe's Opening Brief explained in a clear and concise manner why the employee consent argument is a sham. Interpipe's Opening Brief has a separate section entitled "The Legislature's 'Worker Consent' Justification is Belied by How SB 954 Operates under PLAs." The Ninth Circuit decision fails to address or even mention Interpipe's argument in this regard.

### D. The Court Should Settle Whether the Minimum Labor Standards Exception under *Metropolitan Life* Can Override the NLRA's Protection of Labor Speech

#### 1. The Ninth Circuit Decision Misapplies the First Prong and Ignores the Second Prong of *Metropolitan Life*

The Ninth Circuit decision is inconsistent with *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), which sets forth a two prong analysis to determine whether a state "minimum labor standards" law is saved from preemption under the NLRA. The first prong involves a determination of whether the state law is a minimum labor standard, and the second prong involves a determination of whether the law is inconsistent with the general legislative goals of the NLRA. Those two prongs are reflected in the Court's statement that "[w]hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act." *Id.* at 757. This case presents an opportunity for the Court to expressly reaffirm there are two prongs.

Under the first prong, a court must determine whether the challenged statute is a minimum labor standard. In that regard, the Court in *Metropolitan Life* described key characteristics of minimum labor standards laws as follows:

> Minimum state labor standards affect union and nonunion employees equally, and

> neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively.

*Id.* at 755.

SB 954 does not possess these characteristics, and thus fails to satisfy the first prong of *Metropolitan Life* because SB 954 is specifically designed to treat union and nonunion employees differently, and because it distorts California's prevailing wage laws to encourage unionization through the imposition of PLAs. As explained above, SB 954 accomplishes this by effectively cutting off funding of anti-PLA advocacy by IAFs like ABC-CCC, while preserving funding for pro-PLA advocacy by union favored IAFs.

Under the second prong of *Metropolitan Life*, a court must determine whether or not the statute is "inconsistent with the general legislative goals of the NLRA." *Id.* at 756. The Ninth Circuit decision fails to analyze or even mention this second prong. Complete silence. Consequently, the Ninth Circuit decision appears to effectively hold state laws that purport to be minimum labor standards laws are never preempted, even where, as here, the facts show SB 954 was intentionally crafted to upset the balance of

protected labor speech in a manner prohibited by *Brown*.

The Ninth Circuit's stated rationale for rejecting Interpipe's NLRA preemption argument is that "Interpipe sails full steam ahead into a flotilla of cases upholding generally applicable labor laws that provide opt out provisions limited to CBAs." (See Appendix at 16). The Ninth Circuit decision then cites five cases where minimum labor standards statutes were held not preempted. However, none of those five cases presented an issue that involved protected labor speech under *Brown* or involved the second prong of *Metropolitan Life*.

There are at least two problems with the Ninth Circuit's flotilla rationale. First, the court characterizes SB 954 as a generally applicable labor law without providing any justification for that conclusion. SB 954 is actually narrow in scope because it is targeted at open shop employers in the construction industry that seek work on government building projects. Second, and more significantly, the Ninth Circuit's flotilla rationale fails to account for the second prong of *Metropolitan Life.* In that regard, Interpipe acknowledges that most minimum labor standards laws are not even arguably inconsistent with the NLRA, and thus are not preempted. In other words, most minimum standards laws do not raise an issue under the second prong. But SB 954 is different. SB 954 has an impact on labor speech that is protected under *Brown*. Consequently, SB 954, as applied to Interpipe and ABC-CCC, is among the relatively few

minimum labor standards statutes that is inconsistent with the NLRA. SB 954 is inconsistent with the NRLA because of *Brown*. SB 954's failure to satisfy the second prong of *Metropolitan Life* is NLRA hull damage that sinks the ship known as SB 954, preventing this case from becoming part of the flotilla.

Interpipe's Opening Brief cites and carefully analyzes four cases where minimum labor standards statutes were "sunk" by NLRA preemption due to a failure to satisfy the second prong of *Metropolitan Life*. Again, the Ninth Circuit decision is entirely silent regarding these cases and the principle for which they are offered. Interpipe asks this Court to explain how the Ninth Circuit's decision is inconsistent with the two pronged approach in *Metropolitan Life.*

### E. This Case Presents an Excellent Vehicle for This Court to Address the Recurring Issue Regarding the Preference for "As Applied" Challenges Over Facial Challenges

The Ninth Circuit's decision treats Interpipe's claim as a facial challenge to California's SB 954 rather than an "as applied" challenge. Interpipe's preemption claim is based on an undisputed and extensive factual record presented to the District Court in Interpipe's Motion for Preliminary Injunction. The Ninth Circuit disregarded the facts, and its decision fails to address the primary legal issue presented in this appeal – whether Interpipe's

advocacy against PLAs is protected labor speech under the NLRA.

The Ninth Circuit decision erroneously states "[a]ppellants bring a facial challenge to SB 954 as they seek a declaration that SB 954 is unconstitutional in all circumstances. Our review therefore focuses on whether SB 954 is per se unlawful." (See Appendix at 11). With all due respect, this is wrong. Interpipe has never characterized its NLRA preemption challenge to SB 954 as a facial challenge. Interpipe has never asserted SB 954 is preempted in all circumstances.

Interpipe's preemption challenge is based on the specific facts of this case, and therefore should be treated as an "as applied" challenge to SB 954. In that regard, Interpipe's Complaint contains two attachments, one of which is an example of Interpipe's published advocacy materials regarding PLAs. Interpipe's Motion for Preliminary Injunction is supported by numerous declarations and documentary evidence showing Interpipe's anti-PLA advocacy and contrasting pro-PLA advocacy undertaken by labor organizations. All of Interpipe's arguments have been based on its specific allegations of facts. Because Interpipe's preemption challenge is based on those facts, the Court should treat this case as an as applied challenge to SB 954.

The Ninth Circuit's inappropriate approach contaminates its entire decision, and creates a disconnect between the actual appeal presented and

briefed by Interpipe, and the court's proffered analysis and decision, as explained further below.

### 1. Facial Challenges are Disfavored; This Case Should be Treated as an "As Applied" Challenge

This Court "has repeatedly emphasized in recent years that facial challenges are disfavored." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 398 (2010) (Justice Stevens' partial concurrence and partial dissent). They are disfavored because they run contrary to the fundamental principle of judicial restraint that courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936)).

This principle was applied in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), where the Court noted that "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force [citation]. . . ." 546 U.S. at 328-329. The Court went on to note that "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in

this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." After finding that the courts below improperly chose the bluntest remedy, the Court vacated the First Circuit Court of Appeals' decision, and remanded the case for further proceedings under an as applied approach. *Id*. at 332. Interpipe requests similar relief from the Court.

### 2. The Ninth Circuit Decision Improperly Fails to Treat Interpipe's Allegations of Fact As Being True

The Ninth Circuit decision concludes its NLRA preemption analysis by stating the following:

> Thus, absent compelling evidence – lacking here – that SB 954 impairs Interpipe's ability to engage in non-coercive labor speech, we cannot invalidate a legitimate exercise of California's traditional police power to regulate labor conditions. Accordingly, we hold that SB 954 does not infringe employers' NLRA-protected right to engage in labor speech and is not preempted by the NLRA.

(See Appendix at 20-21).

Interpipe has gone beyond presenting mere factual allegations, and argues it has presented compelling evidence that SB 954 has infringed upon its ability to engage in its anti-PLA advocacy. Even if Interpipe had presented mere factual allegations, this court must accept the factual allegations as true and

construe them in the light most favorable to Interpipe when analyzing the Defendants' motion to dismiss this case. The Ninth Circuit's suggestion that Interpipe must present compelling evidence at a pre-discovery phase of the case, in order to resist Defendants' motion to dismiss, is an application of an improper legal standard and is another reason Interpipe should receive relief from this Court.

## CONCLUSION

The Ninth Circuit decision is inconsistent with the Supreme Court cases of *Brown* and *Metropolitan Life*, and presents two issues of first impression that are of exceptional importance for maintaining uniformity of national labor law. For these reasons, Interpipe petitions the Court to review and analyze Interpipe's NLRA preemption challenge to SB 954 as it applies to Interpipe and ABC-CCC.

Respectfully submitted,

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