FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERPIPE CONTRACTING, INC.; ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC., *Plaintiffs-Appellants*, v. 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; JULIE A. SU, in her official capacity as California Labor Commissioner, Division of Labor Standards Enforcement, *Defendants-Appellees*.	No. 17-55248 D.C. No. 3:16-cv-02247-BEN-NLS

INTERPIPE CONTRACTING, INC.,

Plaintiff-Appellant,

and

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

Plaintiff,

v.

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; JULIE A. SU, in her official capacity as California Labor Commissioner, Division of Labor Standards Enforcement,

Defendants-Appellees.

No. 17-55263

D.C. No. 3:16-cv-02247-BEN-NLS

OPINION

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, Senior District Judge, Presiding

Argued and Submitted February 5, 2018
Pasadena, California

Filed July 30, 2018

Before: Consuelo M. Callahan and Jacqueline H. Nguyen, Circuit Judges, and Robert W. Pratt,* District Judge.

Opinion by Judge Callahan

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* The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

OPINION

CALLAHAN, Circuit Judge:

California's labor code requires employers on public works projects to pay their employees a "prevailing wage." To comply with this requirement, employers must either pay the prevailing wage itself or pay a combination of cash wages and benefits, such as contributions to healthcare, pension funds, vacation, travel, and other fringe benefits. In 2004, the California legislature expanded the list of eligible "benefits" to include employer payments to third-party industry advancement funds ("IAFs"). But there's a catch. Since 2017, employers may take a wage-credit for IAF contributions only if their employees consent to doing so through a collective bargaining agreement ("CBA") negotiated by a union.

Plaintiffs-Appellants Interpipe Contracting, Inc. ("Interpipe") and Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC") challenge an amendment to the labor code that imposed the 2017 wage-credit limitation on these types of contributions. They argue that the amendment, SB 954, 2016 Leg., 2015–2016 Reg. Sess. (Cal. 2016), violates their constitutional rights because, they contend, it discriminates against pro-open shop advocacy.

Appellants' challenges require us to answer two questions. First, we must decide whether SB 954 is preempted by the National Labor Relations Act ("NLRA") because it regulates an aspect of labor relations that Congress intended to leave to market forces,

or because it regulates non-coercive labor speech. Second, if SB 954 is not preempted, we must decide whether it violates the First Amendment and the Fourteenth Amendment's Equal Protection Clause by limiting the ability of certain IAFs to raise funds to finance their speech. Because we conclude that ABC-CCC lacks standing to press its equal protection claim, and because we hold that SB 954 is neither preempted by the NLRA nor infringes ABC-CCC's First Amendment rights, we affirm the district court's judgment dismissing Appellants' action.

I.

A.

Since 1931, California has required contractors on public works projects to pay their employees a "prevailing wage." Cal. Lab. Code § 1770; *State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th 547, 554 (2012). "[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. & Const. Trades Council*, 54 Cal. 4th at 555 (internal quotation marks omitted). "In satisfying the prevailing wage, employers can either pay all cash wages or pay a combination of cash wages and benefits, like contributions to pension funds, healthcare, vacation, travel, and other fringe benefits." *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579, 584 (S.D. Cal. 2010); *see also* Cal. Lab. Code § 1773.1. These

"[e]mployer payments are a credit against the obligation to pay the general prevailing . . . wages." Cal. Lab. Code § 1773.1(c).

Section 1773.1 allows certain employer contributions to count toward the prevailing wage. Beginning in 2004, that provision provided that

> Per diem wages . . . shall be deemed to include employer payments for the following:
>
> (1) Health and welfare.
>
> (2) Pension.
>
> (3) Vacation.
>
> (4) Travel.
>
> (5) Subsistence.
>
> (6) Apprenticeship or other training programs . . . so long as the cost of training is reasonably related to the amount of the contributions.
>
> (7) Worker protection and assistance programs or committees . . . to the extent that the activities of the programs or committees are directed to the monitoring and enforcement of laws related to public works.
>
> (8) Industry advancement and [CBA] administrative fees, provided that these payments are required under a [CBA] pertaining to the particular craft, classification, or type of work within the locality or the nearest labor market area at issue.

> (9) Other purposes similar to those specified in paragraphs (1) to (8), inclusive.

Id. § 1773.1(a) (2004). Prior to 2004, employers could credit contributions only to numbers (1) through (6) above. *Id.* § 1773.1(a) (2003). The 2004 version expanded the credit to include contributions to IAFs—number (8)—subject to approval under a CBA.

The added IAF wage-credit option sparked controversy when employers began interpreting subsection (9) as allowing them to wage-credit contributions to IAFs *without employee consent*, so long as the recipient IAFs were similar to, but not covered by, a CBA, as set forth in subsection (8). To close this loophole, in 2016 the state legislature amended § 1773.1 with SB 954—the law at issue here. SB 954 clarifies that subsection (9) allows wage crediting only for "other purposes similar to those specified in paragraphs (6) to (8), inclusive, *if the payments are made pursuant to a [CBA] to which the employer is obligated.*" *Id.* § 1773.1(a)(9) (2017) (emphasis added). Thus, since SB 954 went into effect on January 1, 2017, it has been clear that employers may reduce payments to employees to support their contributions to IAFs only if doing so is approved by their employees through a CBA.

Interpipe is a plumbing and pipeline contractor that favors "open shop" employment arrangements and opposes project labor agreements ("PLAs") on public works projects. "Open shop" is labor vernacular for projects involving an employer that has no formal contracts with a labor union, and where both unionized

and non-unionized labor is permitted. *Del Turco v. Speedwell Design*, 623 F. Supp. 2d 319, 326 (E.D.N.Y. 2009); *Ray Angelini, Inc. v. City of Philadelphia*, 984 F. Supp. 873, 875 (E.D. Pa. 1997). A PLA, by contrast, is a type of collective bargaining relationship involving multiple employers and unions that agree to abide by a uniform labor agreement in their bids on public works projects. *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 30 (D.C. Cir. 2002).

Before SB 954 took effect, Interpipe took a wage credit for its contributions to ABC-CCC—an IAF that opposes PLAs and supports open shop arrangements. Since SB 954 went into effect, Interpipe has ceased making payments to ABC-CCC.

B.

Interpipe and ABC-CCC brought this action against California state officials ("Appellees" or "the State")[1] in federal district court challenging SB 954 on constitutional grounds. Appellants claimed that SB 954 violates the Supremacy Clause by frustrating the purposes of the NLRA, 29 U.S.C. § 151 *et seq*. They argued that the law regulates in an area Congress intended to leave to the free play of market forces, and is preempted by the NLRA's prohibition on regulating non-coercive labor speech. ABC-CCC alone brought

[1] Appellants named as Defendants Xavier Becerra, the Attorney General of California, Christine Baker, the Director of the California Department of Industrial Relations, Julie A. Su, the California Labor Commissioner, and other state officials.

two additional claims: that SB 954 infringes its First Amendment right to free speech and violates the Equal Protection Clause. Appellants filed a motion for preliminary injunction and Appellees filed motions to dismiss and a motion for judgment on the pleadings.

On January 27, 2017, the district court denied Appellants' motion for a preliminary injunction and dismissed their action. *Associated Builders & Contractors of Cal. Cooperation Comm., Inc. v. Becerra*, 231 F. Supp. 3d 810, 828 (S.D. Cal. 2017). The court held that the NLRA does not preempt SB 954, that SB 954 does not infringe ABC-CCC's First Amendment rights, and that ABC-CCC lacked standing to bring its equal protection claim. *Id.* at 820–28. As to the NLRA claim, the court held that *Machinists*[2] preemption—a doctrine deeming preempted conduct that "'Congress intended be unregulated,'" *id.* at 820 (quoting *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008)), such as collective bargaining—did not apply because the NLRA preserves States' authority to set minimum labor standards, and SB 954 is such a standard. *Id.* at 821–24. The court further held that SB 954 does not regulate non-coercive labor speech because it "does not prevent employers or employees from speaking about any issue." *Id.* at 823. Finally, the court held that *Garmon*[3] preemption—a doctrine deeming preempted state laws regulating matters governed by the

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[2] Machinists v. Wis. Emp't Relations Comm'n, 427 U.S. 132 (1976).

[3] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

NLRA—did not apply because SB 954 "places no substantive restrictions on the terms of [CBAs] and does not regulate or preclude speech about unionization or labor issues." *Id.* at 825.

As to ABC-CCC's First Amendment claim, the district court found that SB 954 operates as a state subsidy of speech and does not restrict anyone's right to speak. *Id.* at 825–27. Because "nothing requires government 'to assist others in funding the expression of particular ideas, including political ones,'" *id.* at 825 (quoting *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009)), the court held that "'[the] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny,'" *id.* (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)). The court also rejected ABC-CCC's claim that SB 954 is viewpoint discriminatory. The court found that "the statute is neutral and does not favor, target, or suppress any particular speaker or viewpoint." *Id.* at 826. Accordingly, it applied rational basis review and held SB 954 to be a permissible exercise of California's police powers to regulate employee wages. *Id.* at 827.

Finally, the court held that ABC-CCC lacked standing on its equal protection claim because SB 954 "does not discriminate against ABC-CCC—if it does discriminate, it discriminates against employers not subject to CBAs, like Interpipe." *Id.* at 819.

Interpipe and ABC-CCC filed timely, separate appeals, which were consolidated.

II.

Appellants 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 Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579 (1987).

We "review de novo a district court's order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)," *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017), and apply the same standard of review to a district court's order granting a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). We "will affirm a dismissal for failure to state a claim where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *L.A. Lakers*, 869 F.3d at 800 (internal quotation marks omitted). We must "accept the factual allegations of the complaint as true and construe them in the light most favorable to the plaintiff." *Id.* (internal quotation marks omitted). Where the district court has considered documents attached to the complaint, we review facts in those documents together with the complaint itself. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). We also review the district court's denial of Appellants' motion for a preliminary injunction de novo because the court's conclusion was based solely on conclusions of law. *Save Our*

Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1121 (9th Cir. 2005).

III.

A.

The NLRA codifies employees' right to bargain collectively, seeks to equalize bargaining power between employers and employees, and preempts state laws that frustrate the accomplishment of these goals. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20–21 (1987); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747–48, 753–54 (1985); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). "The NLRA's declared purpose is to remedy '[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.'" *Metro. Life Ins.*, 471 U.S. at 753 (quoting NLRA § 1, 29 U.S.C. § 151); *see also Livadas v. Bradshaw*, 512 U.S. 107, 117 & n.11 (1994) (explaining that the NLRA is a "statutory scheme premised on the centrality of the right to bargain collectively" and preempts "a State's penalty on those who complete the collective-bargaining process"). Thus, the statute stresses the "desirability of 'restoring equality of bargaining power,' among other ways, 'by encouraging the practice and procedure of collective bargaining. . . .'" *Metro. Life Ins.*, 471 U.S. at 753–54 (quoting NLRA § 1, 29 U.S.C. § 151).

While the NLRA contains no express preemption provision, two categories of state action are implicitly preempted: (1) laws that regulate conduct that is either protected or prohibited by the NLRA (*Garmon* preemption), and (2) laws that regulate in an area Congress intended to leave unregulated or "'controlled by the free play of economic forces'" (*Machinists* preemption). *Brown*, 554 U.S. at 65 (quoting *Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976)) (internal quotation marks omitted). Interpipe argues that SB 954 is preempted under a *Machinists* theory.[4]

Machinists preemption "protects against state interference with policies implicated by the structure of the [NLRA] itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metro. Life Ins.*, 471 U.S. at 749. The doctrine bars states from interfering with the collective bargaining process and from regulating noncoercive labor speech by an employer, employee, or an employee's union. *See id.* at 751; *Brown*, 554 U.S. at 67–68. Interpipe argues that SB 954 constitutes state interference with its labor speech supporting pro-open shop advocacy by IAFs like ABC-CCC.

B.

Virtually any labor standard—e.g., wage and hour requirements—will affect the terms of a CBA, but the

[4] Interpipe abandoned its *Garmon* preemption claim by stating in its opening brief that it would focus "exclusively on how *Machinists* preempts SB 954."

pertinent question under *Machinists* is whether such a standard interferes with the collective bargaining *process*. *Metro. Life Ins.*, 471 U.S. at 756. The Supreme Court has explained that

> there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. . . . "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples."

Id. (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)). Minimum labor standards will necessarily affect employer-employee relations by "form[ing] a backdrop"—i.e., setting the statutory baseline—for collective bargaining negotiations. *Fort Halifax*, 482 U.S. at 21 (internal quotation marks omitted). But such *effects* differ in kind from a State's regulation of the bargaining process itself. "[S]tate action that intrudes on the mechanics of collective bargaining is preempted, but state action that sets the stage for such bargaining is not."

Am. Hotel & Lodging Ass'n v. City of L.A., 834 F.3d 958, 964 (9th Cir. 2016).

This accommodation of state labor law is of a piece with the NLRA's structure and generally applicable preemption principles. It reflects that "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metro. Life Ins.*, 471 U.S. at 753; *Fort Halifax*, 482 U.S. at 20. It is also consistent with the presumption against preemption that applies in areas of traditional state regulation, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), as "the establishment of labor standards falls within the traditional police power of the State," *Fort Halifax*, 482 U.S. at 21. Thus, "preemption should not be lightly inferred in this area." *Id.*

Interpipe and the State agree that SB 954 is a minimum labor standard. But Interpipe argues that SB 954 is still preempted under *Machinists* because, it reasons, the law favors pro-union, pro-PLA speech over anti-union, pro-open shop speech. Interpipe asserts that "SB 954 is a minimum labor standards law that is inconsistent with the general NLRA policy protecting labor speech and favoring open and robust debate on matters dividing unions and employers (including debate regarding 'top down' organizing through PLAs)." Interpipe reasons that unionized employees might consent to wage-crediting that benefits pro-union IAFs, but would definitely not approve of wage-crediting that

benefits pro-open shop IAFs. Such discriminatory effects, Interpipe argues, run afoul of the NLRA's protection of labor speech.

Interpipe's argument fails because SB 954 is a legitimate minimum labor standard that regulates no one's labor speech. First, in arguing otherwise, Interpipe sails full steam ahead into a flotilla of cases upholding generally applicable labor laws that include opt-out provisions limited to CBAs.[5] Consistent with the NLRA's goal of promoting collective bargaining, courts have long upheld state laws that permit *only* unions to opt out of state labor standards. *See*, *e.g.*, *Fort Halifax*, 482 U.S. at 22 (upholding state law requiring severance payments to laid-off employees but allowing unionized workers to opt out through a CBA); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489–90 (9th Cir. 1996) (upholding California law setting a maximum workday standard for mineworkers but allowing unionized workers to opt out through a CBA); *Am. Hotel & Lodging*, 834 F.3d at 965 (upholding county ordinance setting a minimum wage and time-off compensation but allowing unionized workers to opt out through a CBA);

[5] Amicus Associated Builders and Contractors, Inc.'s ("ABC") motion to file an amicus brief is **GRANTED**. ABC asserts that California is the only State to "impose[ ] . . . [a] discriminatory restrictive limitation on non-union employer contributions to funds." We find this statement somewhat misleading based on a review of ABC's citation to nine other States' prevailing wage laws. In fact, those States do not allow *any* wage-crediting for contributions made to the particular types of "funds" at issue here—IAFs. Instead, those States allow wage crediting only for programs that *inure directly to the benefit of employees*, such as pension plans and health benefit programs.

Nat'l Broad. Co. v. Bradshaw, 70 F.3d 69, 73 (9th Cir. 1995) (upholding state law setting minimum overtime pay requirements but allowing unionized workers to opt out through a CBA). Opt-out provisions limited to unions are consistent with Congress' objectives under the NLRA because the risk of coercion is low where bargaining power between employers and employees is in equipoise. *See Metro. Life Ins.*, 471 U.S. at 753; *Fort Halifax*, 482 U.S. at 20.

Second, Interpipe conflates labor standards affecting employers' ability to *fund* their speech with unlawful regulations *of* their speech. The NLRA provides that

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

NLRA § 8(c), 29 U.S.C. § 158(c). In enacting § 8(c), Congress sought to encourage "free debate" on labor issues. *Brown*, 554 U.S. at 67. To that end, the NLRA prohibits government policies that frustrate "'uninhibited, robust, and wide-open debate in labor disputes'" and also "precludes regulation of [non-coercive] speech about unionization."[6] *Id.* at 68 (quoting *Letter Carriers v.*

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[6] Section 8(c) does not protect "coercive" labor speech—i.e., speech that "contain[s] a threat of reprisal or force or promise of

Austin, 418 U.S. 264, 272–73 (1974)). Interpipe implicitly concedes that SB 954 does not regulate its own speech, but contends that neither did the law in *Brown*, which the Supreme Court invalidated.

Interpipe's reliance on *Brown* is misplaced. *Brown* stands for the straightforward proposition that § 8(c) means what it says: the government may not "regulate[]" non-coercive labor speech. *Id.* *Brown* involved a California law (AB 1889) that prohibited certain employers from using state financial subsidies "'to assist, promote, or deter union organizing.'" *Id.* at 63 (quoting Cal. Gov't Code §§ 16645.1–16645.7). The Court did not dispute California's right to determine how such state "subsidies" could be used, *see id.* at 73–74, nor did it rely on AB 1889's disparate treatment of certain pro-union activities, which were exempt from the law's restriction,[7] *see id.* at 70–71. Instead, the Court deemed AB 1889 preempted because its complex and severe enforcement scheme chilled employers' use *of their own money* to engage in protected labor speech. *See id.* at 71–73. The law required employers to maintain records ensuring segregation of state and private funds, which was "no small feat" because the law drilled into virtually every aspect of an employer's operations. *Id.* at 72. Moreover, AB 1889's "[p]rohibited expenditures

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benefit.'" *Brown*, 554 U.S. at 68 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

[7] To the contrary, the Court made plain that "a State may 'choos[e] to fund a program dedicated to advance certain permissible goals'" over others. *Brown*, 554 U.S. at 73 (alteration in original) (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

include[d] not only discrete expenses such as legal and consulting fees, but also an allocation of overhead, including salaries of supervisors and employees, for any time and resources spent on union-related advocacy." *Id.* (internal quotation marks omitted). Finally, the law imposed "deterrent litigation risks." *Id.* Any person could bring a civil action seeking injunctive relief, damages, civil penalties, and other relief for a suspected violation. *Id.* And liable employers could be slapped with fines trebling the amount of state funds the employer spent on " 'assist[ing], promot[ing], or deter[ring] union organizing.' " *Id.* at 63, 72 (quoting Cal. Gov't Code Ann. §§ 16645.1–16645.7).

The Court found that AB 1889's draconian enforcement provisions effectively put employers to a coercive choice: "either . . . forgo [their] 'free speech right to communicate [their labor] views to [their] employees,' or else . . . refuse the receipt of any state funds." *Id.* at 73 (internal citation omitted) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). In other words, AB 1889 effectively forced employers to either relinquish their right to engage in NLRA-protected speech *with their own money* in order to avoid costly litigation and recordkeeping requirements, or refuse the state subsidy, avoid the law's enforcement scheme altogether, and be free to exercise their NLRA speech rights. The Court held that "[i]n so doing, the statute impermissibly 'predicat[es] benefits on refraining from conduct protected by federal labor law,' and chills one side of the 'robust debate which has been protected under the NLRA.' " *Id.* (internal citation omitted)

(quoting *Livadas*, 512 U.S. at 116 and *Letter Carriers*, 418 U.S. at 275).

SB 954 differs from AB 1889 in a crucial way. Unlike AB 1889, 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. As the district court observed, SB 954 imposes no "compliance burdens or litigation risks that pressure Plaintiffs to forgo their speech rights in exchange for the receipt of state funds." *Associated Builders & Contractors of Cal. Cooperation Comm.*, 231 F. Supp. 3d at 823. SB 954 simply bars employers from diverting their employees' wages to the employers' preferred IAFs without their employees' collective consent.

SB 954 is also unlike AB 1889 in that it is a minimum labor standard, whereas AB 1889 was not. SB 954 therefore falls into the category of state labor laws typically saved from preemption, and so the presumption against preemption applies with particular force. *Fort Halifax*, 482 U.S. at 21. As the Supreme Court made clear, "there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the *processes* of bargaining or self-organization." *Metro. Life Ins.*, 471 U.S. at 756 (emphasis added). 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.

IV.

A.

Having determined that SB 954 is not preempted under *Machinists*, we proceed to consider whether it is invalid under the First Amendment.[8] ABC-CCC asserts that SB 954 "limits the way private speakers"—in this case IAFs like ABC-CCC—"may raise money to fund their speech activities," and therefore infringes its right to free speech.[9] Notably, ABC-CCC does not

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[8] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

[9] Because Article III standing is jurisdictional, we must *sua sponte* assure ourselves of ABC-CCC's standing to pursue its First Amendment claim. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Article III standing requires a party to show that it has (1) suffered a concrete and particularized, actual or imminent injury-in-fact, (2) which is fairly traceable to the challenged conduct, and (3) which is likely to be redressed by a ruling in its favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). ABC-CCC clearly satisfies the first and second prongs because it alleges facts showing it has suffered an economic injury—diminution in funding—that is fairly traceable to SB 954. But the redressability analysis requires more effort because ABC-CCC is not the party being regulated—SB 954 regulates its benefactors. *See id.* at 562. "When, . . . as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*," "causation and redressability ordinarily hinge on the *response* of the regulated (or regulable) third party to the

dispute that SB 954 leaves it free to speak and express itself at will. Nor does ABC-CCC suggest that SB 954 prevents employers (and employees for that matter) from contributing to ABC-CCC. Instead, it advances a novel First Amendment theory: that it has a protected First Amendment right to *receive* the employee-subsidized funds from Interpipe and other employers. ABC-CCC claims that "[l]aws that restrict the ability to fund one's speech are burdens on speech."[10]

ABC-CCC swerves off course straight out of the gate by equating a contributor's right to fund an entity's speech with a recipient's right to receive another's financial largesse. The Supreme Court has said otherwise. In *Regan*, the Court held that "[a]lthough [an organization] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be

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government action or inaction." *Id.* (first emphasis in original; second emphasis added). Even if we were to enjoin enforcement of SB 954, ABC-CCC's injury might persist because contributors like Interpipe could decide not to resume their funding. Nonetheless, because Interpipe and other employers have submitted declarations testifying to their concrete intentions to resume contributions to ABC-CCC should we enjoin SB 954, ABC-CCC has shown it to be likely that a favorable decision would redress its injury. It therefore has standing to press its First Amendment claim.

[10] To be sure, ABC-CCC elsewhere argues that SB 954 violates the First Amendment by allegedly discriminating based on viewpoint. But ABC-CCC also makes clear its belief that a broader constitutional right is at stake: an asserted First Amendment right to be free from a legislative "burden" on its "ability to receive contributions."

necessary to realize all the advantages of that freedom.'" 461 U.S. at 550 (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1980)). In other words, there exists no standalone right to receive the funds necessary to finance one's own speech. ABC-CCC's theory ignores this bedrock principle and, in so doing, misapplies Supreme Court precedent addressing the First Amendment rights of campaign contributors and charitable organizations.

i.

It is well-established that "'contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.'" *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)); *see also Randall v. Sorrell*, 548 U.S. 230, 247–48 (2006). As concerns political contributions in particular, this First Amendment right is reflected in the "'symbolic expression of support evidenced by a contribution.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 21). The question in cases challenging contribution limitations is whether the law "infringe[s] the contributor's freedom to discuss candidates and issues.'" *Id.* at 1444 (quoting *Buckley*, 424 U.S. at 21).

ABC-CCC asserts that where monetary contributions are involved, the First Amendment right applies equally to the contributor *and* the recipient. In support, ABC-CCC looks to *Randall*, where the Court observed that a Vermont campaign finance law

diminished candidates' ability to "'amass[] the resources necessary for effective advocacy.'" 548 U.S. at 248 (alteration omitted) (quoting *Buckley*, 424 U.S. at 21). But ABC-CCC wrenches the quote out of context. *Randall* is, at bottom, a case about the free speech rights of contributors; it does not establish an independent constitutional right of recipients to "amass" funds.

Randall involved a challenge to Vermont's campaign finance law setting contribution limits. *Id.* at 238–39. To determine whether the restriction withstood First Amendment scrutiny, the Court applied the test set forth decades earlier in *Buckley.* That test requires assessing, among other things, whether the "'contribution restriction[] could have a severe impact on political dialogue . . . [by] prevent[ing] candidates and political committees from amassing the resources necessary for effective advocacy.'" *Id.* at 247 (quoting *Buckley*, 424 U.S. at 21). The First Amendment interest implicated, however, was the right of an individual to contribute, not the right of a political candidate or organization to amass funds. The question was whether the restriction impermissibly affected *contributors*' First Amendment rights—the determination of which turned in part on measuring the impact on recipients of such contributions. *See id.* An analogous fact pattern might involve a claim by Interpipe that SB 954 violates its First Amendment right to contribute to ABC-CCC's advocacy, an analysis of which might consider the

effect of such a restriction on ABC-CCC's speech. But Interpipe brings no such claim.[11]

Our reading of *Randall* is confirmed by the Court's later decision in *Davis v. FEC*, 554 U.S. 724 (2008). There, the Court invalidated a federal campaign finance law increasing contribution limits for non-self-financing political candidates if their self-financing opponent exceeded a spending threshold in their own campaign. *Id.* at 729–30, 736. The Court found that the self-financing candidate's First Amendment rights were implicated not because their ability to receive funds was disproportionately impaired, but because the law "impose[d] an unprecedented penalty on any candidate who robustly exercises [*her*] First Amendment right [to spend personal funds]"—i.e., it effectively regulated the self-financing candidate's own speech. *Id.* at 738–40; *see also Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 4–5 (D.C. Cir. 2009) (invalidating limitation on which types of contributions

[11] Even if Interpipe did bring a First Amendment claim, it would still have to show that (1) SB 954 regulates speech, not just conduct, and (2) that it pares back a state subsidy of speech in a viewpoint discriminatory way. Nor could ABC-CCC seek to advance Interpipe's purported First Amendment interests. ABC-CCC does not claim third-party standing to assert Interpipe's rights, let alone seek to vindicate those rights. *Cf. Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955–58 (1984) (holding that a fundraiser that contracted with charities could assert the charities' First Amendment rights because it had third-party standing to do so); *Viceroy Gold*, 75 F.3d at 489 (finding no third-party standing absent a showing of a "genuine obstacle" to the affected individuals bringing their own claims). ABC-CCC argues only that SB 954 violates its own right to receive funds.

non-profits could *spend* on election-related activities). SB 954, by contrast, leaves IAFs free to spend their funds on expressive activities however they wish without incurring a "penalty" for doing so.

ii.

ABC-CCC also searches for support in decisions addressing laws limiting solicitation of funds by charities. In *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 623–24 (1980), the Court invalidated a state law requiring "at least seventy-five percent of the proceeds of [fundraising] solicitations [to] be used directly for the charitable purpose of the organization" if the charity wished to solicit funds in a public forum. The Court found that solicitation activities were "intertwined" with the charities' First Amendment rights because "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Schaumburg*, 444 U.S. at 631–32; *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech. . . ."); *Sec'y of State of Md. v. Munson*, 467 U.S. 947, 967 & n.16 (1984) (holding that a law restricting the amount charities could spend on fundraising activities infringed their ability to solicit funds, and amounted to "a direct restriction on protected First Amendment activity"); *cf. Cornelius v. NAACP*

Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799 (1985) (extending *Schaumburg* to solicitation activities that are not "in-person" but are accomplished through dissemination of literature). These cases do not support ABC-CCC's claimed First Amendment right, however, because laws limiting charitable solicitations target the speaker's rights, manifested through charities' solicitation activities. SB 954, by contrast, steers clear of regulating IAFs' solicitation of funds.

iii.

ABC-CCC's reliance on a non-precedential district court case is similarly unavailing. *United Food and Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1121–22 (D. Ariz. 2011) (not appealed), concerned an Arizona law restricting some unions' ability to collect funds from employees through employer payroll deductions. Before the law took effect, employees could elect to have their employers automatically deduct from their paychecks the amount needed to pay for health insurance and union dues. *Id.* at 1121. But under the challenged law, employees were barred from doing so unless the unions either certified to employers that they would not use any of their general funds for "political purposes," or if they specified what percentage of their funds would be so used. *Id.* If a union spent any funds on politicking after it had forsworn such activities, or if it spent more than the specified percentage, it was subject to a civil fine of $10,000. *Id.* at 1122. The court held that the law implicated the unions' First Amendment rights and invalidated it as

an impermissible viewpoint-based restriction on speech because it applied only to—and thereby discriminated against—particular unions. *Id.* at 1125.

At first blush, SB 954 might appear similar to Arizona's law in *United Food.* Both laws affect the contribution decisions of third parties—employees in *United Food* and employers here—which, in turn, affect another entity's ability to amass funds. But the constitutional interest in *United Food* was in the law's regulation *of the unions*, not in the law's effect of diminishing the funds the unions received. *See id.* at 1125. Similar to the campaign finance law struck down in *Davis*, Arizona's law limited the unions' speech by tying payroll deduction contributions *to* their political speech. *Id.* Moreover, if unions expressed their political views "too much," they incurred a fine, which further evinced an objective to target union speech.[12] *Id.* SB 954, by contrast, does not regulate the recipients of funds—IAFs—let alone tie the funding IAFs receive to their own expressive activities.

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[12] The Supreme Court's recent decision in *Janus v. American Federation of State, County, & Municipal Employees*, 138 S. Ct. 2448 (2018) does not affect our assessment of *United Food. Janus* invalidated state agency shop laws requiring nonmembers of a union to pay a fee in support of the union's collective bargaining activities—activities performed on behalf of union members and nonmembers alike. *Id.* at 2477–78. The Court did not have occasion to address, nor did it question, unions' well-established First Amendment right "to participate in the electoral process with all available funds other than [ ] state-coerced agency fees lacking affirmative permission." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 190 (2007).

* * *

The cases discussed in this section share a common characteristic: they address laws regulating the aggrieved party's speech. But while the First Amendment protects the right of an individual to express herself through the medium of finance, it does not establish a free-floating right to receive the funds necessary to broadcast one's speech. *Regan*, 461 U.S. at 550. Accordingly, we reject ABC-CCC's theory of a First Amendment right to amass funds to finance its speech.

B.

Even if ABC-CCC could show that SB 954 targets its own rights as a speaker rather than as a recipient of others' financial contributions, we would find no constitutional violation because the law's aim is employer conduct—the payment of wages—that is not inherently expressive.

Conduct-based laws may implicate speech rights where (1) the conduct itself communicates a message, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. ("FAIR II")*, 547 U.S. 47, 65–66 (2006); (2) the conduct has an expressive element, *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); or where, (3) even though the conduct standing alone does not express an idea, it bears a tight nexus to a protected First Amendment activity, *see Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Regardless of the

theory, the conduct must be "'inherently expressive'" to merit constitutional protection. *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014) (quoting *FAIR II*, 547 U.S. at 66).

SB 954 does not regulate conduct that communicates a message or that has an expressive element. The Court's decision in *FAIR II* is instructive. *FAIR II* involved a claim brought by law schools that federal legislation tying funding to their decision whether to allow military recruiters on campus violated their First Amendment rights. 547 U.S. at 51, 66. The schools argued that the law infringed their right to express disagreement with military policy. *Id.* at 53. The Court rejected their argument, reasoning that the law targeted conduct—"treating military recruiters differently from other recruiters"—that was not "inherently expressive." *Id.* at 66; *cf. Clark*, 468 U.S. at 296 (assuming that sleeping overnight in public parks as part of a demonstration was an expressive protest in support of the homeless). Same here. A law regulating wages does not target conduct that communicates a message nor does such conduct contain an expressive element.

Nor does regulating wages bear a tight nexus to ABC-CCC's right to free speech. In *Minneapolis Star*, the Court assessed a Minnesota law imposing a special use tax on certain paper and ink products. 460 U.S. at 577. Purchasing ink and paper is not expressive conduct, but the law applied to ink and paper products used exclusively by news publications. *Id.* at 578. Indeed, the law defined the products taxed as those "'used or consumed in producing a publication as

defined [by law].'" *Id.* at 578 n.2 (quoting Minn. Stat. § 297A.14). Because the law "singled out the press for special treatment" and impaired news publications' ability to exercise their press freedoms, the law burdened interests protected by the First Amendment. *Id.* at 582–85.

SB 954 has none of the hallmarks of the Minnesota tax. Far from taking aim at IAFs' speech, SB 954 is, instead, a generally applicable wage law that targets employer use of employee wages, does not single out pro-open shop IAFs, and only indirectly affects one possible revenue source for IAFs. Indeed, the law leaves ABC-CCC free to solicit funds from employers, employees, or anyone else. That ABC-CCC may now need to explore alternative means of raising funds to finance its speech does not somehow transform a minimum wage law into a regulation of expressive conduct. SB 954 is therefore more akin to generally applicable economic regulations affecting rather than targeting news publications that the Court has found pass constitutional muster.[13] *Id.* at 581 ("It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.").

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[13] Indeed, *Minneapolis Star* observed that the Minnesota tax's burden on press freedoms did not, in and of itself, trigger First Amendment scrutiny. *Minneapolis Star*, 560 U.S. at 581, 583 (noting that economic regulation of the press through antitrust and other laws does not implicate constitutional freedoms). The law offended the First Amendment because it "singled out the press for special treatment." *Id.* at 582–85.

To be sure, the Supreme Court has not drawn a bright line distinguishing conduct-based laws that permissibly burden speech from those that do not. But three considerations back a requirement that, in order to trigger First Amendment scrutiny, a conduct-based law must (1) target a particular type of entity for differential treatment, and (2) regulate the ingredients necessary to effectuate that entity's First Amendment rights. First, a law regulating conduct that merely alters incentives rather than restricts the ingredients necessary for speech does not regulate conduct that is "inherently expressive"—a necessary trait of an impermissible conduct-based regulation. *FAIR II*, 547 U.S. at 66; *Pickup*, 740 F.3d at 1225. Second, applying the First Amendment to conduct that has only an indirect effect on speech would task the courts with unwieldy line drawing exercises: how indirectly related to speech must a conduct-based restriction be to avoid First Amendment scrutiny? Third, scrapping conduct-based laws that have only an attenuated relationship to speech would have the perverse effect of invalidating legitimate exercises of state authority to protect the general health and welfare. A labor standard like SB 954 that ensures employee approval before their wages are rerouted to third-party advocacy groups would, under ABC-CCC's theory, be subject to scrutiny simply because it *affects* ABC-CCC's ability to finance its speech. That cannot be the law. Accordingly, because SB 954 regulates conduct that is not "inherently expressive," we hold that it does not regulate ABC-CCC's speech.

C.

Finally, we consider whether SB 954 limits a state subsidy on speech in a viewpoint discriminatory way. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . . ." *Regan*, 461 U.S. at 549. Because speech subsidies are not coated with constitutional protection, the government is typically free to limit or remove speech subsidies at its discretion, and such limitations are generally subject to rational basis review. *Ysursa*, 555 U.S. at 358–59. Further, the legitimacy of a State's limitation on a speech subsidy is all the more apparent where it withdraws a policy that facilitates compulsory subsidization of others' expression. As the Supreme Court recently made clear, "[c]ompelling a person to *subsidize* the speech of other private speakers raises [] First Amendment concerns." *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018) (emphasis in original). On the other hand, where a State limits a speech subsidy in a viewpoint discriminatory way, we generally apply strict scrutiny.[14] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834–35, 837 (1995) ("Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the

[14] We do not have occasion to decide whether a condition placed on a state subsidy that remedies a limitation on others' expression would, if targeted at only certain viewpoints, be subject to strict scrutiny. We need not address that question because we conclude that SB 954 does not discriminate based on viewpoint.

University may not silence the expression of selected viewpoints.").

With this framework in mind, we assess first whether SB 954 limits a state subsidy on speech or instead burdens First Amendment rights. We then evaluate whether SB 954 is viewpoint discriminatory.

i.

ABC-CCC argues that SB 954 burdens its constitutional right to free speech rather than limits a state subsidy of its speech. ABC-CCC begins with the premise that state subsidies of speech are inherently financial in nature. Because SB 954 "restricts the way *private parties* obtain *private funding* for their speech, at no cost to the government," ABC-CCC reasons that the law is a direct affront to its constitutional rights and must be subject to strict scrutiny.

ABC-CCC misconceives the nature of state subsidies of speech. A speech subsidy need not be financial; it may be a non-monetary means of facilitating an entity's speech—e.g., by creating a mechanism that assists the entity in funding its own speech. *Ysursa*, 555 U.S. at 358 (2009); *see also Rosenberger*, 515 U.S. at 835 (rejecting the argument that, "from a constitutional standpoint, funding of speech differs from provision of access to facilities"). And because the State has no constitutional duty to subsidize speech in the first place, it may restrict that assistance without triggering constitutional scrutiny. As the Chief Justice explained in *Ysursa*,

> While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983); *cf. Smith v. Highway Employees*, 441 U.S. 463, 465 (1979) (*per curiam*) ("First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize [a labor] association and bargain with it").

555 U.S. at 358 (alterations in original). Put simply, what the government giveth it can taketh away.

Ysursa involved a challenge to an Idaho law barring public employees from authorizing a payroll deduction for contributions to their union's political action committee. *Id.* at 355. In so doing, the law did not involve any governmental financial subsidy, but it did restrict a mechanism by which the State facilitated private funding (by employees) of private speech (by the unions)—the same factual circumstance ABC-CCC identifies in the instant matter. The Court held that Idaho's law did not violate the First Amendment because,

> While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, Idaho is under no obligation to aid the unions

> in their political activities. And the State's decision not to do so is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor. Idaho's decision to limit public employer payroll deductions as it has "is not subject to strict scrutiny" under the First Amendment. *Regan*, 461 U.S., at 549, 103 S. Ct. 1997.

Id. at 359. In a statement that is acutely on point here, the Court added that "[a] decision not to assist fundraising that may, as a practical matter, result in fewer contributions is simply not the same as directly limiting expression." *Id.* at 360 n.2. Indeed, California's decision to limit assistance for IAFs' fundraising activities under SB 954 "is simply not the same as directly limiting [IAFs'] expression." *Id.*; *see also Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007) (approving a law that placed a condition "upon [a] union's extraordinary *state* entitlement to acquire and spend *other people's* money" (emphasis in original)); *cf. Janus*, 138 S. Ct. at 2464 ("the compelled subsidization of private speech seriously impinges on First Amendment rights").

Ysursa relied on the Court's decision in *Davenport* to distinguish speech subsidies from First Amendment rights. In *Davenport*, the Court upheld a state ban on unions using agency fees of non-union members on political activities absent employees' affirmative approval. 551 U.S. at 182, 188–91. Because unions have no First Amendment right to collect fees from

nonmembers in the first place, the State's limitation on unions' ability to collect those fees merely restricted a state subsidy. *Id.* at 185–87. The Court reasoned that "[w]hat matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies"—rather than the self-executing operation of the First Amendment—"have compelled their employees to pay those fees." *Id.* at 187.

Finally, in *Regan*, the Court considered a federal law barring non-profit organizations engaged in lobbying activities from accepting tax-deductible donations. 461 U.S. at 543–44. The Court began by explaining that "tax-deductibility [is] a form of subsidy that is administered through the tax system." *Id.* at 544. It then considered the challenger's argument "that the government may not deny a benefit to a person because he exercises a constitutional right"—there, the right to lobby. *Id.* at 545. The Court rejected that argument, concluding that the government had not denied the challenger's right to lobby because he could still do so; "Congress has merely refused to pay for the lobbying out of public monies." *Id.*

Ysursa, Davenport, and *Regan* are controlling. As in those cases, SB 954 trims a state subsidy rather than infringes a First Amendment right. The subsidy here takes the form of a state-authorized entitlement allowing employers to reduce their employees' wages to support the employers' favored IAFs. It does not restrict IAFs' right to free speech. ABC-CCC's contrary argument relies on the faulty premise that a state

subsidy operates like a one-way ratchet: once California offered wage-crediting for IAFs, the state entitlement became imbued with constitutional protections and could not be restricted. Not so. As discussed, ABC-CCC's argument flies in the face of the Supreme Court's clear statements to the contrary:

> While [the wage credit] can enhance [ABC-CCC's] exercise of First Amendment rights, [California] is under no obligation to aid [ABC-CCC] in [its expressive] activities. And the State's decision not to do so is not an abridgment of [ABC-CCC's] speech; [it is] free to engage in such speech as [it] see[s] fit.

Ysursa, 555 U.S. at 359.

ii.

We turn next to evaluating whether SB 954 targets certain IAFs based on their open shop advocacy. If it does, then the law is likely subject to strict scrutiny notwithstanding its limitation on a state subsidy rather than a constitutional right. *Rosenberger*, 515 U.S. at 834–35, 837; *Davenport*, 551 U.S. at 189.

"A regulation engages in viewpoint discrimination when it regulates speech 'based on the specific motivating ideology or perspective of the speaker.'" *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017), *cert. denied*, No. 17-1087 (June 28, 2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015)) (internal quotation marks omitted); *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir.

2009) ("[V]iewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject." (internal quotation marks omitted)). Viewpoint discrimination is the most noxious form of speech suppression. *Rosenberger*, 515 U.S. at 829. By targeting not only "subject matter, but particular views taken by speakers on a subject," it constitutes "an egregious form of content discrimination." *Id.*

If a law is facially neutral, we will not look beyond its text to investigate a possible viewpoint-discriminatory motive. *See First Resort*, 860 F.3d at 1278 ("'[t]he Supreme Court has held unequivocally that it will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive'" (quoting *Menotti v. City of Seattle*, 409 F.3d 1113, 1130 n.29 (9th Cir. 2005)) (internal quotation marks omitted)). If, however, the law includes indicia of discriminatory motive, we may peel back the legislative text and consider legislative history and other extrinsic evidence to probe the legislature's true intent. *See*, *e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (considering legislative findings where the challenged law favored some entities over others); *cf. Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004) (considering statements by government officials to help determine legislative intent). Two indicia of discriminatory motive relevant here are underinclusiveness and overinclusiveness. *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1670 (2015); *Ridley*, 390 F.3d at 87. The presence of either indicates potential viewpoint

discrimination, which would prompt us to consider extrinsic evidence to help determine whether the California legislature did, in fact, act with discriminatory intent. *Cf. Ridley*, 390 F.3d at 87–88.

ABC-CCC argues that SB 954 discriminates against organizations that favor open shop arrangements because it "burdens based on the recipient's status and viewpoint." ABC-CCC asserts that "the requirement that prevailing wage contributions be made pursuant to a CBA acts as a proxy for union-backed speech" because unionized employees are unlikely to approve of a wage credit that benefits an organization whose purpose is pro-open shop advocacy.[15] As evidence, ABC-CCC claims that SB 954 is overinclusive because it does not allow an employer to take a wage credit for IAF contributions even if an individual employee approves of doing so. It also argues that the law is underinclusive because it does not require the consent of all unionized employees, and because it leaves in place wage credits for contributions that do not require employee consent—e.g., contributions to pension funds and health insurance plans.

We are unpersuaded. First, that only unionized employers may have an opportunity to take a credit

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[15] Amicus ABC goes a step further, arguing that SB 954 "allow[s] credits for contributions to union [IAFs], while denying the same rights to non-union employers." But SB 954 does no such thing. The law allows credits to *any* type of IAF. The fact that pro-union IAFs may benefit disproportionately is simply a function of employees' decision to spend their money supporting the speech of certain IAFs over others.

against their employees' wages for IAF contributions does not facially discriminate against certain *recipients* of that credit: SB 954 is indifferent to which IAFs—if any—employees elect to subsidize. Second, that unionized employees are unlikely to fund an anti-union IAF over a pro-union one is beside the point: A facially neutral statute restricting expression for a legitimate end is not discriminatory simply because it *affects* some groups more than others. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). That employees may consent to wage deductions only in support of pro-union IAFs merely reflects a choice made by employees, not a mandate imposed by the California legislature. For example, "an ordinance against outdoor fires" is legitimate even though it might affect antigovernment protesters more than pro-government ones because only the former are likely to engage in the expressive activity of flag burning. *Id.*

Our decision in *First Resort* is instructive. There, we considered a city ordinance prohibiting limited services pregnancy centers ("LSPCs") from providing false or misleading statements about their abortion-related services. 860 F.3d at 1267–68. The record included evidence that LSPCs misled women into believing they provided abortion services and "unbiased counseling" when, in fact, they offered no such services and sought to discourage women from getting abortions. *Id.* at 1267–69 (internal quotation marks omitted). First Resort, Inc., an LSPC, challenged the ordinance as discriminating against its anti-abortion views. *Id.* at 1277.

We rejected First Resort's theory. We explained that a law affecting entities holding a particular viewpoint is not viewpoint discriminatory unless it targets those entities *because of* their viewpoint. *Id.* at 1277–78. The ordinance in *First Resort* did not cross that line because it targeted false and deceptive advertising—a legitimate, non-speech-suppressing purpose—and not the views held by LSPCs. *Id.* Indeed, the ordinance in no way limited LSPCs in expressing their anti-abortion views. *Id.*

> Put differently, it may be true that LSPCs engage in false or misleading advertising concerning their services because they hold anti-abortion views. However, the Ordinance does not regulate LSPCs based on any such anti-abortion views. Instead, the Ordinance regulates these entities because of the threat to women's health posed by their false or misleading advertising.

Id. at 1278.

Like the ordinance in *First Resort*, SB 954 targets a legitimate area of state regulation and does not discriminate based on viewpoint. Just as LSPCs remain free to express their anti-abortion views however they wish, SB 954 leaves ABC-CCC and other IAFs—regardless of viewpoint—free to engage in whatever speech they like.

In fact, SB 954 is planted on even firmer constitutional ground than the ordinance in *First Resort* for two reasons. First, whereas the law there regulated the

aggrieved party, First Resort, SB 954 does not regulate ABC-CCC or other IAFs *at all*. At most, SB 954 indirectly *affects* ABC-CCC. This fact attenuates any concern that the law targets ABC-CCC's speech. Second, whereas *First Resort* concerned possible infringement of LSPCs' First Amendment rights, SB 954 goes some way toward *remedying* an encumbrance on the First Amendment rights of others—namely, employees on public works projects. Indeed, if ABC-CCC were to prevail here and California's prevailing wage law reverted to its pre-SB 954 state—whereby employers could deduct employee wages to support the employers' favored IAFs without employee consent—the result would likely be an infringement of *employees'* First Amendment right to contribute to causes of *their* choosing. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Janus*, 138 S. Ct. at 2464 (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted)).

ABC-CCC also argues that discriminatory motive can be inferred from SB 954's text because, it asserts, the law is over-and underinclusive. A showing that a law regulates a greater or lesser number of entities than is reasonable to serve its objectives could indicate such a motive. *Williams-Yulee*, 135 S. Ct. at 1668.

Whether a law is overinclusive or underinclusive requires first ascertaining the law's declared purpose. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,

460 U.S. 37, 48–51 (1983) (upholding law restricting access to teacher mailboxes to a particular union because doing so was "compatible with the intended purpose of the property"). SB 954's averred objective is to close a loophole in California's prevailing wage law by requiring collective employee consent before an employer may divert employee wages to IAFs. ABC-CCC argues that SB 954 is overinclusive because it disallows individual employees from agreeing to the IAF wage-credit.

ABC-CCC's argument is unavailing because it loses sight of the law's purpose. SB 954 is part of a larger statutory scheme setting a wage floor for employees on public works projects. The prevailing wage requirement means an employer may not deny an individual employment because she is unwilling to negotiate down a minimum wage and instead hire an employee who is. Allowing individual employees to negotiate wage credits for employers' IAF contributions as ABC-CCC suggests would effectively circumvent this prohibition. Employers could pit prospective employees against each other and hire only those who agreed to take the wage deduction, thereby rendering employee "consent" illusory. That risk is relatively low under a unionized CBA arrangement because employers in that context cannot coerce individual employees into agreeing to a below-floor wage. Thus, because the legislature did not unreasonably determine that individual employees are not similarly situated to unions

in negotiating wage credits, SB 954 is not overinclusive.[16]

A law's underinclusiveness may also indicate viewpoint discrimination.[17] "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). But while a "law's underinclusivity raises a red flag, the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee*, 135 S. Ct. at 1668 (quoting *R.A.V.*, 505 U.S. at 387) (internal quotation

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[16] At any rate, SB 954 does nothing to bar individual employees from contributing to ABC-CCC or any other IAF. Just as restricting automatic payroll deductions does not infringe unions' free speech rights, *Ysursa*, 555 U.S. at 360–61, neither does limiting a wage deduction infringe IAFs' free speech rights.

[17] ABC-CCC argues that the Court's recent decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) supports its position that SB 954 discriminates based on viewpoint. *National Institute* invalidated a California law compelling medical clinics to post information about State-provided reproductive services. *Id.* at 2376. ABC-CCC observes that *National Institute* criticized the law as underinclusive because it applied only to certain clinics and not to others providing some of the same reproductive services. *Id.* at 2375–76. ABC-CCC's reliance on *National Institute* is misplaced. First, *National Institute* expressly did not reach the issue of viewpoint discrimination. *Id.* at 2370 n.2. Second, the law there was underinclusive because exempting some clinics from the information requirement fit poorly with its objective of "providing low-income women with information about state-sponsored services." *Id.* at 2375. As we explain, SB 954 is, by contrast, reasonably tailored to the objective of ensuring that employer credits taken against employee wages inure to the benefit of employees.

marks omitted). "A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.*

ABC-CCC argues that SB 954 is underinclusive because it (1) fails to ensure *all* employees' consent and (2) does not require employee consent for wage credits related to pension plans, health insurance, and other statutorily-enumerated employee benefit programs. ABC-CCC's arguments are unpersuasive. First, although SB 954 does not require the unanimous consent of all employees, it certainly ensures a greater degree of consent than if employers could—as they were doing—freely reduce employees' wages without *any* form of employee consent. Thus, while SB 954 might not "address all aspects of a problem," it at least addresses lawmakers' "most pressing concerns." *Id.* Moreover, the fact that some employees may disapprove of their union's decision not to agree to a wage deduction in support of a particular IAF simply reflects the inherently representative nature of unions. As with any representative arrangement, if a majority of employees disagrees with the outcome of a negotiated CBA, they can vote for a new union representative or dump the union entirely.

Second, the notion that deductions for pension plans and the like must be subject to the same consent requirement fails to account for SB 954's declared purpose. *See id.* Pension plans, training programs, and

worker assistance programs all share a common denominator: they directly benefit employees. Allowing wage credits for those programs is therefore reasonably tailored to the purpose of the prevailing wage law: setting a compensation floor for employee pay. IAFs like ABC-CCC, by contrast, focus not on programs directly benefitting employees, but on public policy advocacy and, as ABC-CCC puts it, "precedential issues of importance to the construction industry." To that end, ABC-CCC spends funds on distributing mailers to voters, underwriting academic articles, providing testimony to governmental bodies, and hosting seminars for contractors that promote open shop employment arrangements. These activities, which are geared at promoting the interests of the construction industry, have only an attenuated relationship to employee interests. Treating IAFs differently from employee-focused programs therefore makes sense in light of the objectives of California's prevailing wage law. Accordingly, requiring employee consent for IAF contributions and not others fits snugly with SB 954's purpose and is not underinclusive.[18]

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[18] Because SB 954 is neutral on its face, we do not proceed to consider ABC-CCC's argument that the legislative record reveals a discriminatory motive. *First Resort*, 860 F.3d at 1278. But we observe that even if we did go the distance, we do not discern a pro-union motivation by the California legislature in the legislative record. The record shows that proponents of SB 954 in the legislature were intent on closing a loophole allowing employers to take a wage credit without their employees' consent. For example, an analysis by the Senate Rules Committee states that the bill would

V.

"Given that [SB 954 does] not infringe[ ] [ABC-CCC's] First Amendment rights, the State need only demonstrate a rational basis to justify the ban on [wage-crediting IAF contributions]." *Ysursa*, 555 U.S. at 359. SB 954 easily clears this low bar. California has a legitimate interest in enacting a prevailing wage law to protect its workers, and SB 954 is rationally related to that purpose because it prevents employers from deducting their employees' wages to support the employers' preferred IAFs absent their employees' collective consent. Because workers have greater negotiating power when bargaining collectively, California's decision to allow such wage-crediting only for IAF contributions made pursuant to a CBA is "plainly reasonable." *See id.* at 360.

> revise[ ] the definition of acceptable employer payments toward benefits, and thus what counts as payment of the prevailing wage. The author feels that the current broad definition of these employer payments allows non-union employees who are not party to a CBA to have part of their wages deducted for industry advancement purposes. As such, employers can deduct and use these wages without the input or consent of the employees or their labor representatives.

The legislature's concern with employers reducing their employees' wages for industry advancement purposes does not plausibly reflect a discriminatory motive. To the contrary, it supports the State's averred objective of closing a loophole in the law's employee consent provision.

VI.

Finally, we address ABC-CCC's equal protection claim. "Article III requires 'a plaintiff [to] demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1233 (9th Cir. 2017) (alteration in original) (quoting *Davis*, 554 U.S. at 734). Thus, ABC-CCC's standing to pursue its First Amendment claim is not determinative of its standing for all purposes, and we must independently assess its standing to bring an equal protection challenge.

ABC-CCC argues that it has standing because, "[b]y permitting some [IAFs] to obtain prevailing wage payments, but not others, SB 954 discriminates against funds like ABC-CCC." ABC-CCC's argument flows from the same flawed premise anchoring its First Amendment claim: a perceived right to "obtain" funding. As discussed in Part IV.A, *supra*, however, such a right is alien to the First Amendment. To have standing to press its equal protection claim, ABC-CCC must instead show that the law deprives it of some cognizable fundamental right guaranteed to other similarly situated entities. *See*, *e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (noting that equal protection claims derive from a discriminatory policy that impairs the rights of one entity vis-à-vis another); *Sang Yoon Kim v. Holder*, 603 F.3d 1100, 1104 (9th Cir. 2010) (noting that the party bringing the equal protection claim must "belong to the class of [entities] who are

allegedly similarly situated to" the party). But SB 954 neither regulates IAFs nor treats certain IAFs differently. The law applies to employers, and so ABC-CCC cannot show that SB 954 causes an equal protection injury *to itself*.[19] We therefore agree with the district court that ABC-CCC lacks standing to press its equal protection claim.

CONCLUSION

SB 954 does not frustrate the objectives of the NLRA and is not preempted under the *Machinists* doctrine. By setting a floor for employee pay while allowing unionized employees to opt-out of a particular provision, California has acted well within the ambit of its traditional police powers.

SB 954 also does not violate ABC-CCC's alleged First Amendment rights. Contrary to its assertion, ABC-CCC has no free-floating First Amendment right to "amass" funds to finance its speech. And to the extent SB 954 implicates ABC-CCC's speech interests at all, those interests are not constitutional in nature because SB 954 merely trims a state subsidy of speech, and does so in a viewpoint-neutral way. The law is therefore subject to rational basis review. Under that lenient standard, because SB 954 is rationally related to a legitimate government purpose—ensuring meaningful employee consent before employers contribute

[19] Interpipe might have standing to bring an equal protection claim based on SB 954's disparate treatment of unionized employers, but Interpipe brings no such claim.

portions of their wages to third-party advocacy groups—it easily withstands scrutiny.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC. and INTERPIPE CONTRACTING, INC., Plaintiffs, v. 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, Defendants.	Case No.: 3:16-cv-02247-BEN-NLS **ORDER:** **(1) GRANTING DEFENDANT BECERRA'S MOTION TO DISMISS [ECF No. 6];** **(2) DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [ECF No. 11]; and** **(3) GRANTING DEFENDANT SU'S MOTION TO DISMISS AND DEFENDANT BAKER'S MOTION FOR JUDGMENT ON THE PLEADINGS [ECF No. 17]** (Filed Jan. 27, 2017)

This case concerns the constitutionality of California Senate Bill ("SB") 954, a law that amends part of California's prevailing wage law. Before passage of the law, both unionized and non-union employers were entitled to the same benefit. However, with the

enactment of SB 954, the Legislature of the State of California made a political decision to take away that benefit from non-union employers. Unionized employers retain the benefit. The fight over the constitutionality of SB 954 continues the ongoing fight between unions and open shops in this state.

Unlike the California Legislature, this Court is not a political institution. It does not act politically or personally. It is a court of law bound by prior precedent. As such, upon consideration of the issues and controlling authority, the Court is compelled to grant Defendants' motions and dismiss Plaintiffs' complaint.

BACKGROUND

This case involves California's prevailing wage law. *See* Cal. Labor Code §§ 1770 *et seq*. That law requires contractors on public works construction projects to pay the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed. *Id.* § 1771. The Director of the California Department of Industrial Relations ("California DIR") determines the general prevailing rate of per diem wages. Under the law, the "general prevailing rate of per diem wages includes . . . [t]he basic hourly wage rate . . . [and] employer payments," *i.e.*, benefits. *Id.* § 1773.9. In other words, employers can satisfy the prevailing wage by either paying all cash wages or a mix of cash wages and benefits that add up to the prevailing wage rate. California Labor Code section 1773.1 defines what "employer payments" are included

in per diem wages. "Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages." § 1773.1(c). SB 954 amends the definition of employer payments under section 1773.1.

Under section 1173.1, per diem wages include employer payments for traditional benefits like "health and welfare," "pension," and "vacation." Previously, section 1773.1 also provided that employer payments include:

> (8) Industry advancement and collective bargaining agreements administrative fees, provided that these payments are required under a collective bargaining agreement pertaining to the particular craft, classification, or type of work within the locality or the nearest labor market area at issue.
>
> (9) Other purposes similar to those specified in paragraphs (1) to (8), inclusive.

Id. § 1773.1 (citing law before SB 954 became effective).

Thus, an employer making payments to an industry advancement fund could receive prevailing wage credit under § 1773.1(a)(8) if the payment was required under a collective bargaining agreement ("CBA"). An employer making a similar payment to an industry advancement fund, but which was not required by a collective bargaining agreement, could receive prevailing wage credit under § 1773.1(a)(9). This arrangement changed on January 1, 2017.

Plaintiff Associated Builders & Contractors of California Cooperation Committee, Inc. ("ABC-CCC") is a § 501(c)(6) tax exempt trade association representing the interests of open shop employers in the building and construction industry. (Compl. ¶ 4.) It is recognized by the California DIR as an industry advancement fund. (*Id.*) It received employer payments that qualified for credit under section 1773.1(a)(9). (*Id.* ¶ 14.) Plaintiff Interpipe Contracting, Inc. ("Interpipe") is a California contractor that "has made prevailing wage payments to ABC-CCC on a regular basis in the past, and has received prevailing wage credit under California Labor Code section § 1773.1(a)(9) for those payments." (*Id.* ¶ 5.)

Effective January 1, 2017, SB 954[1] amends what qualifies as "employer payments" under subsections (8) and (9) as follows:

> (8) Industry advancement and collective bargaining agreements administrative fees, provided that these payments are made pursuant to a collective bargaining agreement to which the employer is obligated.
>
> (9) Other purposes similar to those specified in paragraphs (1) to (5), inclusive; or other purposes similar to those specified in paragraphs (6) to (8), inclusive, if the payments

[1] SB 954 was sponsored by the State Building and Construction Trades Council of California ("Building Trades Council"). (Pls. Mot., Broyles Decl. ¶ 4.) According to Plaintiffs, the Building Trades Council engages in pro-union advocacy. (Pls. Mot. at 3; Broyles Decl. ¶ 8; Dayton Decl. ¶¶ 9–10.)

> are made pursuant to a collective bargaining agreement to which the employer is obligated.

(SB 954, Compl. Ex. A.) Therefore, according to Plaintiffs, under the new law, employers making payments to industry advancement funds will not receive prevailing wage credit unless the payment is required by a collective bargaining agreement.

Plaintiffs allege that the "loss of employer payment credits under SB 954 will cause Interpipe and other open shop employers to reduce or eliminate their payments to industry advancement funds like ABC-CCC." (Compl. ¶ 15.) ABC-CCC alleges that it will "suffer severe financial harm in the form of lost revenues as a result of reduced employer payments resulting from the loss of" the credit, and those lost revenues will force ABC-CCC to "curtail or discontinue its advocacy on behalf of open shop employers." (*Id.* ¶ 18.) And Interpipe will be harmed because it "will lose some or all of the industry advocacy and financial assistance previously provided by ABC-CCC." (*Id.* ¶ 19.)

Plaintiffs' complaint seeks declaratory and injunctive relief on three claims for relief: (1) a claim that SB 954 is preempted by the National Labor Relations Act ("NLRA") under the Supremacy Clause; (2) a claim that SB 954 violates ABC-CCC's First Amendment speech rights; and (3) a claim that SB 954 violates ABC-CCC's equal protection rights. (Compl. ¶¶ 22–34.) They have sued Xavier Becerra, in his official capacity

as Attorney General of the State of California;[2] Christine Baker, in her official capacity as Director of the California DIR; and Julie Su, in her official capacity as California Labor Commissioner. Becerra is represented separately from Baker and Su.

Becerra and Su have moved to dismiss the complaint and Baker has moved for judgment on the pleadings. (Becerra Mot., ECF No. 6; Su & Baker Mot., ECF No. 17.) Plaintiffs have moved for a preliminary injunction to prevent SB 954 from going into effect on January 1, 2017. (Pls. Mot., ECF No. 11.) The Court held a hearing on Becerra's and Plaintiffs' motions on December 14, 2016. The Court takes Su and Baker's motion under submission without oral argument, pursuant to Civil Local Rule 7.1.d.1.

LEGAL STANDARDS

I. Motions to Dismiss and for Judgment on the Pleadings

"[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to

[2] When Plaintiffs originally filed suit, Kamala Harris was California's Attorney General. Since that time, Harris has been elected and sworn in to the United States Senate and Xavier Becerra has been sworn in as the 33rd Attorney General of the State of California. Under Federal Rule of Civil Procedure 25(d), a public officer's successor is automatically substituted as a party. The Court therefore substitutes Becerra for Harris.

draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). When considering a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss,[3] the court must "accept as true facts alleged and draw inferences from them in the light most favorable to the plaintiff." *Stacy v. Rederiet Otto Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010) (citing *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Dismissal may be based on either the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *In re Tracht Gut, LLC*, 836 F.3d 1146, 1151 (9th Cir. 2016) (internal citations omitted). The same standard applies to motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).[4] *Cafasso, U.S. ex*

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[3] Defendants Becerra and Su bring motions to dismiss under Rule 12(b)(6).

[4] Defendant Baker brings a motion for judgment on the pleadings under Rule 12(c). Plaintiffs contend that Baker's motion should be denied as premature because the pleadings have not closed. Rule 12(c) permits a motion for judgment on the pleadings "after the pleadings are closed," Fed. R. Civ. P. 12(c), and generally this means after all defendants have filed an answer. *See Noel v. Hall*, No. CV 99-649, 2005 WL 2007876, at *1 (D. Or. Aug. 16, 2005). Only Defendant Baker has filed an answer. However, "courts have exercised their discretion to permit a motion on the pleadings before all defendants have filed an answer where no prejudice to any party would result." *Id.* (internal citations omitted). Because Plaintiffs bring the same purely legal claims against all Defendants, and because the same questions are

rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 n.4 (9th Cir. 2011).

Documents attached to or incorporated by reference in the complaint or matters of judicial notice may be properly considered under Rule 12(b)(6) and Rule 12(c) without converting the motion into one for summary judgment. *See Fortuna Enters., L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1004 (C.D. Cal. 2008); *Rose v. Chase Manhattan Bank USA*, 396 F.Supp.2d 1116, 1119 (C.D. Cal. 2005). Here, SB 954 is attached as an exhibit to Plaintiffs' complaint and its terms are uncontested. Defendants request that the Court take judicial notice of the legislative history of SB 954 and a copy of the General Prevailing Wage Determination made by the California DIR. These documents are available on government websites. Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of the legislative history of state statutes and government documents available on reliable sources on the Internet. *Louis v. McCormick & Schmick Rest. Corp.*, 460 F.Supp.2d 1153, 1155 n.4 (C.D. Cal. 2006) (citing cases); *U.S. ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich. 2003). Accordingly, the Court takes judicial notice of these documents.

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before the Court in Defendants Becerra's and Su's motions as in Defendant Baker's motion, no prejudice would result from considering Baker's Rule 12(c) motion now. Accordingly, the Court exercises its discretion to rule on Baker's motion.

II. Motion for a Preliminary Injunction

"A preliminary injunction is an extraordinary and drastic remedy." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014) (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of hardships tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The *Winter* factors are considered in conjunction with the Ninth Circuit's "sliding scale" approach, which provides that "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 739 (9th Cir. 2011).

DISCUSSION

I. Ripeness and Standing

The Court asked the parties to address why the case was ripe for adjudication and why Plaintiff ABC-CCC has standing. After hearing the parties' arguments at the hearing, the Court finds that the case is ripe but that ABC-CCC does not have standing to bring its equal protection claim.

The ripeness doctrine seeks to separate matters that are premature for judicial review because the injury is speculative and may never occur, from those

cases that are appropriate for federal court action. E. Chemerinsky, Federal Jurisdiction § 2.4.1 (4th ed.). The Court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

Ripeness has a constitutional and prudential component. *Id.* at 1138. Under the constitutional component, the court "considers whether the plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement,' or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Id.* at 1139.[5] The constitutional

[5] *Thomas* articulated three factors to evaluate the constitutional component of a pre-enforcement challenge. Those factors are (1) whether the plaintiffs have articulated a concrete plan to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute. *Id.* at 1139.

Several reasons compel this Court not to apply the *Thomas* factors strictly. First, the *Thomas* factors are inapplicable to ABC-CCC. The Ninth Circuit has found that the "familiar pre-enforcement challenge analysis articulated in *Thomas*" does not apply when the plaintiffs "are not the target of enforcement." *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011). Here, while Interpipe would be the target of any enforcement action for violating SB 954, ABC-CCC would not be. When the plaintiff is not the target of enforcement, "the consideration of 'whether the plaintiff[ ] ha[s] articulated a concrete plan to violate the law in question' has little meaning." *Id.* Further, the last factor—the history of past enforcement—is inapplicable to both parties because the statute is new. *Wolfson v. Brammer*, 616

component of ripeness is the same or similar to the injury in fact prong of standing. *See id.* Prudential ripeness involves "two overarching considerations: the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration." *Id.* at 1141.

Here, the Court is satisfied that this case is ripe for review. The constitutional components of ripeness are met. First, Interpipe has been injured as a result of SB 954 because, due to SB 954, ABC-CCC had to refuse Interpipe financial assistance (*i.e.*, ABC-CCC's advocacy resources) to oppose a particular bond measure. (Pls. Mot., Smith Decl. ¶ 8.) With respect to ABC-CCC, at the hearing, Plaintiffs contended that ABC-CCC would incur financial damage once the statute went into effect and that ABC-CCC's speech rights would be chilled. Plaintiffs pointed to evidence submitted in support of their motion for a preliminary injunction to sustain ABC-CCC's claim of economic and non-economic injuries. In those declarations and attachments, eleven employers contend that they will cease making contributions to ABC-CCC as of January 1, 2017 because of

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F.3d 1045, 1060 (9th Cir. 2010). Next, as discussed in the text, the statute is now in effect and the Plaintiffs have sufficiently alleged injury as a result of its operation. Finally, to avoid chilling a plaintiff's speech in cases with First Amendment implications, such as this case, courts apply the requirements of ripeness less stringently when "the plaintiff is immediately in danger of sustaining[ ] a direct injury as a result of [an executive or legislative] action." *Ala. Right to Life Political Action Committee v. Feldman*, 504 F.3d 840, 851 (9th Cir. 2007) (alterations in original). As explained in the text, the Court finds that the Plaintiffs satisfy this test.

the loss of the prevailing wage credit. (*Id.* Smith Decl. ¶¶ 6–7; Loudon Decl. ¶ 20, Ex. B.) The statute has now gone into effect and Court has no reason to doubt that Plaintiffs' prior averments have changed. Therefore, ABC-CCC has sufficiently alleged an injury. Moreover, Defendants conceded at the hearing that they intend to enforce SB 954. (Hr'g Tr. at 28, 32, 35, ECF No. 36.) Thus, based on the parties' representations, the Court finds that Plaintiffs face a realistic danger of sustaining a direct injury as a result of SB 954.

The prudential component to ripeness is also satisfied. First, "the challenge is fit for judicial review because further factual development would not 'significantly advance [the Court's] ability to deal with the legal issues presented.'" *San Luis & Delta-Mendota Water Authority*, 638 F.3d at 1173 (internal citations omitted). Second, Plaintiffs would suffer hardship if the Court withholds consideration because the statute is now in effect, depriving ABC-CCC of payments it would have otherwise received through employer prevailing wage credits. Therefore, the case is ripe for judicial determination.

However, ABC-CCC does not have standing to assert an equal protection claim on behalf of itself.[6]

[6] An association can have standing to bring suit on behalf of its members. *See Associated Builders & Contractors, Golden Gate Chapter Inc. v. Baca*, 769 F.Supp. 1537, 1541 (N.D. Cal. 1991). That is, an association can raise the equal protection rights of its members. But the complaint does not plead associational standing on behalf of ABC-CCC's members. Rather, it is clear that ABC-CCC sues on its own behalf to challenge violations of its own rights. (*See* Compl. ¶¶ 31–34 (equal protection claim captioned

Standing is an essential component of Article III's case or controversy requirement. One of the three irreducible standing requirements is that the plaintiff must have suffered an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). On this requirement, "[t]he Court requires that even if a government actor discriminates . . . , the resulting injury 'accords a basis for standing only to those persons who are personally denied equal treatment.'" *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003) (internal citations omitted). ABC-CCC sues for violations of its own equal protection rights, but SB 954 does not discriminate against ABC-CCC—if it does discriminate, it discriminates against employers not subject to CBAs, like Interpipe. The legal requirements changed by SB 954 are directed to employers, and any penalties for noncompliance will be assessed against employers. Thus, ABC-CCC lacks standing to pursue an equal protection claim on its own behalf.[7] Accordingly, ABC-CCC's equal protection claim is **DISMISSED**.

"SB 954 Violates ABC-CCC's Equal Protection Rights"); Pls. Opp'n to Becerra Mot. at 12, ECF No. 12 (stating that the equal protection claim "is brought by Plaintiff ABC-CCC as an industry advancement fund. It is not brought by Plaintiff Interpipe as an employer."); Pls. Opp'n to Su & Baker Mot. at 16, ECF No. 34 (emphasizing that ABC-CCC brings equal protection claim "on behalf of itself."))

[7] Defendants Su and Baker raised the issue of ABC-CCC's standing to bring the equal protection claim in their motion. In response, Plaintiffs failed to offer authority to support why ABC-CCC has standing to sue on behalf of itself.

II. Analysis of the Motions to Dismiss

Plaintiffs bring a facial challenge to the constitutionality of SB 954 because they seek a declaration that SB 954 is unconstitutional under any circumstance. *See Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 119 F.Supp.3d 1177, 1194 (C.D. Cal. May 13, 2015) ("Here, the Plaintiffs seek an order enjoining the City from implementing and enforcing the Wage Ordinance under any circumstance, and therefore they indisputably assert a facial challenge against the Wage Ordinance."), *aff'd*, 834 F.3d 958 (9th Cir. 2016). Therefore, "there is no need for further development of the facts" and "this case is capable of resolution at the motion to dismiss stage." *Fortuna Enters.*, 673 F.Supp.2d at 1003 (granting motion to dismiss and finding wage ordinance not preempted by federal labor law and not in violation of equal protection guarantees).

A. Preemption

Plaintiffs argue that SB 954 is preempted by the NLRA under the Supremacy Clause of the U.S. Constitution. The NLRA contains no express preemption provision, but the Supreme Court has held that Congress "implicitly mandated two types of preemption . . . to implement federal labor law." *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008). Those two doctrines are known as *Machinists* and *Garmon* preemption. Plaintiffs contend that both doctrines apply. At the hearing, Plaintiffs' counsel stated that *Machinists* preemption is the soul of their complaint. (Hr'g Tr. at 13–14.)

Accordingly, this Court will address *Machinists* preemption first.

1. *Machinists* Preemption

Machinists preemption forbids the National Labor Relations Board ("NLRB") and States from regulating "conduct that Congress intended 'be unregulated because [it should be] left to be controlled by the free play of economic forces.'" *Brown*, 554 U.S. at 65. Generally, a state's attempt to "influence the substantive terms of collective-bargaining agreements" is preempted. *Chamber of Commerce v. Bragdon*, 64 F.3d 497, 500 (9th Cir. 1995). And "the [Supreme] Court has clearly held that state legislation, which interferes with the economic forces that labor or management can employ in reaching agreements, is preempted by the NLRA because of its interference with the bargaining process." *Id.* at 501. The Supreme Court has also found that Congress intended to leave non-coercive speech by unions and employers unregulated. *Brown*, 554 U.S. at 68 (preempting state provision prohibiting employers from using funds "to assist, promote or deter union organizing" because of the "explicit direction from Congress to leave [such] noncoercive speech unregulated").

In contrast, state laws setting minimum labor standards that are unrelated to the processes of collective bargaining or self-organization are not preempted. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756–57 (1985). Such laws include child labor laws,

minimum and other wage laws, and laws affecting occupational health and safety. *Id.* at 756. "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." *Id.* at 755. The Ninth Circuit recently explained:

> Minimum labor standards do technically interfere with labor-management relations and may impact labor or management unequally, much in the same way that California's at-will employment may favor employers over employees. Nevertheless, these standards are not preempted, because they do not "regulate the mechanics of labor dispute resolution." *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 86 (2d Cir. 2015). Rather, these standards merely provide the "backdrop" for negotiations. *Metropolitan Life*, 471 U.S. at 757, 105 S. Ct. 2380 (internal quotations omitted). Such standards are a valid exercise of states' police power to protect workers. *Fort Halifax Packing Co. v. Coyne* ("*Fort Halifax*"), 482 U.S. 1, 21–22 (1987).

Am. Hotel & Lodging Ass'n v. City of Los Angeles, 834 F.3d 958, 963 (9th Cir. 2016) ("[S]tate action that intrudes on the mechanics of collective bargaining is preempted, but state action that sets the stage for such bargaining is not.").

Moreover, minimum labor standards laws that provide narrowly tailored "opt outs" for employers subject to collective bargaining agreements have been repeatedly upheld. *See Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 490 (9th Cir. 1996) (California law that allowed only union employers to provide twelve-hour workdays despite general law that required eight-hour days was a narrowly tailored opt-out and was not preempted). For instance, in *American Hotel & Lodging Association*, the Ninth Circuit held that a city hotel worker wage ordinance that allowed for hotels covered by a collective bargaining agreement to waive the requirements of the ordinance was not preempted. 834 F.3d at 965. Opt-out provisions are allowed because the protections of the collective bargaining process permit unionized employees to forgo the minimum standard in exchange for another bargained-for benefit. *See Livadas v. Bradshaw*, 512 U.S. 107, 131–32 (1994); *Viceroy Gold*, 75 F.3d at 489–90. The Ninth Circuit has explained that opt-outs are not preempted, even though they might "provide[ ] an incentive to unionize or to remain non-union" and may have a "potential benefit or burden in application." *Id.* at 490.

Plaintiffs argue that SB 954 regulates ABC-CCC's noncoercive labor speech and is therefore preempted under *Machinists.* Defendants counter that SB 954 establishes a minimum labor standard, pursuant to the State's valid exercise of its traditional police power, and that it provides a valid "opt out" for employers subject to a collective bargaining agreement.

Plaintiffs contend that classifying SB 954 as a minimum labor standard does not save it from preemption. The Supreme Court has said that "[w]hen a state law establishes a minimal employment standard *not inconsistent* with the general legislative goals of the NLRA," it does not conflict with the purposes of the Act. *Metro. Life*, 471 U.S. at 757 (emphasis added). Plaintiffs argue that because SB 954 targets noncoercive labor speech, it *is inconsistent* with the NLRA under an application of *Chamber of Commerce v. Brown*. In *Brown*, the Supreme Court held that a California statute, which prohibited employers that received state funds from using the funds "to assist, promote, or deter union organizing," was preempted under the *Machinists* doctrine because Congress intended to leave non-coercive speech unregulated when it added section 8(c) to the NLRA.[8] Plaintiffs argue that ABC-CCC's industry advancement advocacy is noncoercive labor speech, which SB 954 regulates by depriving ABC-CCC of employer payments that support that advocacy.

Plaintiffs further argue that the minimum labor standards cases cited by Defendants are inapplicable because none of them involve labor speech. Rather, they assert that the most applicable of those cases is

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[8] Section 8(c) provides:

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

29 U.S.C. § 158(c).

Chamber of Commerce v. Bragdon, 64 F.3d 497 (9th Cir. 1995). In *Bragdon*, the Ninth Circuit found that *Machinists* preemption applied to invalidate a Contra Costa County ordinance that required construction employers to pay prevailing wages on certain private industrial construction projects costing over $500,000. Employers had to agree to pay the state-determined prevailing wage for public works before the County would issue a building permit for the private construction project. 64 F.3d at 499. The prevailing wage for public works contracts, which the ordinance made applicable to private projects, was determined "by reference to established collective-bargaining agreements within the locality in which the public work [was] to be performed." *Id.*

Applying the *Machinists* preemption doctrine, the Ninth Circuit rejected the argument that the ordinance functioned as a minimum labor standard. By imposing on private employers a wage "derived from the combined collective bargaining of third parties," private employers had to pay a wage that was "not the result of the bargaining of those employers and employees actually involved in the selected construction projects in Contra Costa County." *Id.* at 502. Furthermore, the manner in which the ordinance operated "would place considerable pressure on the contractor and its employees to revise the[ir] labor agreement to reduce the benefit package and increase the hourly wages in order to remain competitive and obtain the contracts and jobs in Contra Costa County." *Id.* Based on these alterations to the "free-play of

economic forces," the court found that the ordinance affected "the bargaining process in a much more invasive and detailed fashion than" other state labor standards and was preempted under *Machinists*. *Id.*

Plaintiffs contend that SB 954 is similar to the ordinance preempted in *Bragdon* because (1) both are minimum labor standards laws that relate to California's prevailing wage law; (2) both are supported by a Building Trades Council; (3) both are narrowly targeted at employers in the construction industry; (4) both are incompatible with the goals of the NLRA—the *Bragdon* ordinance interfered with the free play of economic forces and SB 954 interferes with the NLRA-protected non-coercive labor speech of ABC-CCC; and (5) both have "tenuous" public policy justifications that mask each bill's true objectives.

Upon consideration of *Brown, Bragdon*, and other cases defining the scope of the *Machinists* preemption doctrine, the Court finds that SB 954 is not subject to *Machinists* preemption. Plaintiffs read *Brown* too broadly. In *Brown*, the Supreme Court, drawing on its prior precedent, explained that the addition of section 8(c) manifested "congressional intent to encourage free debate on issues dividing labor and management." 554 U.S. at 68 (quoting *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966)).[9] That is, the

[9] In *Linn*, after stating that the enactment of section 8(c) represented congressional intent to "encourage free debate," the Supreme Court limited this finding in a footnote. The Court explained that "[i]t is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from

NLRA protects the rights of employers and employees to engage in open debate about labor disputes. *Id.* Such speech is the type of speech that Congress intended to leave unregulated. It goes too far to say that Congress intended to leave unregulated a third party's speech to the general public and government agencies. *See Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224 (1993) (explaining that, in the absence of clear congressional intent, a court should be "reluctant to infer preemption"). 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.

SB 954 is distinct from the preempted statute in *Brown*. The statute in *Brown* prohibited employers receiving state funds from using such funds to assist, promote, or deter union organizing, but then exempted certain activities that promoted unionization. Unlike the statute in *Brown*, SB 954 does not prevent employers or employees from speaking about any issue. And it expresses no preference about what type of speech is allowed or prohibited. The statute certainly does not regulate the mechanics of collective bargaining.

SB 954 also does not impose the same type of burdens on employers that the Court found offensive in *Brown*. The statute in *Brown* established a "formidable" enforcement scheme, "making it exceeding difficult

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attributing antiunion motive to an employer on the basis of his past statements." 383 U.S. at 62 n.5. This more narrow interpretation of congressional intent further contradicts Plaintiffs' broad application of *Brown*.

for employers to demonstrate that they have not used state funds," "imposed punitive sanctions for noncompliance," and permitted suit by the state attorney general and private taxpayers. *See id.* at 71–72. This enforcement mechanism "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 state funds." *Id.* at 73. "In so doing, the statute impermissibly 'predicat[ed] benefits on refraining from conduct protected by federal labor law.'" *Id.* In contrast, SB 954 does not establish compliance burdens or litigation risks that pressure Plaintiffs to forgo their speech rights in exchange for the receipt of state funds. It seems quite simple to comply with the law: Effective January 1, 2017, an employer will not be able to credit industry advancement fund fees when calculating the prevailing wage for their workers, unless the employer is required by a CBA to pay them. The statute does not condition the receipt of state funds on employers sacrificing their free speech rights. Plaintiffs remain free to speak.

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. And, as the Court has explained above, there are important distinctions between SB 954 and the statute preempted in *Brown.* In the absence of clear congressional intent, the Court should be "reluctant to infer preemption." *Building &*

Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 224 (1993) ("The NLRA contains no express preemption provision. Therefore, in accordance with settled preemption principles, we should find [the statute] preempted unless it conflicts with federal law or would frustrate the federal scheme, or unless we discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. We are reluctant to infer preemption.").

Bragdon is similarly unhelpful for Plaintiffs. Plaintiffs ignore that the Ninth Circuit has retreated from its holding in *Bragdon*, cautioning that it "must be interpreted in the context of Supreme Court authority and . . . other, more recent, rulings on NLRA preemption." *Associated Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004). In *Nunn*, the Ninth Circuit limited *Bragdon* to "extreme situations, when [substantive labor standards] are 'so restrictive as to virtually dictate the results' of collective bargaining." *Id.* The Ninth Circuit also effectively reversed *Bragdon* to the extent the opinion was based on a concern that the ordinance targeted particular workers. *Id.* The court explained that "[i]t is now clear in this Circuit that state substantive labor standards, including minimum wages, are not invalidated simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market." *Id.*

This case is not such an "extreme situation" where the terms of SB 954 "virtually dictate the results

of collective bargaining." In *Bragdon*, Contra Costa County went beyond the exercise of its traditional police power in setting minimum wage standards by intruding on how private industry negotiates its labor agreements. Here, SB 954 may ultimately "alter[] the backdrop" of labor-management negotiations, but it does not "intrude[] on the mechanics of collective bargaining." *Am. Hotel & Lodging Assoc.*, 834 F.3d at 964–65. Employers and employees will come to the bargaining table and no employer, unionized or open shop, will be able to take prevailing wage credit under SB 954. *See Fort Halifax*, 4832 U.S. at 21 (explaining that employers and employees come to the bargaining table with rights under state law that form a "backdrop" for their negotiations"). Only an employer that agrees with its employees in a collective bargaining agreement to divert the workers' wages to an industry advancement fund may take the credit. Unionized employers that fail to reach an agreement with their workers on this issue may not take the credit. Thus, SB 954 sets a standard applicable to all employers but provides an opt-out for employers that are obligated to make the payments under collective bargaining agreements. Under Ninth Circuit precedent, opt-out provisions are not preempted, even if there is a "potential benefit or burden in [their] application." *Viceroy Gold*, 75 F.3d at 490.

When plaintiffs lack a cognizable legal theory, dismissal of their complaint is appropriate. *Fortuna Enters.*, 673 F.Supp.2d at 1003. Here, Plaintiffs have failed to allege a cognizable legal theory. They

interpret *Brown* too broadly and ignore the import of the minimum labor standards and opt-out cases. *Machinists* preemption does not apply to SB 954. Rather, the statute constitutes a minimum labor standard with an opt-out for employers required to pay industry advancement fund fees pursuant to collective bargaining agreements. Plaintiffs' claim based on *Machinists* preemption is **DISMISSED**.

2. *Garmon* Preemption

Garmon preemption "is intended to preclude state interference with the NLRB's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Brown*, 554 U.S. at 65. "To this end, *Garmon* preemption forbids States to 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" *Id.* (internal citations omitted). Specifically, a state statute is subject to *Garmon* preemption when the statute's terms regulate matters within the scope of sections 7 or 8 of the NLRA. *Fortuna Enters.*, 673 F.Supp.2d at 1004. Section 7 of the NLRA protects the rights of employees in collective bargaining, including the right to strike, their right to picket, and their right to join or not join a union. *See* 29 U.S.C. § 157. Section 8 regulates unfair labor practices, and generally prohibits employers and labor organizations from interfering with employee rights that are protected under section 7 of the Act. *See id.* § 158.

In their complaint, Plaintiffs argue SB 954 is preempted under *Garmon* because it "interferes with

employer speech rights guaranteed under § 8(c) of the NLRA." (Compl. ¶ 22.) However, Plaintiffs appear to have abandoned this particular argument. They do not raise *Garmon* preemption in their oppositions to Defendants' motions and, in their motion for a preliminary injunction, they set forth a different basis for *Garmon* preemption. Plaintiffs' new *Garmon* preemption argument is that the "NLRB regulates payments to industry advancement funds" and therefore "the statute intrudes in an area reserved for the exclusive regulation by the NLRB." (Pls. Mot. at 14.)

No matter which argument Plaintiffs promote, both fail. As established above, SB 954 represents a minimum labor standard with an opt-out provision for employers subject to collective bargaining agreements and, as a "minimum employment standard and an opt-out provision, there is no *Garmon* preemption." *Viceroy Gold*, 75 F.3d at 490 ("The establishment of a minimum labor standard does not impermissibly intrude upon the collective bargaining process. The fact that the parties are free to devise their own arrangements through the collective bargaining process strengthens the case that the statute works no intrusion on collective bargaining."). The statute places no substantive restrictions on the terms of collective bargaining agreements and does not regulate or preclude speech about unionization or labor issues. Plaintiffs' cases about industry advancement funds are inapposite—those cases do *not* stand for the proposition that the NLRB actually regulates industry advancement funds or payments to them. Therefore, Plaintiffs fail to allege

a cognizable legal theory that SB 954 is subject to *Garmon* preemption. Plaintiffs' claim on this ground is **DISMISSED**.

B. First Amendment

The foundational question that the Court must answer is whether ABC-CCC has pled a plausible claim that SB 954 impinges on the exercise of its First Amendment rights. The Court concludes that ABC-CCC has not satisfied the plausibility standard.

SB 954 operates as a state subsidy of speech. Employers receiving public funds for construction projects are allowed to credit payment of industry advancement fund fees against the obligation to pay the prevailing wage if they are obligated by a collective bargaining agreement to pay those fees. Thus, the Court's analysis is controlled by the Supreme Court's speech subsidy cases, particularly *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) and *Ysursa v. Pocatello Education Association*, 555 U.S. 353, 358–59 (2009). In those cases, the Supreme Court explained that "although government may not place obstacles in the path of a person's exercise of freedom of speech," *Regan*, 461 U.S. at 549, nothing requires government "to assist others in funding the expression of particular ideas, including political ones," *Ysursa*, 555 U.S. at 358. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan*, 461 U.S. at 549.

ABC-CCC argues that SB 954 is an obstacle to speech because it burdens the ability of industry advancement associations with a pro-open shop perspective to fund their political activity. (Opp'n to Becerra Mot. at 7; Compl. ¶ 26.) The statute thus discriminates against certain speakers and viewpoints, and restricts speech based on speaker and viewpoint. (Opp'n to Becerra Mot. at 7–8; Compl. ¶¶ 25, 27–28.)

ABC-CCC's argument fails for several reasons. First, SB 954 "erects no barrier to speech." *Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 646 (7th Cir. 2013) (upholding state statute prohibiting payroll deductions for certain types of unions against First Amendment challenge). Employers that cannot take advantage of the wage credit are not restricted from speaking, nor are the industry advancement funds that might receive fees from employers which cannot take the credit. SB 954 says nothing about particular speakers or viewpoints. It does not deny access to the state subsidy depending on who the speaker is or what he, she, or it might say. The statute is thus facially neutral.

ABC-CCC predicates its claim of speaker and viewpoint discrimination on the assertion that it will receive less "funding for [its] pro-open shop speech activities." (Compl. ¶ 26.) But that assertion is tenuous and speculative. The complaint assumes that ABC-CCC will not receive any contributions from employers who are now precluded from prevailing wage credits and that the only industry advancement speakers that will receive contributions will be funds with a

viewpoint contrary to ABC-CCC. However, ABC-CCC speaks on many issues that benefit the construction industry as a whole. (*See* Compl. ¶ 16.) Open shop employers and employees can still contribute to their preferred industry advancement organizations. In fact, non-union employees may continue to independently contribute to ABC-CCC. Moreover, as a result of the law, open shop employers can market that their employees bring home more wages than unionized employees, even though both open shop and closed shop employers will be paying the same prevailing wage. The open shop employers might be able to hire better workers. Consequently, with improved quality and performance, open shop employers might win more public works contracts and have more money to contribute to industry advancement funds like ABC-CCC. Of course, this chain of events is also hypothetical, but the point is that the economic effects of the statute are unknown. The statute is neutral and does not favor, target, or suppress any particular speaker or viewpoint. "The mere fact that, in practice, [industry advancement funds receiving wage credits pursuant to a CBA] may express different viewpoints [than industry advancement funds not receiving the credits] does not render [SB 954] viewpoint discriminatory." *Walker*, 705 F.3d at 648.

The only obstacle to speech set forth by ABC-CCC is the ability to fund its speech. Thus, "the 'obstacle' to speech here is the cost of speaking, an obstacle the state itself has not created." *Walker*, 705 F.3d at 646.

The Supreme Court has rejected such a burden as a basis to apply strict scrutiny:

> Although [ABC-CCC] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.

Regan, 461 U.S. at 550 (internal quotation marks omitted). SB 954 does not erect affirmative burdens or requirements on speech. Rather, the California Legislature has at most expressed a preference to continue to provide the subsidy for some groups, while refraining from doing so for others. A legislature's "selection of particular entities or persons for entitlement to" government largesse is a "matter of policy and discretion," that it "can, of course, disallow . . . as it chooses." *Id.* at 549.

"What [ABC-CCC is] left with, then, is an argument that [the Court] should look past [SB 954's] facial neutrality as to viewpoint and [speaker] identity, and conclude nevertheless that the [statute's] real purpose is to suppress speech by" open shops. *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) (holding that state statute prohibiting payroll deductions for public school union dues did not violate First Amendment or Equal Protection Clause). ABC-CCC contends that the "legislative history reveals that SB 954's true purpose is to facilitate closed-shop advocacy and discourage open-shop advocacy." (Pls. Mot. at 18.) ABC-CCC's arguments again fail. To begin, "[i]t is a familiar principle

of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of alleged illicit legislative motive." *Bailey*, 715 F.3d at 960 (refusing to "peer past" the text of statute "to infer some invidious legislative intention"). That principle binds the Court here. The Court has taken judicial notice of the legislative history and finds it implausible that the Legislature had such an illicit purpose. Rather, the legislative history reveals that the Legislature was concerned about employers "credit[ing industry advancement fund] payments towards their prevailing wage obligation without the input or consent of the employees or their labor representatives." (Becerra Mot., Goldstein Decl., Ex. B.) That SB 954 *might* have the effect of burdening open-shop advocacy "does not transform its facially neutral language into an invidiously discriminatory statute." *Walker*, 705 F.3d at 651. Similarly, the fact that SB 954 was sponsored by the Building Trades Council, a pro-union group, "reveals little of the intent of the legislature as a whole when it enacted" the statute. *Id.* at 652.

Thus, because the statute does not interfere with a fundamental right or proceed along suspect lines, it is subject to rational basis review. *Regan*, 4651 U.S. at 547–48; *Fortuna Enters.*, 673 F.Supp.2d at 1013. Under this standard, a law is upheld as long as it bears a rational relationship to a legitimate government interest. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Rational basis review requires the Court to "determine whether there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.*

"A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.*

Here, it is clear that there is a rational basis for SB 954. The Legislature was concerned that workers' wages were being reduced without their consent. The State has a legitimate interest in ensuring that workers are paid the amounts they are owed. The statute now protects individual workers from being underpaid in this manner. The law's exception for "workers party to a collective bargaining agreement could rationally arise from the expectation that unionized workers are better able to protect their interests with regard to wages than non-unionized workers." *Fortuna Enters.*, 673 F.Supp.3d at 1014 (citing *Viceroy Gold*, 75 F.3d at 490–91). Therefore, SB 954 satisfies rational basis review and the Court accordingly **DISMISSES** ABC-CCC's First Amendment claim.[10]

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[10] ABC-CCC's equal protection claim relies on its contention that it has a fundamental right to speak. However, the Court finds that ABC-CCC has not pled a plausible claim that SB 954 interferes with the exercise of its First Amendment rights. The Court concludes that the statute satisfies rational basis review. Therefore, ABC-CCC's equal protection claim also fails on the merits for the same reasons discussed in the text. *See*, *e.g.*, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) ("As long as the City's distinction has a rational basis, that distinction does not violate the Equal Protection Clause. This Court has long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose.' ").

III. Preliminary Injunction

Because Plaintiffs have not shown that they are likely to succeed on the merits, the Court declines to issue a preliminary injunction. *Winter*, 555 U.S. at 20.

CONCLUSION

The Court **DISMISSES** all three claims for relief and **GRANTS** Becerra's motion to dismiss (ECF No. 6), Su's motion to dismiss (ECF No. 17), and Baker's motion for judgment on the pleadings (ECF No. 17.) The Court **DENIES** Plaintiffs' motion for a preliminary injunction. (ECF No. 11.)

IT IS SO ORDERED.

Dated: January 27, 2017

/s/ Roger T. Benitez
Hon. Roger T. Benitez
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERPIPE CONTRACTING, INC. and ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITEEE, INC., Plaintiffs-Appellants, v. XAVIER BECERRA, in his official capacity as Attorney General of the State of California; et al., Defendants-Appellees.	No. 17-55248 D.C. No. 3:16-cv-02247-BEN-NLS Southern District of California, San Diego ORDER (Filed Sep. 21, 2018)

INTERPIPE CONTRACTING, INC., Plaintiff-Appellant, and ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITEEE, INC., Plaintiff, v. XAVIER BECERRA, in his official capacity as Attorney General of the State of California; et al., Defendants-Appellees.	No. 17-55263 D.C. No. 3:16-cv-02247-BEN-NLS

Before: CALLAHAN and NGUYEN, Circuit Judges, and PRATT,*District Judge.

The panel has voted to deny Interpipe's petition for panel rehearing and Judges Callahan and Nguyen vote to deny Interpipe's petition for rehearing en banc. Judge Pratt recommends denying Interpipe's petition for rehearing en banc.

Judges Callahan and Nguyen vote to deny ABC-CCC's petition for rehearing en banc. Judge Pratt

* * The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

recommends denying ABC-CCC's petition for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petitions for rehearing en banc are **DENIED**.

U.S.C.A. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

29 U.S.C.A. § 158

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as

provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition

or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

> **(A)** forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry,

and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

> **(A)** where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,
>
> **(B)** where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or
>
> **(C)** where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the

provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

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

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the

employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute

occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care

institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

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 unenforcible and void: *Provided*, That nothing in this subsection 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: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees

are members (not established, maintained, or assisted by any action defined in subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing

and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Cal.Labor Code § 1773.1

§ 1773.1. Employer payments included in per diem wages

Effective: January 1, 2017

(a) Per diem wages, as the term is used in this chapter or in any other statute applicable to public works, includes employer payments for the following:

(1) Health and welfare.

(2) Pension.

(3) Vacation.

(4) Travel.

(5) Subsistence.

(6) Apprenticeship or other training programs authorized by Section 3093, to the extent that the cost of training is reasonably related to the amount of the contributions.

(7) Worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978 (29 U.S.C. Sec. 175a), to the extent that the activities of the programs or committees are directed to the monitoring and enforcement of laws related to public works.

(8) Industry advancement and collective bargaining agreements administrative fees, provided that these payments are made pursuant to a collective bargaining agreement to which the employer is obligated.

(9) Other purposes similar to those specified in paragraphs (1) to (5), inclusive; or other purposes similar to those specified in paragraphs (6) to (8), inclusive, if the payments are made pursuant to a collective bargaining agreement to which the employer is obligated.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, credit shall not be granted for benefits required to be provided by other state or federal law, for payments made to monitor and enforce laws related to public works if those payments are not made to a program or committee established under the federal Labor Management Cooperation Act of 1978 (29 U.S.C. Sec. 175a), or for payments for industry advancement and collective bargaining agreement administrative fees if those payments are not made pursuant to a collective bargaining agreement to which the employer is obligated. Credits for employer payments also shall not

reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. However, an increased employer payment contribution that results in a lower hourly straight time or overtime wage shall not be considered a violation of the applicable prevailing wage determination if all of the following conditions are met:

(1) The increased employer payment is made pursuant to criteria set forth in a collective bargaining agreement.

(2) The basic hourly rate and increased employer payment are no less than the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the director's general prevailing wage determination.

(3) The employer payment contribution is irrevocable unless made in error.

(d) An employer may take credit for an employer payment specified in subdivision (b), even if contributions are not made, or costs are not paid, during the same pay period for which credit is taken, if the employer regularly makes the contributions, or regularly pays the costs, for the plan, fund, or program on no less than a quarterly basis.

(e) The credit for employer payments shall be computed on an annualized basis when the employer seeks credit for employer payments that are higher for public works projects than for private construction performed

by the same employer, unless one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(f)(1) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever they are filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

(2) When a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

(3) The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.