Nos. 18-1065, 18-1092

IN THE
Supreme Court of the United States

INTERPIPE CONTRACTING, INC.,
and
ASSOCIATED BUILDERS & CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC.,

Petitioners,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE U.S. CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber has 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This is such a case because California is abusing its massive public-works spending to regulate in an arena Congress reserved for unrestricted private speech and to tilt public debate about unionization against the free-speech rights of employers. The California statute at issue seeks to effect a massive transfer of resources into the coffers of union-selected "industry advancement funds" opposing right-to-work laws. Even worse, the statute conscripts employers as unwilling participants in

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

pro-unionization advocacy by compelling them to fund pro-unionization speech with which they may disagree.

This is not the first time California has tried to skew the unionization debate. Over a decade ago, the Court instructed California and the lower courts that the National Labor Relations Act ("NLRA") preempts *any* state regulation of noncoercive employer speech about unionization. *See Chamber of Commerce v. Brown*, 554 U.S. 60 (2008). The Court explained that any state regulation in this sensitive area of national policy invades the zone of market freedom Congress enacted the NLRA to protect and frustrates the "freewheeling" debate on labor-relations issues that Congress envisioned.

Brown controls this case and dooms California's statute. Because the Ninth Circuit's decision flouts and impermissibly narrows *Brown*, the NLRA, and the First Amendment, it merits the Court's review.

BACKGROUND

California requires contractors on public works projects to pay their employees a prevailing wage. Cal. Lab. Code § 1771. Employers may satisfy that requirement by paying all cash wages, or a mix of cash wages and "employer payments" that add up to the prevailing wage. *Id.* §§ 1773.1, 1773.9. California counts certain defined "employer payments" as "a credit against the obligation to pay" the prevailing wage. *Id.* § 1773.1(c).

Among the payments California deems eligible for the wage credit are those which employers make

to third-party industry advancement funds. *See* Cal. Lab. Code § 1773.1(a)(8), (9). Industry advancement funds engage in speech about unionization.

For over a decade, the wage credit for employer payments to industry advancement funds was available on a neutral basis. Employers could take the credit for payments to industry advancement funds selected by labor unions pursuant to collective bargaining agreements. And employers could take the credit for payments to industry advancement funds of their own choosing. *See* App. 54.

California ended its neutrality in 2016 by enacting Senate Bill No. 954 ("SB 954"). SB 954 provides that "employer payments" to industry advancement funds are only eligible for the wage credit "if the payments are made pursuant to a collective bargaining agreement to which the employer is obligated." Cal. Lab. Code § 1773.1(a)(9). Payments to funds that lack that union imprimatur are no longer eligible for the wage credit.

Unlike the prior regime, SB 954 is designed to subsidize one side of the unionization debate by conditioning the prevailing-wage credit on the viewpoints of the industry advancement funds receiving employer payments. If a fund supports unionization and is therefore selected by a labor union for inclusion in a collective bargaining agreement, the obligated employer may claim a wage credit. By contrast, if a fund opposes unionization and therefore is not selected by a labor union, an employer may not claim credit for payments to that fund.

In practice, SB 954 favors and even operates to compel pro-unionization speech. If a collective bargaining agreement obligates an employer to contribute to a labor union's preferred industry advancement fund, the employer cannot avoid paying for advocacy with which it disagrees. Moreover, because California law authorizes public agencies to "require" contractors to enter into "prehire collective bargaining agreements" to bid on public-works contracts, Cal. Pub. Cont. Code § 2500, employers may become obligated to collective bargaining agreements that a union lobbies the public agency to adopt and over which the employer and employees have no control.

SUMMARY OF THE ARGUMENT

The Petitions present an important question regarding a state's power to tilt public debate about unionization in a preferred direction: May a state favor pro-unionization speech by burdening contractors on public-works projects with a prevailing wage requirement while crediting against that requirement *only* money a contractor spends to support advocacy directed by a labor union?

By upholding this scheme, the Ninth Circuit blessed California's end run around *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008). In *Brown*, California used its massive public-works expenditures to muzzle employer views on unionization. California claimed its restriction on the use of public funds was neutral, but the practical effect was to squelch employer speech about unionization. The Court saw through California's

pretense and held that the National Labor Relations Act preempted its law.

In this case, California is using the same leverage arising from substantial public-works spending to tilt the playing field even more sharply in favor of speech favoring unionization. SB 954 undoubtedly discriminates against and suppresses employer speech on one side of the debate by denying it credit against California's prevailing wage requirement. Even more striking, the statute empowers unions to use collective bargaining agreements to require employers to support pro-unionization speech with which they disagree, conscripting employers to carry California's preferred message. Moreover, from the perspective of the industry advancement funds that directly benefit from the wage credit, SB 954 impermissibly discriminates based upon viewpoint by subsidizing only funds engaged in pro-unionization speech.

The Ninth Circuit overlooked these problems by treating *Brown* as a narrow case standing for the proposition that the NLRA preempts only statutes that inhibit employer speech through "draconian enforcement provisions." App. 19. Although that was the *dissent's* position in *Brown*, the majority made clear that the NLRA broadly preempts *any* state regulation that "directly" or "indirectly" contravenes Congress's decision "to leave noncoercive speech unregulated." 554 U.S. at 68–69. In addition, the Ninth Circuit erred by concluding that California's regulation of employer speech was "facially neutral" notwithstanding its clear design to favor pro-unionization speech. App. 41.

If allowed to stand, the Ninth Circuit's decision will have significant and deleterious effects on federal labor policy. The decision provides a blueprint for circumventing *Brown*, inviting state governments to distort the free debate on labor policy that Congress sought to promote in the NLRA. It also allows California to trample free speech rights guaranteed by the First Amendment on a topic (unionization) that Congress and this Court have recognized to be especially in need of evenhanded treatment by the government.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS AN END RUN AROUND THE EMPLOYER FREE SPEECH RIGHTS PROTECTED IN *BROWN*.

A. The NLRA Recognizes The Importance Of A Hands-Off Approach To Speech About Unionization.

Free and robust speech about unionization is so important that the NLRA both codifies and extends the First Amendment's application to such speech. Section 8(c) provides that the "expressing of any views, argument, or opinion" about unionization "shall not constitute or be evidence of an unfair labor practice" so long as "such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c); *see NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (recognizing § 8(c) "implements the First Amendment"). The First Amendment also prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. amend. I. The

"freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

But the NLRA does more. In addition to codifying the First Amendment, the NLRA establishes a broad "zone" of free labor speech that is "protected and reserved for market freedom." *Brown*, 554 U.S. at 66 (internal quotation marks and citation omitted). Congress created that zone because it recognized that "uninhibited, robust, and wide-open debate in labor disputes" was the best mechanism for achieving a sound national labor policy. *Id.* at 68 (internal quotation marks and citation omitted); *cf. Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

Thus, under the NLRA, state intervention cannot be justified by balancing the state and employer speech interests. Rather, because Congress intended "to leave noncoercive speech unregulated," the Court recognized in *Brown* that *any* state regulation that "directly" or "indirectly" regulates "noncoercive speech about unionization" is "unequivocally pre-empted." 554 U.S. at 68–69.

Brown explained that Congress's preemptive intent is evident from the NLRA's history. As originally enacted, the statute was silent on the

"intersection between employee organizational rights and employer speech rights." 554 U.S. at 66. The National Labor Relations Board mistook that silence as an invitation to require "complete employer neutrality" and accordingly imposed on employers burdensome pro-unionization speech restrictions that undermined the "free debate" Congress sought to promote. *Id.* at 66–68. Rather than rely on the courts, however, to correct the Board's decisions through case-by-case adjudication, Congress responded by adding Section 8(c) to make "explicit" its "policy judgment" that the Board and state governments should simply stay out of the "freewheeling" debate over unionization. *See id.*; *see also Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) ("States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.").

The facts of *Brown* illustrate the broad scope of NLRA preemption. There, as here, California sought to leverage its massive public-works spending to control employer speech. The statute in *Brown* specifically prohibited contractors from using state funds to "assist, promote, or deter union organizing." 554 U.S. at 63 (internal quotation marks and citation omitted). It also exempted from that restriction certain "expense[s] incurred" in connection with undertakings "that promote unionization." *Id.*

Notwithstanding California's general right to control expenditures of state funds, the Court held that the statute impermissibly conflicted with Congress's decision "to leave noncoercive speech

unregulated." *Brown*, 554 U.S. at 68. Because the statute regulated within "a zone protected and reserved for market freedom," *id.* at 66 (citation omitted), the Court held it preempted.

B. The NLRA Preempts California SB 954 Because It Regulates Employer Speech About Unionization.

The NLRA likewise preempts SB 954 because it regulates employer speech in a zone reserved for market freedom.

For starters, SB 954 is an impermissibly viewpoint-based regulation of speech about unionization. Viewpoint regulation is an "egregious form of content discrimination." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2223 (2015) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). A regulation discriminates based on viewpoint if it targets "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829.

SB 954 is viewpoint-based because it specifically targets the open-shop perspective of employers in two distinct ways. *First*, SB 954 conditions the wage credit on the viewpoints of the industry advancement fund(s) to which an employer makes payments. If a fund supports unionization and is therefore selected by a labor union in a collective bargaining agreement, the employer may claim wage credit for its "employer payments." Cal. Lab. Code § 1773.1(a)(9). If a fund does not support unionization, however, and therefore is not selected

by a labor union, an employer may not claim the credit for any employer payments to that fund. *See id.*

The viewpoint discrimination evident in SB 954 mirrors the viewpoint discrimination evident in the scheme preempted in *Brown*. There, as here, California set a generally applicable spending requirement and then "exempt[ed]" from that requirement employer payments "for *select* employer advocacy activities that promote unions." *Brown*, 554 U.S. at 71. By similarly denying an exemption for speech favoring an open-shop, SB 954 likewise "imposes a targeted negative restriction on employer speech about unionization" because the denial of the credit penalizes employers who choose to express a pro-open-shop viewpoint. *See id.*; *see also Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."). By discouraging some employers—like Interpipe, App. 8—from expressing that viewpoint altogether, that denial suppresses the overall amount of speech favoring open shops in the marketplace of ideas and allows California to "tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011).

Second, SB 954 effectively compels pro-unionization speech by employers. If an employer is "obligated" to a collective bargaining agreement designating a labor union's preferred industry advancement fund, the obligated employer cannot avoid paying for advocacy with which the employer disagrees. Cal. Lab. Code §§ 1773.1(a)(8), (9).

Moreover, because California law authorizes public agencies to "require" public works contractors to enter into "prehire collective bargaining agreement[s]" in order to bid on public works contracts, Cal. Pub. Cont. Code § 2500, employers may become obligated to collective bargaining agreements that a union lobbies a public agency to adopt and over which the employer and employees have no control. Whichever way the requirement is imposed, the result is that SB 954 compels employers to "underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (invalidating funding scheme for speech about branded mushrooms).

It is no answer to say that an employer who objects to compulsory funding of pro-unionization speech may also fund counterspeech. That "freedom" is illusory because it makes the wage credit available only "at the price of evident hypocrisy." *USAID v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013) (invalidating compelled speech requirement for recipients of federal grants). Even worse, the ability to fund counterspeech cannot remedy the fundamental harm from forcing a speaker "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715; *see also Janus*, 138 S. Ct. at 2464 ("to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical" (quoting A Bill for Establishing Religious Freedom,

in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

Because SB 954 is, as shown above, clearly preempted by the NLRA under *Brown*, the Court does not have to address the First Amendment infirmities that also render it invalid. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("If one [of two plausible statutory interpretations] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

C. The Ninth Circuit's Contrary Decision Merits This Court's Review Because It Is Inconsistent With And Undermines *Brown*.

The Ninth Circuit brushed aside *Brown* by recharacterizing it as a decision only about the chilling effect of "draconian enforcement provisions." App. 17–21. The enforcement regime was one problem with the statute at issue in *Brown*, and the Court pointed out that problem to rebut California's theory that its regulation did not burden speech because it purported to "restrict only the use of [state] funds." 554 U.S. at 71. That observation did not, however, limit the Court's holding that the NLRA preempts any state regulation that "directly" or "indirectly" contravenes Congress's decision "to leave noncoercive speech unregulated." *Id.* at 68–69.

In fact, the narrow reading of *Brown* advanced by the Ninth Circuit below "likely rests on Justice Breyer's dissent." *See* William J. Kilberg & Jennifer

J. Schulp, *Chamber of Commerce v. Brown: Protecting Free Debate on Unionization*, 2008 Cato Supreme Court Review 189, 206 (2008). Justice Breyer would have held California's regulation preempted only if "the record" had showed that the "compliance provisions, as a practical matter, unreasonably discourage[d] expenditure of nonstate funds"—suggesting that he viewed the degree of the enforcement provisions' chilling effect to be the dispositive issue. *Brown*, 554 U.S. at 81 (Breyer, J., dissenting, joined by Ginsburg, J.). The Ninth Circuit implicitly adopted Justice Breyer's approach—rejected by the Court—when it distinguished *Brown* on the theory that "SB 954 imposes no compliance burdens or litigation risks that pressure plaintiffs to forego their speech rights in exchange for the receipt of state funds." App. 20 (quotation marks and citation omitted); *see also id.* (finding no "compelling evidence" of burden).

The Ninth Circuit also erred in holding that SB 954 avoided preemption because it is merely a "legitimate minimum labor standard" rather than a viewpoint-based regulation of speech. App. 16; *see id.* at 40–42. The court reasoned that SB 954 is "facially neutral" because it supposedly is "indifferent to which IAFs . . . [unionized] employees elect to subsidize." App. 41.

The Ninth Circuit's view blinks reality. If a state imposed a statutory mechanism permitting only lifetime National Rifle Association members to direct employer contributions to advocacy groups about guns, no one would contend that the law was "facially neutral" so long as the statute did not

expressly prohibit selection of the Brady Campaign. The same logic applies here. Unions party to a collective bargaining agreement have already taken sides in the unionization debate. By allowing only those unions to direct employer payments, California has rigged the game to favor its own policy view. "[V]iewpoint discrimination" is thus "inherent in the design and structure of this Act." *Becerra*, 138 S. Ct. at 2379 (Kennedy, J., concurring, joined by Roberts, C.J., Alito and Gorsuch, J.J.).

The Court should grant Interpipe's Petition to correct the Ninth Circuit's cramped reading of *Brown* and to protect employers' free-speech rights.

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE COURT'S TEACHING THAT FUNDING FOR PRIVATE SPEECH MUST BE VIEWPOINT NEUTRAL.

The Court should also grant ABC-CCC's petition. It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. "In the ordinary case[,] it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell*, 564 U.S. at 571. Such laws "are presumptively unconstitutional." *Becerra*, 138 S. Ct. at 2371 (quoting *Reed*, 135 S. Ct. at 2226). The First Amendment provides an independent and vitally important reason to hear these cases and declare California's law unconstitutional. The constitutional dimension also reinforces the importance of the preemption question, as the Court can avoid grappling with the constitutionality of SB 954 by

recognizing that it is preempted by the NLRA. *See* Section I.B, *supra*.

The presumption of unconstitutionality applied in *Becerra* and other cases applies with equal force when the government establishes funding mechanisms for private, nongovernmental speech. Thus, a state may not establish a system for "third-party payments" and then restrict payments to particular groups "based upon viewpoint discrimination." *Rosenberger*, 515 U.S. at 832. Nor may a state, after choosing to directly subsidize "private, nongovernmental speech," place viewpoint-based restrictions on the content of that speech. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001); *see also USAID*, 570 U.S. at 218 (holding government may not "compel[ ] a grant recipient to adopt a particular belief as a condition of funding"). This Court has "rejected government efforts to increase the speech of some at the expense of others" in numerous circumstances. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 741 (2011) (invalidating law that increased speech "of one kind and one kind only" while reducing opposing speech).

SB 954 violates these well-established principles. Although the statute purports to subsidize even-handed discussion about "[i]ndustry advancement" through wage crediting for the funding of industry advancement funds, Cal. Lab. Code § 1773.1(8), in fact the statute "exclude[s] certain vital theories and ideas" from that discussion, *Velazquez*, 531 U.S. at 548, by allowing wage crediting only where the speech is approved by a labor union through a

collective bargaining agreement, Cal. Lab. Code § 1773.1(9). Thus, industry advancement funds that adopt California's pro-unionization viewpoint as their own are likely to be the only ones to receive funding. *See also* ABC-CCC Pet. 7–8.

The Ninth Circuit upheld SB 954's restriction on wage crediting notwithstanding this viewpoint-discriminatory effect. Although the Ninth Circuit recognized that SB 954 in practice likely discriminated against industry advancement funds favoring open shops because "unionized employees are unlikely to fund an anti-union IAF over a pro-union one," the court dismissed that reality as "beside the point" because a "facially neutral statute restricting expression for a legitimate end is not discriminatory simply because it *affects* some groups more than others." App. 41 (emphasis in original) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

The Ninth Circuit erred. In *R.A.V. v. City of St. Paul*, this Court held that the *nonspeech* elements of communication may be proscribed notwithstanding a viewpoint-based effect on speech. 505 U.S. at 385–86. The Court also held, however, that "the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) *does not* entail the power to proscribe the same speech on the basis of a content element." *Id.* at 386 (emphasis added). The Ninth Circuit overlooked this important facet of *R.A.V.* Thus, contrary to the Ninth Circuit's view, *R.A.V.* does not support the proposition that a viewpoint-discriminatory effect is "beside the point" when the regulation at issue targets a speech

element of communication. *See also Sorrell*, 564 U.S. at 565 (recognizing that the viewpoint-discriminatory "inevitable effect of a statute on its face may render it unconstitutional" (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

The Ninth Circuit was also led astray by what it viewed as "the purpose of the prevailing wage law" in "setting a compensation floor for employee pay." App. 47. Minimum-wage laws, concededly, are often a valid exercise of a state's police power. But it does not follow that California can establish a viewpoint-discriminatory credit excluding ABC-CCC from eligibility because its speech, in California's view, did not further "employee interests." App. 47. Much of the point of *Brown* is that there is room for vital debate on that point and the NLRA bars governmental efforts to promote private speech on one side or the other of the debate. If a state is permitted to "recast a condition on funding as a mere definition of its program in every case, [ ] the First Amendment [is] reduced to a simple semantic exercise." *USAID*, 570 U.S. at 215 (quoting *Velazquez*, 531 U.S. at 547).

To be sure, the distinctions drawn in this Court's speech subsidy precedents are "not always self-evident." *USAID*, 570 U.S. at 217. And there are cases, the Court has acknowledged, when the lines have been "hardly clear." *Id.* at 215; *accord* Erwin Chemerinsky, *Constitutional Law: Principles and Polices* 1013 (4th ed. 2011) (stating "it is very difficult to reconcile the cases concerning the unconstitutional conditions doctrine" in the context of funding programs). Notwithstanding these

difficulties, the Court has consistently held that viewpoint-discriminatory conditions placed on subsidies for private speech are unconstitutional. This case presents a good opportunity for the Court to remind the lower courts that the First Amendment is a meaningful check on state power to distort the marketplace of ideas when a state establishes mechanisms for funding private speech.

III. THE NINTH CIRCUIT'S DECISION WILL HAVE A SIGNIFICANT AND DELETERIOUS EFFECT ON FEDERAL LABOR POLICY, UNDERMINING LONGSTANDING FEDERAL PRIORITIES AND BURDENING THE SPEECH OF BUSINESSES.

Congress enacted the NLRA as a "comprehensive labor law" to address the "perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict." *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 286 (1971). Recognizing that Congress sought to achieve national uniformity in labor law, this Court has repeatedly granted certiorari to enforce NLRA preemption. *See, e.g.*, *Livadas v. Bradshaw,* 512 U.S. 107, 116 (1994) (granting certiorari "to address the important questions of federal labor law implicated by the [state's] policy"); *N.Y. Tel. Co. v. N.Y. State Dep't of Labor,* 440 U.S. 519, 527 (1979) (granting certiorari because of "[t]he importance of the question" whether the NLRA preempted a state unemployment-benefits law).

If allowed to stand, the Ninth Circuit's decision will significantly undermine federal labor policy. SB 954 allows California to distort the free debate on unionization protected by the First Amendment and the NLRA by redirecting a portion of the money private companies earn on public works projects toward pro-unionization speech. California thus seeks to accomplish through the back door what it cannot through the front; under *Brown*, the NLRA would plainly preempt any law ordering private employers to directly fund pro-unionization advocacy groups. The result should not change merely because California has placed the final decision in the hands of labor unions.

The Ninth Circuit's decision is particularly dangerous because it characterizes SB 954 as a presumptively valid "minimum labor standard" rather than a presumptively invalid regulation of labor-related speech, thereby impermissibly shifting the burden of showing the law's invalidity. The decision provides a constitutional blueprint for states seeking an end run around *Brown*. This Court's intervention is accordingly necessary to confirm that states cannot escape preemption by burying speech regulations in laws that set minimum labor standards.

"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." *Metro. Life Ins. v. Mass.*, 471 U.S. 724, 755 (1985). SB 954 amends a minimum wage law, but it is also "designed to encourage . . . employees in the promotion of their

interests collectively," a characteristic not found in the Court's minimum labor standards decisions. *Id.* The Ninth Circuit plainly ignored this Court's admonition that laws having "any but the most indirect effect on the right of self-organization" and "laws [that] even inadvertently affect the[] interests implicated in the NLRA," are not mere minimum labor standards. *Id.*

The basic question of whether a law should be reviewed as a speech-regulation under *Brown* or a minimum labor standard under *Metropolitan Life* will be outcome determinative in many cases. State actions that frustrate "uninhibited, robust, and wide-open debate in labor disputes" are presumptively prohibited unless the state can show that the regulated activity rises to the level of coercion. *Brown*, 554 U.S. at 68 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). Conversely, for minimum labor standards, "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the state." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

The Ninth Circuit's decision impermissibly narrows the scope of NLRA preemption under *Brown*. As a result, courts in its jurisdiction, the largest by population, are now bound by a decision requiring compelling reasons to invalidate regulations of labor speech provided those regulations are included within a statutory section that also sets a minimum standard. This Court's intervention is necessary to correct the Ninth Circuit's error and to provide guidance on the

interplay between *Brown* and *Metropolitan Life* in appropriate cases.

This Court should also intervene because the Ninth Circuit's decision will have a broad impact. Were it an independent nation, California's 2.7 trillion-dollar economy would be the fifth largest in the world. A significant portion of its state budget is allocated to public works spending, and therefore subject to SB 954. *See, e.g.*, Governor's Budget Summary 2018-19 at 127, http://www.ebudget.ca.gov/2018-19/pdf/BudgetSummary/FullBudgetSummary.pdf (proposing plan to invest $61 billion in infrastructure alone over the next five years). California's Labor Commissioner's Office monitors compliance with prevailing wage laws, and covered contractors are subject to prosecution for violations. Consequences include restitution, monetary penalties, debarment, and even criminal prosecution. "Failure to fund fringe benefits" is identified as a common public works law violation on the Department of Industrial Relations' website. Department of Industrial Relations, *Common Public Works Violations*, https://www.dir.ca.gov/Public-Works/Enforcement.html (last visited Mar. 15, 2019) (highlighting contractor sentenced to 49 years in jail for "short-changing employees" as a "violator in the news"). Employers thus face very real consequences for failing to comply with SB 954, including the provision requiring payment to pro-union advocacy groups pursuant to collective bargaining agreements.

Furthermore, California is a thought-leader on labor relations that other states emulate. "But it is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" *Becerra*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (quoting *Wooley*, 430 U.S. at 715). The Ninth Circuit's decision has garnered significant attention nationally, and if allowed to stand will likely prompt other states to amend their minimum wage laws with similar provisions. If SB 954 "is valid, nothing prevents other States from taking similar action." *Gould*, 475 U.S. at 288.

The current climate is particularly ripe for copy-cat interventions. Businesses routinely find themselves engaged in disputes and debates over unionization, in which employer speech and conduct is closely regulated. Nationally, the rates of unionized workers have been declining, particularly in private sector unions. *See Economic News Release, Union Members Summary, USDL 19-0079* (Jan. 18, 2019) https://www.bls.gov/news.release/union2.nr0.htm. In their effort to rebuild some of their lost membership and power, unions are looking for innovative ways to subsidize their influence. Some California politicians are answering the call to alter the Congressionally-designed equipoise between employer speech rights and labor organizing using ever more creative means. But the legitimate debate over unionization should not be manipulated in the direct and unlawful manner used in California.

This Court needs to intervene now lest SB 954 become a lodestar in organized labor's attempt to seek state government assistance and evade *Brown*.

CONCLUSION

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

Respectfully submitted,

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