FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-55248

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

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.

Appendix A-2

No. 17-55263

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.

OPINION

Appendix A-3

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

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

SUMMARY**

Civil Rights

The panel affirmed the district court's dismissal of an action challenging a 2017 amendment to the California labor code that imposed a wage-credit limitation on employers for payments to third-party industry advancement funds (Senate Bill 954).

Pursuant to the California's labor code, employers must pay public works employees either the prevailing wage or pay a combination of cash wages and benefits. The list of eligible benefits includes employer payments to third-party industry advancement funds. Amendment SB 954 permits employers to take a wage-credit for advancement fund contributions only if their employees consent to doing so through a collective bargaining agreement negotiated by a union. Plaintiff is a contractor that favors open shop employment arrangements and opposes project labor agreements on public works projects. Prior to the amendment, plaintiff took a wage credit for its contributions to co-plaintiff ABC-CCC, an industry advancement fund that opposes project labor agreements and supports open shop arrangements. Since SB 954 went into effect, plaintiff has ceased making payments to ABC-CCC.

The panel held that amendment SB 954 does not frustrate the objectives of the National Labor Relations Act and is not preempted under the doctrine

**This Summary Constitutes no part of the opinion of the Court. It has been prepared by court staff for the convenience of the reader.

set forth in *Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976). The panel held that 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 panel concluded that the law was therefore subject to rational basis review. Under that lenient standard, because SB 954 was rationally related to a legitimate government purpose—ensuring meaningful employee consent before employers contribute portions of their wages to third-party advocacy groups—it easily withstood scrutiny. The panel further concluded that ABC-CCC lacked standing to press its equal protection claim because the law applied to employers, and so ABC-CCC could not show that SB 954 causes an equal protection injury *to itself*.

COUNSEL

David Wolds (argued), San Diego, California, for Plaintiff-Appellant Interpipe Contracting, Inc.

Anastasia P. Boden (argued), Sacramento, California, for Plaintiff-Appellant Associated Builders and Contractors of California Cooperation Committee, Inc.

Seth Goldstein (argued), Sacramento, California, for Defendant-Appellee Xavier Becerra

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Scott A. Kronland and Rebecca C. Lee, Altshuler Berzon LLP, San Francisco, California, for Amicus Curiae State Building and Construction Trades Council of California.

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, AFLCIO 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

[1] Appellants named as Defendants Xavier Becerra, the Attorney General of California, Christine Baker, the Director of the

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 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

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California Department of Industrial Relations, Julie A. Su, the California Labor Commissioner, and other state officials.

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

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 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

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

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 non-coercive 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 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

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

> 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); *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.

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[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.

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. 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[]" noncoercive labor speech. *Id*. *Brown*

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

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 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

[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)).

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

[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.

raise money to fund their speech activities," and therefore infringes its right to free speech.[9] Notably, ABC-CCC does not 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

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[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 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.

"[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 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

[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."

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

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[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.

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 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.").

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

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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 anti-trust 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.

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 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

[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.

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 "taxdeductibility [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

[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 nonunion 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.

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 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 anti-government 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 ABCCCC'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)

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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.

(internal quotation 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, ABCCCC 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

> 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

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.

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

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> 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.

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 ABCCCC." 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.

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[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.

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

AFFIRMED.

Appendix B-1

Filed 01/27/17

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:** **(l) 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]**

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 Califon1ia 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.l(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.l(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.l(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.l(a)(9) for those 16 payments." (*Id.* ¶ 5.)

Effective January 1, 2017, SB 954[1] amends what qualifies as "employer payments" 18 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

[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.)

> 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.

(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

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[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.

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 draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Zixiang Liv. 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. Rederite Otto Danielsen*, 609 15 F.3d 1033, 1035 (9th Cir. 2010) (citing *Barker v. Riverside Cnty. Office of Educ.*, 584 16 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,*

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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

U.S. ex 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.

II. Motion for a Preliminary Injunction

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omitted). Because Plaintiffs bring the same purely legal claims against all Defendants, and because the same questions are 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.

"A preliminary injunction is an extraordinary and drastic remedy." *Pom. Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014) (quoting *Munafv. 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

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[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 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 plaintiffs 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

constitutional 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 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

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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.

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] Standing is an essential component of Article III's case or controversy requirement. One of the three

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[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 "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."))

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**.

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

[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.

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 noncoercive 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 Associatio*n, 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 noncoercive 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 19 most applicable of those cases is *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.*

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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).

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 noncoercive 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 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.

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[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 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*.

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 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 pied 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 factfinding 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]

III. Preliminary Injunction

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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.'").

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 District Court
SOUTHERN DISTRICT OF CALIFORNIA

Associated Builders and Contractors of California Cooperation Committee, Inc.; Interpipe Contracting, Inc.

Plaintiff,

v.

See Attachment,

Defendant.

Civil Action No. 16-cv-2247-BEN-NLS

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

that 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.)

Date: 1/31/17

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ K. Betancourt
K. Betancourt, Deputy

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

(ATTACHMENT)

Civil Action No. 16-cv-2247-BEN-NLS

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 Su in her official capacity as California Labor Commissioner, Division of Labor Standards Enforcement
Defendants.

FILED
SEP 21 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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

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 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**.

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

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
U.S. District Court for Southern California, San Diego

MANDATE

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.

Appendix E-2

No. 17-55263

D.C. No. 3:16-cv-02247-BEN-NLS
U.S. District Court for Southern
California, San Diego

The judgment of this Court, entered July 30, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Jessica F. Flores Poblano
Deputy Clerk
Ninth Circuit Rule 27-7

California Labor Code Section 1773.1

CA Labor Code § 1773.1 (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.

(Amended by Stats. 2016, Ch. 231, Sec. 1. (SB 954) Effective January 1, 2017.)

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Attorneys for Plaintiffs,
ASSOCIATED BUILDERS AND
CONTRACTORS OF CALIFORNIA
COOPERATION COMMITTEE, INC. and
INTERPIPE CONTRACTING, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

KAMALA HARRIS in her 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

COMPLAINT FOR:
(1) DECLARATORY RELIEF;
AND
(2) INJUNCTIVE RELIEF
PRELIMINARY INJUNCTION
REQUESTED

NATURE OF ACTION

1. This action seeks declaratory relief pursuant to the Declaratory Relief Act, 28 U.S.C. §§2201-2202, that California Senate Bill 954, as contained in California Labor Code §1773.1 ("SB 954"), is preempted by the National Labor Relations Act, 29 U.S.C. §151 et seq. ("NLRA") under the Supremacy Clause of the United States Constitution, and is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. This action also seeks preliminary and permanent injunctive relief enjoining the enforcement of SB 954 and any related actions undertaken by Defendants pursuant to the provisions of SB 954. This action also seeks appropriate remedies, including but not limited to attorneys' fees, under the Civil Rights Act of 1871, 42 U.S.C. §1983 and §1988. A redlined version of California Labor Code section 1773.1 that highlights the changes from SB 954 is attached hereto as Exhibit A.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this suit pursuant to 28 U.S.C. §1331, 28 U.S.C §1343(a)(3) and (a)(4), and 42 U.S.C. §1983 as Plaintiffs' claims arise under (a) the due process and equal protection provisions of the Fourteenth

Amendment to the United States Constitution, which incorporate the free speech provisions of the First Amendment; (b) the Supremacy Clause in Article VI, Clause 2 of the United States Constitution which designates the Constitution and laws of the United States as the supreme law of the land; (c) the laws of the United States, and specifically the National Labor Relations Act, 29 U.S.C. §141 et seq.; and (d) the Civil Rights Act of 1871, 42 U.S.C. §1983.

3. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b) as this Court is located in the federal judicial district where a substantial part of the events giving rise to Plaintiffs' claims have occurred, are now occurring, and will occur in the future if not curtailed through the actions of this Court. Plaintiffs Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC") and Interpipe Contracting, Inc. ("Interpipe"), which regularly makes payments to the ABC-CCC, are both situated in this district and will be adversely affected by the irreparable harms sought to be remedied and prevented by this Court's action upon this Complaint.

PARTIES

4. Plaintiff ABC-CCC is a tax exempt trade association representing the interests of open shop employers in the building and construction industry. ABC-CCC was formed in 2004 as a California mutual benefit corporation that is tax exempt under §501(c)(6) of the Internal Revenue Code and §23701e of the California Revenue and Taxation Code. ABC-CCC is recognized by the California Department of Industrial Relations ("California DIR") as an "Industry Advancement Fund." ABC-CCC is the open shop counterpart to industry advancement funds that

are operated by employers signatory to collective bargaining agreements with labor unions throughout California.

5. Plaintiff Interpipe Contracting, Inc. ("Interpipe") is a California corporation with its principal place of business in San Diego County and is the holder of Contractor State License Board License Number 578888. Interpipe 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 §1773.1(a)(9) for those payments on numerous California prevailing wage projects. ABC-CCC has provided financial support to assist Interpipe in resolving prevailing wage issues of precedential importance to the open shop construction industry.

6. Defendant Kamala Harris is Attorney General for the State of California, and she has the responsibility and authority to enforce the laws of the State of California pursuant to California Government Code §§12510-12531. Defendant Kamala Harris is sued in her official capacity pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

7. Defendant Christine Baker is Director of the California Department of Industrial Relations, which enforces California's wage and hour laws, and as Director, she is the public officer responsible for the overall interpretation and enforcement of the State of California's wage and hour laws, including prevailing wage laws under California Labor Code §§1720-1815. Defendant Christine Baker is sued in her official capacity pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

8. Defendant Julie Su is Labor Commissioner for the State of California, and as such is a public officer responsible for enforcement of the State of California's wage and hour laws through the California DIR Division of Labor Standards Enforcement, including prevailing wage laws under California Labor Code §§1720-1815. Defendant Julie Su is sued in her official capacity pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

GENERAL ALLEGATIONS

9. California's prevailing wage law, codified at California Labor Code §§1720, et. seq., sets the minimum wage rate, called a "per diem," that employers who work on public works projects are required to pay their employees. Under California Labor Code §1773.1, certain types of employer payments are eligible for a credit toward this prevailing wage requirement.

10. Prior to the enactment of SB 954, California Labor Code §1773.1(a) provided, in relevant part:

> Per diem wages, when the term is used in this chapter or in any other statute applicable to public works, shall be deemed to include employer payments for the following:
>
> [. . .]
>
> (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; and
>
> (9) Other purposes similar to those specified in paragraphs (1) - (8), inclusive.

11. Prior to the enactment of SB 954, an employer making payments to an industry advancement fund could receive prevailing wage credit under §1773.1(a)(8) above if the payment was required by a collective bargaining agreement. An employer making a similar payment, but which was not required by a collective bargaining agreement, could receive prevailing wage credit under §1773.1(a)(9).

12. On October 15, 2004, the California DIR confirmed in writing that employer payments to ABC-CCC are entitled to full prevailing wage credit under California Labor Code §1773.1(a)(9).

13. California Governor Edmund Brown signed SB 954 into law on August 29, 2016, amending the provisions of §1773.1. The provisions of SB 954 are scheduled to become law effective on January 1, 2017.

14. SB 954 amends §1773.1 such that employer payments to industry advancement funds will no longer receive prevailing wage credit, even under §1773.1(a)(9), unless the payment is required by a collective bargaining agreement. Consequently, under SB 954, only union signatory employers will be entitled to receive prevailing wage credit for payments to industry advancement funds. Open shop employers such as Interpipe will no longer receive prevailing wage credit for payments made to industry advancement funds such as ABC-CCC.

15. 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 and similar open shop industry advancement funds in the future.

16. ABC-CCC was created to utilize payments received from open shop construction employers working on California public works projects to fund industry advancement activities that include: (a) underwriting academic studies regarding prevailing wage issues of significance to employers and prevailing wage contracting agencies; (b) publishing prevailing wage guides for California municipalities; (c) presenting testimony to legislative and other governmental bodies on prevailing wage issues; (d) hosting seminars and publishing newsletters and press releases for construction prevailing wage employers; (e) funding public relations for the advancement of the industry; (f) supporting open shop apprenticeship and job training opportunities; (g) promoting public education on construction-related topics; (h) promoting job targeting programs; (i) working with public agencies to enhance the cooperation between governmental agencies and private companies; and (j) filing amicus briefs in court cases on precedential issues of importance to the construction industry.

17. Industry advancement funds have a long history of use by public works contractors. The National Labor Relations Board ("NLRB") and federal courts have recognized industry advancement program activities as protected under the NLRA and as a permissive subject of collective bargaining under the NLRA. Industry advancement funds must be

administered solely by employers, and can not be jointly administered with unions, under the NLRA.

18. ABC-CCC will suffer severe financial harm in the form of lost revenues as a result of reduced employer payments resulting from the loss of employer payment credit under SB 954. Those lost revenues will lead to a severe economic hardship and will force ABC-CCC to curtail or discontinue its advocacy on behalf of open shop employers.

19. As a consequence of SB 954, Interpipe will lose some or all of the industry advocacy and financial assistance previously provided by ABC-CCC.

20. ABC-CCC's advocacy of the open shop perspective on significant issues, as reflected in the 2011 academic study titled: *Measuring the Cost of Project Labor Agreements on School Construction in California,* published by the National University System Institute for Policy Research and peer reviewed by the Keston Institute for Public Finance and Infrastructure Policy at the University of Southern California (See Exhibit B), will end as a result of SB 954.

21. If it becomes effective, SB 954 will chill ABC-CCC's ability to contribute to public discourse or advocate for its viewpoint. Thus, SB 954 will permit only the pro-union industry perspective to continue while chilling or even eliminating the viewpoint historically promoted by ABC-CCC.

FIRST CLAIM FOR RELIEF

(SB 954 is Preempted Under the Supremacy Clause)

22. SB 954 is preempted under §8(c) of the NLRA pursuant to the *Garmon* preemption doctrine under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959), in that SB 954 prohibits protected conduct and frustrates rights guaranteed to employers under the NLRA. SB 954 is preempted by the NLRA because it interferes with employer speech rights guaranteed under §8(c) of the NLRA which protects the expression of views, argument, or opinion or dissemination thereof, whether in written, printed, graphic, or visual form, so long as the expression contains no threat of reprisal or force of promise or benefit. The NLRB and federal courts have exclusive jurisdiction to interpret and enforce those rights.

23. SB 954 is also preempted under the NLRA pursuant to the *Machinists* preemption doctrine under *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548 (1976), in that SB 954 regulates in an area that Congress intentionally left to be controlled by the "free play of economic forces" by applying the laws unequally to union signatory employers and their industry advancement funds as compared to open shop employers and the industry advancement funds that speak on their behalf.

SECOND CLAIM FOR RELIEF

(SB 954 Violates ABC-CCC's First Amendment Free Speech Rights)

24. Plaintiff ABC-CCC realleges and incorporates herein as if fully restated, the allegations contained in paragraphs 1 through 23 above.

25. SB 954 restricts the prevailing wage credits for contributions to an industry advancement fund to those contributions made pursuant to a collective bargaining agreement. This restriction explicitly favors the speech activities of union sponsored industry advancement funds, while burdening the speech activities of open-shop sponsored industry advancement funds.

26. The result of SB 954 is that industry advancement funds like ABC-CCC are burdened in their ability to obtain funding for their pro-open shop speech activities, while industry advancement funds that engage in pro-union speech are not similarly burdened.

27. SB 954 targets particular speakers (industry advancement funds sponsored by open shop employers) and suppresses their particular views on matters of public interest.

28. SB 954 discriminates against speakers (industry advancement funds sponsored by open shop employers) based on their status and viewpoint.

29. This discrimination is not narrowly tailored to any compelling government interest.

30. By enforcing SB 954, Defendants, acting under color of state law, are unconstitutionally discriminating against the speech of ABC-CCC in violation of the First and Fourteenth Amendments to the United States Constitution.

THIRD CLAIM FOR RELIEF

(SB 954 Violates ABC-CCC's Equal Protection Rights)

31. Plaintiff ABC-CCC realleges and incorporates herein as if fully restated, the allegations contained in paragraphs 1 through 30 above.

32. SB 954 also violates the equal protection clause guarantees of the Fourteenth Amendment of the United States Constitution in ways that include, but are not limited to, favoring unions wishing to advance their cause with employees while burdening non-union employers and open shop industry advancement funds, including Plaintiff ABC-CCC, with respect to their free speech and NLRA rights, and overtly favoring employers who recognize unions over employers who do not.

33. This discrimination is not narrowly tailored to any compelling government interest.

34. By enforcing SB 954, Defendants, acting under color of state law, are irrationally discriminating against Plaintiff ABC-CCC in favor of industry advancement funds supported by unionized employers, in violation of the right to equal protection of the law.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

35. The Civil Rights Act of 1871, 42 U.S.C. §1983 provides a federal remedy for state interference with rights protected under federal statutes or the United States Constitution.

36. SB 954 is state action that will violate Plaintiffs' rights under the NLRA to engage in industry advancement activities free from state interference with the "free play of economic forces" that Congress intended to govern construction industry labor relations. The violation of such NLRA protected rights

can serve as the basis for awarding §1983 remedies in conjunction with declaratory and injunctive relief based on NLRA preemption. See *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989).

37. SB 954 is state action that will violate Plaintiffs' free speech rights under the First Amendment to the United States Constitution.

38. SB 954 is state action that will violate Plaintiffs' rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

39. Plaintiffs have been required to employ attorneys in preparing this Complaint and in pursuing the requested relief as a consequence of Defendants' potential enforcement of provisions in SB 954 that violate Plaintiffs' rights under the NLRA and under the United States Constitution, and are therefore entitled to an award of attorneys' fees pursuant to the provisions of 42 U.S.C. §§1983 and 1988.

40. Without a declaratory judgment and an injunction enjoining enforcement of SB 954, Plaintiffs will be deprived of the rights sought to be protected and enforced by this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs hereby request that the Court enter a judgment declaring that:

a) SB 954 is preempted by the NLRA;

b) SB 954 is unconstitutional under the United States Constitution;

c) SB 954 violates Plaintiffs' rights under the NLRA and under the First Amendment to the United States Constitution; and

d) SB 954 is unenforceable by any party, including but not limited to, the State of California and its subdivisions, the Attorney General of California, the California Department of Labor Standards Enforcement, the California Department of Industrial Relations, and private citizens as taxpayers.

Plaintiffs also request the Court enter a preliminary and permanent injunction preventing the State of California and all of its subdivisions and the Attorney General and all others acting in concert with them and each of them from:

a) Enforcing any of the provisions of SB 954;

b) Refusing to recognize prevailing wage payments made by employers to industry advancement funds under California Labor Code §1773.1 on grounds that the contribution is not made pursuant to the terms of a collective bargaining agreement; and Plaintiffs also request the Court enter an award of attorneys' fees and costs to Plaintiffs, pursuant to law and under the provisions of 42 U.S.C. §1988.

Plaintiffs also request the Court grant such further relief as may be just and proper under the circumstances.

DATED: September 6, 2016

WOLDS LAW GROUP PC

By: s/ David P. Wolds
David P. Wolds
Karl A. Rand

Jeffrey A. VanderWal
Attorneys for Plaintiffs

ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC. and INTERPIPE CONTRACTING, INC.
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Appendix G-15

Table of Contents to Exhibits.

CivLR 5.1e

EXHIBIT A

California LEGISLATIVE INFORMATION

SB-954 Public works: prevailing wage: per diem wages. (2015-2016)

SECTION 1. Section 1773.1 of the Labor Code is amended to read:

1773.1. (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 ~~required under~~ *made pursuant to* 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.~~ *which the employer is obligated.*

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

EXHIBIT B

* * *

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CONTRACTORS OF CALIFORNIA
COOPERATION COMMITTEE, INC. and
INTERPIPE CONTRACTING, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

KAMALA HARRIS in her 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

DECLARATION OF JULIANNE BROYLES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dept.: Courtroom 5A
Judge: Hon. Roger T. Benitez
Magistrate: Hon. Nita L. Stormes

I, Julianne Broyles, declare as follows:

1. This declaration is based upon my personal knowledge and, if called upon to testify about the facts herein, I will do so truthfully and competently.

2. I have been a registered lobbyist in California since 1993 and I represented the Associated Builders and Contractors of California ("ABC of California") in the 2015-2016 legislative session. ABC of California is a nonprofit trade association representing the interests of California Chapter members of the Associated Builders and Contractors of America, Inc. I am informed that ABC of California's Chapter members represent the interests of over 1,200 construction companies in this state which perform public works construction.

3. My work as an open shop industry representative has involved advocacy and legislative activity on a diverse number of policy issues including, but not limited to, the definition of public works; procedures for determining prevailing wages; state regulation of apprenticeship and training programs; and contractor prequalification for public works construction.

4. ABC of California requested that I oppose Senate Bill 954 ("SB 954"), introduced by Senator Robert Hertzberg and sponsored by the State Building and

Construction Trades Council of California. I was additionally asked to seek amendments to reduce or eliminate the impact on open shop contractors. I am informed that numerous ABC of California member contractors take credit against the prevailing wage pursuant to California Labor Code section 1773.1 for employer payments to industry advancement groups – including the Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC") – and that the intention of SB 954 was to discourage open shop speech about industry advancement.

5. Attached as Exhibit A is a true and correct copy of California Senate Rules Committee, Office of Senate Floor Analyses, Analysis of SB 954 (2015-2106 Reg. Sess.) August 5, 2016. Attached as Exhibit B is a true and correct copy of California Assembly Committee on Labor and Employment, Analysis of SB 954 (2015-2016 Reg. Sess.) June 20, 2016. I retrieved these legislative history documents from the publicly accessible website http://leginfo.legislature.ca.gov/.

6. According to the August 5, 2016, Senate Floor analysis of SB 954, "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." However, the conditions of SB 954 are not dependent on what non-union employees want, but on the willingness of the employer to sign a labor agreement that mandates payment to an industry advancement fund.

7. In effect, SB 954 legislatively gives gatekeeper authority to unions to determine what is legitimate "industry advancement" worthy of a credit against the

state set obligation to pay the general prevailing rate of per diem wages, regardless of the views of the employees or value of the industry advancement driven by the program. Testimony during legislative committee hearings I personally attended on SB 954 reflects that SB 954's author, the building trade union sponsor and supporters of the bill disfavor certain industry advancement groups because they do not like how those groups defined "industry advancement."

8. Attached as Exhibit C is a true and correct copy of a bulletin dated August 12, 2016, and posted by the sponsor of SB 954, the State Building and Construction Trades Council of California, on its website at www.sbctc.org/doc.asp?id=4664, declaring that SB 954 "will end the longstanding, shady practice of using workers' own wages to lobby against their best interests, on issues such as project labor agreements, prevailing wage, and health and safety laws."

9. ABC of California has an ally in ABC-CCC since both organizations hold that government public policy and related laws must be impartial in treating union and open shop programs evenly to ensure that that there is: fair and open bid competition on public works projects funded by taxpayer dollars; freedom of choice in employment and training; government fiscal responsibility at all levels; reasonable and fair regulation that advance the entire public works construction industry; economic growth and job creation; and protection of the interests of all workers regardless of their union affiliation.

10. ABC of California made a timely written request for a veto of SB 954 by Governor Edmund G "Jerry" Brown, Jr. A true and correct copy of this

request is attached hereto as Exhibit D. This plea was not heeded and the bill was signed into law on August 26, 2016.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California on 10/30/2016.

By: Julianne Broyles

Appendix H-6

Table of Contents to Exhibits

CivLR 5.1(e)

EXHIBIT A

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478
SB 954

UNFINISHED BUSINESS

Bill No: SB 954
Author: Hertzberg (D)
Amended: 6/14/16
Vote: 21

SENATE LABOR & IND. REL. COMMITTEE: 3-1, 4/6/16
AYES: Mendoza, Leno, Mitchell
NOES: Stone
NO VOTE RECORDED: Jackson

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SENATE FLOOR: 27-12, 4/21/16
AYES: Allen, Beall, Block, Cannella, De León, Galgiani, Glazer, Hall, Hancock,
Hernandez, Hertzberg, Hill, Hueso, Jackson, Lara, Leno, Leyva, Liu, McGuire,
Mendoza, Mitchell, Monning, Pan, Pavley, Roth, Wieckowski, Wolk
NOES: Anderson, Bates, Berryhill, Fuller, Gaines, Huff, Moorlach, Morrell,
Nguyen, Nielsen, Stone, Vidak
NO VOTE RECORDED: Runner

ASSEMBLY FLOOR: 52-22, 8/4/16 - See last page for vote

SUBJECT: Public works: prevailing wage: per diem wages

SOURCE: State Building and Construction Trades Council

DIGEST: This bill redefines what benefits employers can pay into as part of their obligation to pay workers on public works projects the prevailing wage. Specifically, this bill qualifies certain prevailing wage benefit payments only if they are made by an employer obligated to do so pursuant to a collective bargaining agreement (CBA). This bill also applies this same standard to employer payments to benefits that are merely similar to those described under existing law. Lastly, this bill does not allow employers to take credit for paying workers the prevailing wage if the abovementioned conditions are not met. *Assembly Amendments* incorporate language that specifies that certain payments only qualify as part of prevailing wage requirements and as employer credits for these payments if they are made pursuant to an employer's obligation to a CBA.

ANALYSIS:

Existing law:

1) Requires that the applicable general prevailing rate of per diem wages be paid to workers employed on public works projects in California. This rate is determined by the Director of the Department of Industrial Relations for each locality in which the public work is to be performed and for each craft, classification, or type of worker needed to execute the public works project (Labor Code §1773).

2) Defines "public work" to include, among other things, construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds (Labor Code §1720).

3) Requires that employers pay the general prevailing rate of per diem wages to all workers employed on a public works project costing over $1,000 (Labor Code §1771).

4) Allows employers, in addition to paying these workers basic straight-time and overtime pay, to use payments to the following as a credit against the obligation to pay the general prevailing rate of per diem wages (Labor Code §1773.1):

a) Health and welfare.

b) Pension.

c) Vacation.

d) Travel.

e) Subsistence.

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

g) 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.

h) 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.

i) Other purposes similar to those specified in paragraphs (a) to (h), inclusive.

This bill:

1) Redefines the prevailing wage to include industry advancement and CBA administrative fees, provided that the employer is obligated to do so pursuant to a CBA.

2) Revises the definition of the prevailing wage to include employer payments for other purposes similar to the following, but only if they are made pursuant to an employer's obligation to a CBA:

a) Certain apprenticeship or other training programs.

b) Worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978 (29 U.S.C. Sec. 175a).

c) Industry advancement and CBA administrative fees.

3) Prevents the use of employer payments for industry advancement and CBA administrative fees as credit for paying the prevailing wage unless those payments are made pursuant to an employer's obligation to a CBA.

Comments

Need for this bill? The prevailing wage is derived from the basic hourly rate paid on public works projects to a majority of workers engaged in a particular type of work within the locality and in the nearest labor market area. This ensures, among other things, that government funds do not become tangled up in competitive under-bidding which can reduce worker wages. The prevailing wage in both federal and California law can include two parts: 1) a basic hourly rate of pay and 2) employer payment of various

benefits for the employee such as health and life insurance, pension, vacation, among others. In short, rather than just money, these employers can give their employees money and bona fide benefits as long as the value of both components add up to the prevailing wage rate.

This bill revises 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 law's uncertainty regarding benefits is compounded by the inclusion of employer payments for other purposes similar to industry advancement as part of the prevailing wage.

Prior Legislation

SB 776 (Corbett, Chapter 169, Statutes of 2013) prohibited credit from being granted for employer 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 and provided that an employer may take credit for those specified employer payments, even if those payments are not made, or costs are not paid, during the same pay period for which credit is taken, if the employer regularly makes those payments on no less than a quarterly basis.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee, this bill has no significant state fiscal impact.

SUPPORT: (Verified 8/4/16)

State Building and Construction Trades Council (source)
Air Conditioning Sheet Metal Association
Air-Conditioning & Refrigeration Contractors Association
California Chapters of the National Electrical Contractors Association
California Labor Federation, AFL-CIO
California Legislative Conference of the Plumbing, Heating and Piping Industry
California State Council of Laborers
Finishing Contractors Association of Southern California
Northern California Allied Trades
Southern California Contractors Association
United Contractors
Wall and Ceiling Alliance

OPPOSITION: (Verified 8/4/16)

Air Conditioning Trade Association
Associated Builders and Contractors of California
Associated Builders and Contractors-San Diego Chapter
California Construction Advancement Group
Plumbing-Heating-Cooling Contractors Association of California
Western Electrical Contractors Association

ARGUMENTS IN SUPPORT: Proponents state that existing law permits employer credits for industry advancement purposes that are "similar" to those in a CBA pertaining to a particular craft, classification, or type of work in the nearest labor market. This credit, a reduction in the amount of an employee's check, is diverted into a fund that can be used for lobbying or other activities that are not subject to a specific CBA. Proponents further argue that current law is not sufficiently clear that the employer must actually be a party to a CBA that requires such contributions. This ambiguity has been used by contractors to reduce worker's wages to fund the contractors' own "industry advancement." This is done without worker representation or a say as to whether employees want these deductions to occur, for what purposes the money can be used, and the amount of the deduction. In fact, these funds are often used to support activities that are contrary to the interests of workers, such as efforts to weaken health and safety standards or to reduce wages on public works and apprenticeship training standards. Finally, proponents state that the collective bargaining process is essential to level the playing field between management and labor, so that any payments that reduce workers' wages are actually in the interests of workers. SB 954 protects worker wages and clarifies the list of credits an employer may claim when reducing per diem wages.

ARGUMENTS IN OPPOSITION: Opponents state that against the total prevailing wage amount, contractors are allowed credits for a range of cash wages and benefit payments. Funds deposited by both union and non-union contractors into the "other payments" category, which include benefits, may be used for "industry advancement." Opponents claim

that SB 954 is now trying to eliminate non-union contractors' ability to fund industry advancement as part of their permitted credits when calculating the prevailing wage for their workers. Opponents contend that the Legislature should not be singling out prevailing wage contributions based on the union or non-union status of the contractor. This bill is devoid of conditions that empower workers represented by a union to have democratic control and proper accounting of trusts and committees that receive these employer payments. Instead, opponents believe that SB 954 simply bans any payments not made pursuant to a CBA. Finally, opponents claim that California can assist in building a skilled-workforce through education and hands-on training utilizing funds from the "other payments" category for industry advancement and that this would not be possible under SB 954's provisions.

ASSEMBLY FLOOR: 52-22, 8/4/16
AYES: Alejo, Arambula, Atkins, Bloom, Bonilla, Bonta, Brown, Burke, Calderon, Campos, Chau, Chiu, Chu, Cooper, Dababneh, Daly, Dodd, Eggman, Frazier, Cristina Garcia, Eduardo Garcia, Gatto, Gipson, Gomez, Gonzalez, Gordon, Gray, Holden, Irwin, Jones-Sawyer, Levine, Linder, Lopez, Low, McCarty, Medina, Mullin, Nazarian, O'Donnell, Quirk, Ridley-Thomas, Rodriguez, Salas, Santiago, Steinorth, Mark Stone, Thurmond, Ting, Weber, Williams, Wood, Rendon
NOES: Achadjian, Travis Allen, Baker, Bigelow, Brough, Dahle, Beth Gaines, Gallagher, Grove, Harper, Jones, Kim, Lackey, Maienschein, Mathis, Melendez, Obernolte, Olsen, Patterson, Wagner, Waldron, Wilk

NO VOTE RECORDED: Chang, Chávez, Cooley, Hadley, Roger Hernández, Mayes

Prepared by: Brandon Seto / L. & I.R. / (916) 651-1556 8/5/16 11:09:18

****** END ******

EXHIBIT B

Date of Hearing: June 22, 2016

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Roger Hernández, Chair
SB 954 (Hertzberg) – As Amended June 14, 2016

SENATE VOTE: 27-12

SUBJECT: Public works: prevailing wage: per diem wages

SUMMARY: Qualifies which employer payments may be included as per diem wages for purposes of an employer's obligation to pay prevailing wages on public works projects. Specifically, **this bill**:

1) Provides that those per diem wages may include employer payments for industry advancement and collective bargaining agreement administrative fees only if such payments are made pursuant to a collective bargaining agreement to which the employer is obligated.

2) Provides that those per diem wages may include employer payments for "other purposes similar" to certain apprenticeship or other training programs, worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978, and industry advancement and collective bargaining agreements administrative fees, only if such payments are made pursuant to a collective bargaining agreement to which the employer is obligated.

3) Prevents the use of employer payments for industry advancement and collective bargaining agreement administrative fees from being used as a credit against the obligation to pay prevailing wages if those

payments are not made pursuant to a collective bargaining agreement to which the employer is obligated.

EXISTING LAW:

1) Requires that the applicable general prevailing rate of per diem wages be paid to workers employed on public works projects in California. This rate is determined by the Director of the Department of Industrial Relations for each locality in which the public work is to be performed and for each craft, classification, or type of worker needed to execute the public works project (Labor Code §1773).

2) Defines "public work" to include, among other things, construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds (Labor Code §1720).

3) Requires that employers pay the general prevailing rate of per diem wages to all workers employed on a public works project costing over $1,000 (Labor Code §1771).

4) Allows employers, in addition to paying these workers basic straight-time and overtime pay, to use payments to the following as a credit against the obligation to pay the general prevailing rate of per diem wages (Labor Code §1773.1):

a) Health and welfare

b) Pension

c) Vacation

d) Travel

e) Subsistence

f) Apprenticeship or other training programs, as specified, to the extent that the cost of training is reasonably related to the amount of contributions.

g) Worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978, to the extent that the activities of the programs or committees are directed to the monitoring and enforcement of laws related to public works.

h) Industry advancement and collective bargaining agreement 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.

i) Other purposes similar to those specified in paragraphs (a) to (h), inclusive.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS: According to the author, the current broad definition of these "employer Payments" allows non-union employees who are not party to a collective bargaining agreement to have their per diem wage rates include employer payments used for industry advancement purposes. As such, employers can credit these payments towards their prevailing wage obligation without the input or consent of the employees or their labor representatives. In addition, the law's uncertainty regarding benefits is compounded by the inclusion of employer payments for other purposes similar to industry advancement as part of the prevailing wage.

The prevailing wage is derived from the basic hourly rate paid on public works projects to a majority of workers engaged in a particular type of work within the locality and in the nearest labor market area. Proponents of prevailing wage laws contend that this ensures, among other things, that government funds do not become tangled up in competitive under-bidding which can reduce worker wages. The prevailing wage in both federal and California law can include two parts: 1) a basic hourly rate of pay and 2) employer payment of various benefits for the employee such as health and life insurance, pension, vacation, among others. In short, rather than just money, these employers can give their employees money and bona fide benefits as long as the value of both components add up to the prevailing wage rate. This bill would revise the definition of acceptable employer payments toward benefits, and thus what counts as payment of the prevailing wage.

Arguments in Support

The State Building and Construction Trades Council of California is the sponsor of this bill and writes in support:

"This bill will protect construction workers on public works projects by ensuring they receive their rightfully owed wages. The bill prohibits contractors/employers from, without the consent of the worker or worker's collective bargaining representative, deducting a portion of the worker's hourly wages for use by contractor associations.

Contractors on public works projects are required to pay their employees at least the prevailing wage applicable for the craft and for the locality in which

the work is performed. The Labor Code lists the types of fringe benefit payments that can be taken as a credit against the obligation to pay cash wages. These include payment for healthcare, pension contributions, vacation, and other payments that directly benefit the employee. Additionally, Labor Code §1773.1 allows employers to take credit for contributions to apprenticeship training and for contributions required by a collective bargaining agreement (CBA) for worker protection programs, administrative fees for collective bargaining, and industry advancement funds.

However, while Labor Code §1773.1 allows contractors to take credits for contributions to industry advancement funds that are required by a CBA, current law is not sufficiently clear that the employer must actually be a party to a CBA that requires the contributions. This ambiguity has been utilized by contractors to reduce workers' wages to fund their own "industry advancement funds" without worker representation or say on whether they want these deductions to occur, for what purposes the money can be used, and the amount of the deduction. In fact, these funds are often used to support activities that are contrary to the interests of workers, such as efforts to weaken health and safety standards, lower wages on public works, and water down apprenticeship training standards.

[This bill] will protect construction workers on public works projects by ensuring they receive their full prevailing wages, unless, through collective bargaining they have negotiated with employers on deductions for industry advancement funds. Collective bargaining allows workers to be equal

partners in the decision-making process on whether such deductions are made and how those funds will be used in order to equally represent the interests and wellbeing of both contractors and workers.

The sanctity of the collective bargaining process is essential to level the playing field between management and labor by giving workers a strong voice and a seat at the negotiating table, so that any payments that reduce workers' wages are actually in the interests of workers."

Arguments in Opposition

Opponents state that contractors are allowed credits toward their prevailing wage obligation for a range of cash wages and benefit payments. Funds deposited by both union and non-union contractors into the "other payments" category, which include benefits, may be used for "industry advancement." Opponents claim that this bill is now trying to eliminate non-union contractors' ability to fund industry advancement as part of their permitted credits when calculating the prevailing wage for their workers.

Opponents contend that the Legislature should not be singling out prevailing wage contributions based on the union or non-union status of the contractor. This bill is devoid of conditions that empower workers represented by a union to have democratic control and proper accounting of trusts and committees that receive these employer payments. Instead, opponents believe that this bill simply bans any payments not made pursuant to a CBA. Opponents claim that California can assist in building a skilled-workforce through education and hands-on training utilizing funds from the "other payments" category for industry

advancement. This bill takes much of that away by saying only union contractors may use these funds for industry advancement.

In addition, opponents argue that neither the federal government nor the state government require expenditure reports from the entities that receive employer payments under existing law. Therefore, they argue that workers have no means to know of, control or receive a proper accounting of the entities receiving these payments designated as credits against their prevailing wage – even those under a CBA. They suggest that this bill should instead be amended to require the Division of Labor Statistics and Research to annually obtain reports and to examine expenditures of all entities that receive employer payments before it designates those employer payments as a credit against the prevailing wage. They believe there is a strong need for California to exercise strong oversight and regulation of entities that receive employer payments as a legitimate credit against the prevailing wage paid to workers.

Finally, opponents express particular concern about the most recent amendments to this bill that provide that per diem wages may include employer payments for "other purposes similar" to certain apprenticeship or other training programs only if such payments are made pursuant to a collective bargaining agreement to which the employer is obligated. They argue that this new amendment essentially says that individual and non-union contractors will no longer be able to include their apprenticeship training contributions as part of the prevailing wage calculations because they are not party to a collective bargaining agreement.

However, the language of this bill does not appear to impact the ability of an employer under current law to include payments for authorized apprenticeship or other training programs. The qualification that certain payments must be made pursuant to a collective bargaining agreement applies to payments made for "other purposes similar" to payments for apprenticeship or other training programs. Therefore, by definition this limitation applies only to employer payments for something "other" than an authorized apprenticeship or other training program. Moreover, the sponsor of the bill has indicated that this bill is not intended to limit credit for employer payments for authorized apprenticeship or other training programs as provided under existing law.

Previous Related Legislation

SB 776 (Corbett) Chapter 169, Statutes of 2013 prohibited credit from being granted for employer 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 and provided that an employer may take credit for those specified employer payments, even if those payments are not made, or costs are not paid, during the same pay period for which credit is taken, if the employer regularly makes those payments on no less than a quarterly basis.

REGISTERED SUPPORT / OPPOSITION:

Support

Air Conditioning Sheet Metal Association
Air-conditioning & Refrigeration Contractors Association

California Chapters of the National Electrical Contractors Association
California Labor Federation, AFL-CIO
California Legislative Conference of the Plumbing, Heating and Piping Industry
California State Association of Electrical Workers
California State Pipe Trades Council
Finishing Contractors Association of Southern California
International Union of Elevator Construtors
Northern California Allied Trades
Southern California Contractors Association
State Building and Construction Trades Council (sponsor)
United Contractors
Wall and Ceiling Alliance
Western States Council of Sheet Metal Workers

Opposition

Air Conditioning Trade Association
Associated Builders and Contractors of California
Associated Builders and Contractors-San Diego Chapter
California Construction Advancement Group
California Construction Compliance Group
Plumbing-Heating-Cooling Contractors Association of California
Western Electrical Contractors Association

Analysis Prepared by: Taylor Jackson / L. & E. / (916) 319-2091

EXHIBIT C

State Building & Construction Trades Council of California

Building Trades Bill To Protect Workers' Wages Sent to Governor

August 12, 2016 - Senate Bill 954, legislation sponsored by the State Building and Construction Trades Council of California to further ensure that construction workers' wages are not deducted without their approval and then used by anti-union, anti-worker contractors and organizations against the workers' best interests, was sent to Governor Jerry Brown's desk today following a Senate vote to concur in Assembly amendments to the measure.

The bill by Senator Bob Hertzberg, D-Van Nuys, was strongly opposed by Associated Builders and Contractors (ABC) and its allies because it strengthens the landmark reforms of SB 776 from 2013 which stopped many such unscrupulous wage deductions by requiring that they be paid only to a joint program or committee established by the federal Labor Management Cooperation Act of 1978.

SB 954 cracks down still further by specifying that for the contributions to be applied to industry advancement funds instead of paid to workers in wages or benefits, the employer must actually be a party to a collective bargaining agreement—agreed to by workers—that authorizes the contributions. This will end the longstanding, shady practice of using workers' own wages to lobby against their best interests, on issues such as project labor agreements, prevailing wage, and health and safety laws.

SBCTC President Robbie Hunter commented: "This important legislation not only protects the wages

workers have rightfully earned, but ensures that when deductions are authorized, workers and their unions have had a fair say in determining their use for the best interests of construction workers."

EXHIBIT D

California Advocates, Inc.

August 18, 2016

The Honorable Edmund G. Brown, Jr.
Governor, State of California
State Capitol, First Floor
Sacramento, CA 95814

Subject: **SB 954 (HERTZBERG) PREVAILING WAGES: EMPLOYER CREDITS: DENIAL FOR NON-UNION CONTRACTORS – REQUEST FOR VETO**

Dear Governor Brown:

Associated Builders and Contractors of California (ABC California) respectfully requests **a VETO** of **SB 954 (Hertzberg),** regarding industry advancement payments made as part of the prevailing wage calculation that is used for work performed on public works projects.

Before January 1, 2004, an employer in the California construction industry was permitted to take credits against the total hourly prevailing wage rate when making employer payments to six categories of fringe benefit programs that accrue to the direct benefit of trade employees. These original categories were (1) health and welfare; (2) pension; (3) vacation; (4) travel; (5) subsistence; and (6) certain apprenticeship or other training programs. In 2003, Governor Gray Davis signed into law Senate Bill 868, which added three new categories of potential credits that do NOT accrue to the direct benefit of trade employees. One of these categories is "industry advancement."

Senate Bill 954 would establish that a contractor cannot take a credit for employer payments made for

"industry advancement" unless it pays the money to an entity established under a collective bargaining agreement (CBA). If a contractor makes an employer payment to any other entity that engages in "industry advancement," no matter how much industry advancement it does, the contractor cannot take the credit.

In addition, an amendment was made to SB 954 on June 14, 2016 which illegally denies equal treatment under the law to individual company apprenticeship programs as well as those formed through non-union contractor training programs. The new amendments essentially say that individual and non-union contracts will no longer be able to include their apprenticeship training contributions as part of the prevailing wage calculations because they are not party to a collective bargaining agreement. This would apply even though these programs have state and federal approval and would harm thousands of apprentices currently involved in these programs.

Some background: In 2003, Governor Gray Davis signed into law SB 868, which added three new categories to the existing six categories of employer payments for which a contractor can take a credit against a prevailing wage paid to a construction trade worker. These categories are spent by various organizations in a variety of ways – mostly unseen by or reported to the state on how they are used. The new categories added to the Labor Code by SB 868 are the following:

> *(7) Worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the*

United States Code), 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 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.

In 2013, Senate Bill 776 (Chapter was enacted to indicate that non-union contractors could not take credit against the prevailing wage for employer payments made to monitor and enforce laws related to public works unless those payments were made to a program or committee established under the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code). These committees are only available to employers covered by a collective bargaining agreement (CBA). SB 776 did not impose any other requirements or restrictions on the programs or committees established under the federal Labor Management Cooperation Act of 1978.

Currently, the California Division of Labor Statistics and Research (DLSR) determines the amount of the credits for items 1-9 by obtaining the applicable union Master Labor Agreement for each trade in each union jurisdiction, scanning through the agreement for employer payments, categorizing them and then

adding them up to determine the prevailing wage. Although DLSR could choose to protect workers by examining each employer payment to determine its eligibility for inclusion in the prevailing wage determination, DLSR does not do so at this time.

As a result, employer payments classified as (7), (8), and (9) are included in prevailing wage determinations, even though they do not accrue to the direct benefit of the contractor's employees. There are concerns that some employer payments classified as (7), (8), and (9) are included in prevailing wage determinations despite being used for purposes other than true industry advancement, such as job targeting programs. A court decision prohibits prevailing wages from being used for job targeting programs, as this would be a an illegal kickback to the employers that made the payments on behalf of an employee rather than an irrevocable payment to the benefit of the employee. SB 954, as before you, again would only deem these payments as an employer payments only if made under the auspices of a CBA. SB 954 goes further to say the "fees" from negotiating a CBA are now an employer payment that is a new acceptable credit towards prevailing wage rate calculation. Again this is discriminatory.

ABC California does not believe that is it equal treatment under the law to statutorily provide that only collectively bargained payments may be used as a credit for prevailing wage purposes. Non-union contractors pay prevailing wages on all public works projects they are awarded, as required by state and federal law.

It is also important to note the lack of transparency about these payments. Neither the federal

government nor the state government require expenditure reports from the entities that receive employer payments classified as (7), (8), and (9). The federal Office of Labor Management Standards (OLMS) in the U.S. Department of Labor nor the Federal Mediation and Conciliation Service also do not require reports from entities that receive such employer payments. Workers have no means to know of, control or receive a proper accounting of the entities receiving these payments designated as credits against their prevailing wages – even those under a CBA. The fact of the matter is that these entities and their payments are essentially unregulated and unions have fought against any transparency of these payments in the state.

In their continued effort to selectively deprive non-union contractors of taking credit against the prevailing wage for employer payments classified as (7), (8), and (9), the proponents, the State Building and Construction Trades Council of California, is exposing flaws in Senate Bill 868 that led Associated Builders and Contractors of California to be an opponent of that bill when it was hastily presented as a gut-and-amend late in the 2003 session. Thirteen years later, the Legislature has yet to examine what these employer payments are used for in practice or how expenditure decisions are made.

ABC California believes there is a strong need for California to exercise strong oversight and regulation of entities that receive employer payments designated under California Labor Code 1773.1(a) (7-9) as a legitimate credit against the prevailing wage paid to workers. SB 954 is not the answer and should not

become law before transparency on how these payments are used is truly established in this state.

For these reasons, ABC California must respectfully urge a **VETO** of **SB 954 (Hertzberg)** when it comes before you for action.

Sincerely,

Julianne Broyles

On Behalf of Associated Builders and Contractors of California

David P. Wolds (Bar No. 96686)
Karl A. Rand (Bar No. 153017)
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ASSOCIATED BUILDERS AND
CONTRACTORS OF CALIFORNIA
COOPERATION COMMITTEE, INC. and
INTERPIPE CONTRACTING, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC. and INTERPIPE CONTRACTING, INC.,
Plaintiffs,
v.
KAMALA HARRIS in her 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

DECLARATION OF JOHN LOUDON IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dept.: Courtroom 5A
Judge: Hon. Roger T. Benitez
Magistrate: Hon. Nita L. Stormes

I, John Loudon, declare as follows:

1. This declaration is based upon my personal knowledge and, if called upon to testify about the facts herein, I would do so truthfully and competently.

2. I am the Executive Director of the Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC") and have held that position since February, 2012. Prior thereto, I was a Missouri State Senator for the period January 1, 2001 through 2008. While in the Missouri Senate, I was the Chairman of the Small Business, Insurance and Industrial Relations Committee and very involved in issues related to prevailing wage and public contracting.

3. As the Executive Director of ABC-CCC, my responsibilities have covered a wide area of activities. As a trade association representing the interests of open shop contractors in California, the ABC-CCC has invested its resources and efforts to support fair and open contracting which provides open shop contractors with opportunities to bid competitively on public works and to create job opportunities for their journeymen and training and employment opportunities for their apprentices.

4. ABC-CCC has an industry advocacy role for the entire open shop building and construction industry in California. Although ABC-CCC receives monthly

contributions from around 100 contractors each month, the organization's efforts to support fair and open competition provide benefits to other separate organizations whose members receive the advantages of ABC-CCC's community outreach, opposition to project labor agreements and now statutorily prohibited labor compliance work, including the Western Electrical Contractors Association, the Associated General Contractors of America, San Diego Chapter, Inc. and the five California Chapters of the Associated Builders and Contractors of America.

5. ABC-CCC's efforts to engage in public debate concerning the cost of project labor agreements on school construction has provided many non-contributors with resources to address project labor agreement demands; its prior efforts to audit wage and hour and also apprentice ratio compliance by both non-union and union signatory contractors working on project labor agreements have rebutted union claims that they are not wage violators; and other organizations such as the Associated Builders and Contractors of Northern California ("ABC Nor Cal") have been provided with funding to join tax payer and other community organizations to expand their reach; and individual companies such as Interpipe Contracting in San Diego have been provided with valuable financial resources to protect their ability to perform public contracting work.

6. All of the industry advocacy activity referred to in the prior sections of this declaration are pursuant to the specific purposes included in ABC-CCC's bylaws to:

a) Advance the interests of the open shop construction industry;

b) Improve work opportunities for employers and employees in the open shop construction industry;

c) Improve open shop construction employee job security and employment opportunities;

d) Encourage understanding of federal and state prevailing wage laws;

e) Encourage the expansion of open shop apprentice and journeymen training programs;

f) Create and assist open shop construction worker protection and educational programs;

g) Protect open shop construction employment opportunities through participation in litigation, legislative activity, and state and federal enforcement proceedings;

h) Provide financial and litigation support to employers and similar organizations involved in open shop construction;

i) Promote efforts to improve the open shop construction industry by furthering public relations efforts;

j) Educate the general public regarding open shop construction issues;

k) Collaborate with prevailing wage enforcement agencies regarding the open shop construction industry; and

l) Coordinate activities with similar organizations in order to achieve these purposes.

7. ABC-CCC is involved in a diverse variety of activities to advance the open shop construction industry in California in the areas of public policy

issue research; research and analysis of state and local legislative proposals and actions promoting or hindering open shop employer work opportunities; review of activities of union-sponsored labor-management cooperation committees; research and analysis of prevailing wage policies and related public education; research and analysis regarding operational aspects of project labor agreements; research and analysis of the use of environmental laws to hinder public works projects in favor of project labor agreements; research and analysis regarding public contracting practices and develop educational materials; financial support for impact litigation supporting the rights of open shop contractors; and coordination of efforts with third party organizations that share open shop industry advocacy goals.

8. A more specific summary of industry advancement activities undertaken by ABC-CCC during my tenure as Executive Director related to research and analysis of public policy issues include these actions:

a) Research public policy issues related to the construction industry and educate the industry and the general public through studies and reports:

i. Major sponsor of several conferences of the Coalition for Adequate School Housing to promote lower cost school funding options.

ii. Distribute monthly newsletters to contractors and public officials and staff regarding industry trends.

iii. Distribute occasional mailers to all local government and school districts on industry trends.

iv. Production of several educational videos on the public benefits of merit shop training programs.

v. Funding of the study entitled *"Are Charter Cities Taking Advantage of State-Mandated Construction Wage Rate. ("Prevailing Wage") Exemptions 4th Edition."*

vi. Funding of the study entitled *"University of Utah Study on Government-Mandated Construction Wage Rate ("Prevailing Wage") Policies in Five California Cities: Not a Reliable Tool for Policymakers."*

vii. Funding of the study entitled *"Sixteen Flaws in the October 2012 Working Partnerships USA Argument for Project Labor.*

viii. *Agreements on Community College District Construction in Santa Clara County."*

ix. Funding of the study entitled *"The Troubled History of Government-Mandated Project Labor Agreements on Contracts for Contra Costa County, California."*

x. Funding of the study entitled *"From Peace to Absurdity – The Emergence of Cost Thresholds and Multi-Project Coverage for Project Labor Agreements in California: Shifting the Purpose from Labor Peace to Cutting Merit Shop Competition."*

9. A summary of work undertaken during my tenure as Executive Director of ABC-CCC related to the research of state and local legislative proposals hindering or promoting work opportunities for open shop contractors include:

a) Identify items related to construction labor policies, public contracting, construction training, and

environmental permitting policies and provide these items to various construction industry association officials and to the public via social media and earned media.

b) Research and report on union campaign involvement with local bond measures on election ballots to identify likely targets for project labor agreements and other policies that favor unions.

c) Research and report on union involvement with Citizens Bond Oversight Committees, including the creation of union-affiliated taxpayer groups to subvert bona fide taxpayer associations and neutralize oversight and analysis of project labor agreements.

d) Maintain close tracking and analysis of Monterey County public policies related to construction issues, including project labor agreements, prevailing wage on private projects, labor compliance, environmental review, transportation planning, water supply, and community choice aggregation electrical generation facilities.

10. During my tenure as Executive Director of ABC-CCC, research various aspects of prevailing wage policies and encourage greater understanding among industry and general public about them by sponsoring a series of prevailing wage compliance workshops for open shop contractors.

11. During my tenure as Executive Director of ABC-CCC, research various aspects of project labor agreements and encourage greater understanding among industry and general public about them:

a) Tracking, obtaining, and compiling all project labor agreements on public works in California and also on private projects where possible.

b) Circumstances leading to the development and implementation of a project labor agreement imposed administratively on California High-Speed Rail Authority's Construction Package 1.

c) Performance of the Helmets to Hardhats program incorporated in some government-mandated project labor agreements and development of recommendations on alternative policies that may better encourage veterans hiring in construction.

d) Analysis of the legality of local governments being able to discuss negotiation status of project labor agreements in closed session.

e) Use of the grievance procedures mandated within a project labor agreement at the San Diego Unified School District.

f) Development of Project Excellence Provisions as alternative to project labor agreements.

12. During my tenure as Executive Director, research various aspects of environmental review for construction projects and encourage greater understanding among industry and general public about them:

a) Identify construction union involvement with actions related to the California Environmental Quality Act (CEQA) and National Environmental Protection Act (NEPA).

b) Show correlation between these actions and efforts to obtain economic concessions from public, commercial, residential, industrial, and renewable energy developers.

c) Identify and compile evidence of environmental groups in California that appear to be front groups for construction trade unions.

13. During my tenure as Executive Director of ABC-CCC, research public contracting practices and encourage greater understanding among industry and general public about them:

a) Evaluate contractor performance to determine compliance with claims made in proposals for contracts awarded based on "best value" criteria.

b) Evaluate and compile evidence regarding number of bidders and low bid amounts under various circumstances related to economic activity, workforce shortage, and bidding conditions.

c) Identify lease-leaseback contracts for school construction that may be considered unconventional.

14. During my tenure as Executive Director of ABC-CCC, evaluate activities of public policy programs that provide research and education about construction for the industry and the general public:

a) University of California Miguel Contreras Labor Program and its affiliates.

b) Working Partnerships USA, particularly for the San Francisco Bay Area Regional Economic Prosperity Plan - Economic Prosperity Strategy.

c) Smart Cities Prevail.

15. During my tenure as Executive Director of ABC-CCC, engage in litigation and legal defense of interest to taxpayers, workers and contractors:

a) Provided major funding in defense of the successful legal effort supporting the right of the City

of Vista and other public agency plaintiffs to set their own wage rates.

b) Financially supported litigation involving Russ Will Mechanical emanating from efforts to redefine offsite work as prevailing wage work.

c) Successfully defended Interpipe Contracting from pressure to pay double benefits on a public project.

16. ABC-CCC accepts "other" contributions from contractors engaged in public works construction in California pursuant to California Labor Code § 1773.1. Our contributors perform work in numerous construction trade classifications. Contribution payments are normally submitted on a monthly basis and the hourly contribution rates cannot exceed the hourly rates for various classifications set forth in the wage determinations issued by the California Department of Industrial Relations ("DIR").

17. ABC-CCC has filed and published fictitious business name statements for the California Construction Compliance Group ("CCCG") and the California Construction Advancement Group ("CCAG"). CCCG was utilized exclusively through December 31, 2013. This DBA designation was discontinued after SB 776 became effective on January 1, 2014. SB 776 ended the labor compliance audit activity undertaken by ABC-CCC. Thereafter, the CCAG reference was used.

18. Numerous publications and studies were released under the CCCG fictitious business name. For example, Kevin Dayton of Labor Issues Solutions was contracted to perform a number of academic studies related to project labor agreements which

were published under the CCCG fictitious business name.

19. ABC-CCC is organized as a tax exempt mutual benefit corporation of the state of California. A true and correct copy of the organization's IRS Form 990 return for the fiscal year ending September 30, 2015, is attached hereto as Exhibit A. As reflected in the 990, annual contributions to ABC-CCC for the fiscal year ending September 30, 2015, totaled $1,125,161 and the average numbers of contractors submitting contributions was around 100 per month. The "other" contributions received by this organization compare to contributions received by tax-exempt, collectively bargained industry advancement funds and labor-management cooperation committees also funded by "other" contributions.

20. I have recently traveled the length of the state of California talking with participating employers about ABC-CCC, the value of their contributions, the achievements of the organization and the impact of SB 954. I talked with the owners of the companies or their designees responsible for the decision to contribute to ABC-CCC. In the past 60 days, I had conversations with over 50 employer representatives in this regard. Every employer representative from our ten biggest contributors, representing 80% of our annual contributions, stated that SB 954 would end the company's contribution payments. The reason uniformly given is that they are so heavily scrutinized by labor unions and the state that they have to follow the absolute letter of the law. Public works bids are so competitive that the addition of any amount over the per diem wage rate beyond what their union and non-union competitors make, would make these

companies non-competitive and cost them jobs. While many expressed deep appreciation for our work and a desire to keep it going, not a single contractor committed to making voluntary contributions after that date. True and correct copies of correspondence and email messages from ten contributing employers stating their intention to terminate contributions as of January 1, 2017, are attached hereto as Exhibit B.

21. The loss of monthly funding will end ABC-CCC's ability to provide the industry advocacy that it has offered in the past. Based upon the comments personally made to me by the owners of the contributing employers, monthly contributions will be decreased by over 90 percent effective with hours worked in January, 2017 if the employer payment credit is eliminated by SB 954. At the present time, the Board of Directors of ABC-CCC has curtailed the funding of industry advancement activities because of the pendency of this litigation and the inordinate costs which it imposes. If contributions are reduced to the extent referenced above as of January 1, 2017, this organization will struggle to keep up with the legal expenses faced in this litigation and possible appeals. Program operations, research and analysis, public advocacy, and the representation of open shop contractor member's interests will cease.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at 700 Seacoast Dr. #107, Imperial Beach, California on 10/31/2016.

By: John Loudon

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EXHIBIT A

* * *

EXHIBIT B

* * *

David P. Wolds (Bar No. 96686)
Karl A. Rand (Bar No. 153017)
Jeffrey A. VanderWal (Bar No. 228107)
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Attorneys for Plaintiffs,
ASSOCIATED BUILDERS AND
CONTRACTORS OF CALIFORNIA
COOPERATION COMMITTEE, INC. and
INTERPIPE CONTRACTING, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

KAMALA HARRIS in her 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

DECLARATION OF TERRY SEABURY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dept.: Courtroom 5A
Judge: Hon. Roger T. Benitez
Magistrate: Hon. Nita L. Stormes

I, Terry Seabury, declare as follows:

1. This declaration is based upon my personal knowledge and, if called upon to testify about the facts herein, I will do so truthfully and competently.

2. I am the Executive Director of the Western Electrical Contractors Association, Inc. ("WECA") and I have held this position since 2002. WECA is a nonprofit trade association based in Rancho Cordova, California which was formed in 1929 and which represents the interests of open shop electrical contractors involved in the public works building and construction industry. WECA has over 200 contractor members throughout the State of California who employ over 7500 employees. WECA is approved statewide as a state and federally approved Apprenticeship training program and currently trains over 4000 electricians and low voltage technicians in their trade. Our members embrace the idea that fair and open competition is the key to a robust and growing economy. To that end, we maintain close working relationships with many other merit shop advocates and organizations such as the Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC").

3. In my role as WECA's Executive Director, CEO I have become familiar with the efforts undertaken by

ABC-CCC to represent the interests of open shop contractors in the building and construction industry in California. Numerous member contractors of WECA contribute to ABC-CCC in accordance with California Labor Code § 1773.1 because ABC-CCC actively protects the rights of WECA members to fairly compete for public work projects through its industry advancement and education, advocacy and legislative efforts.

4. Because ABC-CCC is an open shop industry advocate in the building and construction marketplace, and because many WECA members support ABC-CCC with contributions, it has not been necessary for WECA to create an organization similar to ABC-CCC. ABC-CCC's support of the interests of WECA's open shop contractor members is not unique. ABC-CCC's efforts support the goals of other California open shop building and construction organizations including the Coalition for Fair Employment in Construction, the Air Conditioning Trade Association, the Associated General Contractors of America, San Diego Chapter, Inc. and the California Chapters of the Associated Builders and Contractors, Inc.

5. If SB 954 takes effect on January 1, 2017, I am personally aware that WECA members making contributions to ABC-CCC will terminate those contributions because the continuation of contribution payments by WECA members to ABC-CCC, in the event that the employer payment credit is eliminated by SB 954, will make contributors to ABC-CCC less competitive on public works projects.

6. ABC-CCC has provided assistance to WECA and its members in opposing project labor agreements,

engaging in monitoring and compliance on prevailing wage projects and taking action as an open shop industry advocate to allow open shop contractors to compete competitively in the marketplace.

7. In the event that ABC-CCC loses its funding and ends its operations, WECA members will not only lose an industry advocate, but will also be less effective in bidding jobs and securing public construction employment. ABC-CCC has made WECA members more competitive on California public works projects, has protected work opportunities for their employees and increased training opportunities for their apprentices.

8. ABC-CCC's efforts help assure that apprentices enrolled in the three California state and federally approved apprenticeship programs administered by WECA have a fair chance to work on public projects in California. As a result, ABC-CCC helps protect apprentices and qualified and certified Journeyman electricians against discrimination because of their choice to remain free of union representation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California on Oct. 26, 2016.

By: Terry Seabury,
Executive Director, CEO
Western Electrical Contractors
Association, Inc. (WECA)

David P. Wolds (Bar No. 96686)
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Attorneys for Plaintiffs,
ASSOCIATED BUILDERS AND
CONTRACTORS OF CALIFORNIA
COOPERATION COMMITTEE, INC. and
INTERPIPE CONTRACTING, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

v.

KAMALA HARRIS in her 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.

Appendix K-2

Case No. 3:16-cv-02247-BEN-NLS

DECLARATION OF MARY SMITH IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dept.: Courtroom 5A
Judge: Hon. Roger T. Benitez
Magistrate: Hon. Nita L. Stormes

I, Mary Smith, declare as follows:

1. This declaration is based upon my personal knowledge and, if called upon to testify about the facts herein, I will do so truthfully and competently.

2. I am Vice President and Controller of Interpipe Contracting, Inc. ("Interpipe"), a woman-owned plumbing and pipeline business located at 10870 Hartley Road, Santee, CA 92071. Interpipe actively bids California public works projects and the company has worked on school construction and other prevailing wage projects in the San Diego area since 1985. Our company has been open shop from its inception and we are supported by our employees in that choice.

3. We have contributed "other" contributions pursuant to California Labor Code section 1773.1(a)(9) to the Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC") since 2009. We benefit from the advocacy that ABC-CCC offers to small companies like ours and its efforts in furtherance of open shop construction. ABC-CCC's opposition to project labor agreements in San Diego county assists all open shop contractors interested in bidding public works whether they contribute to ABC-CCC or not.

4. Since we do not have the resources to create open shop construction promotional materials ourselves, we rely on information and resources funded by ABC-CCC. For example, in opposing project labor agreements in our area that limit work opportunities for Interpipe and our employees, I refer to the project labor agreement cost study which was funded by ABC-CCC and prepared by National University System Institute for Policy Research.

5. ABC-CCC has also provided Interpipe with funds to pay for legal fees incurred in defending our right to work. Over the years, our company completed numerous projects for the Southwestern Community College District ("SCCD"). SCCD recently imposed a project labor agreement which limits our work opportunities unless we agree to comply with the project labor agreement. Although we can provide economical services at a lower cost without the project labor agreement, we successfully bid on a SCCD project as an experiment to determine whether we could work under the project labor agreement efficiently. The complications and expenses inherent in the project labor agreement became immediately apparent when we submitted our company's fringe benefit plans for review and a determination whether they were "equal to or better than" the union programs specified in the project labor agreement. We preferred to use our own ERISA-compliant plans since our employees on that project would never satisfy the union plans' exclusionary eligibility requirements and would lose benefit coverage. After SCCD's consultant determined our benefits to be equivalent, the union challenged the decision and our low bid was threatened. ABC-CCC provided funds to pay for the legal resources we needed to defend our position. We

prevailed and used our benefit programs for the employees working on the project thanks to ABC-CCC and this result will provide helpful precedent if we bid future SCCD work. ABC-CCC's advocacy and support is unique in our experience and I am not aware of another organization that provides the resources we need to protect our ability to compete in the public works market. But for ABC-CCC's financial assistance, we would have lost this job.

6. If we sign future project labor agreements in order to work on public school projects like those at SCCD, the project labor agreement will obligate us to contribute to collectively bargained labor-management cooperation committees and/or other industry promotion funds sponsored by labor organizations. These funds would be used for political and other purposes which would not create jobs or opportunities for Interpipe or its employees. We want to continue to contribute to ABC-CCC, but SB 954 will compel us to end our contributions to ABC-CCC effective January 1, 2017. The additional payment required to fund ABC-CCC without the employer payment credit against prevailing wage rates would make our costs increase so as to be prohibitive in bidding most state prevailing wage projects.

7. Interpipe customarily uses employees in eight (8) different construction trade classifications on its prevailing wage projects. The range of our "other" contributions for these trades is from $.39 to $1.85 per hour and the average is $.85.5 per employee per hour. When calculated on a project basis, adding this amount to our job costs, if we lose the employer payment credit under SB 954, will make Interpipe a non-competitive bidder. As a result, we cannot

continue to contribute to ABC-CCC if SB 9 54 takes effect on January 1, 2017.

8. ABC-CCC supports fair and open competition and represents the interests of small employers like Interpipe in the prevailing wage marketplace. If SB 954 becomes effective, and the employer payment credit for our contributions to ABC-CCC is eliminated, we lose our most trusted industry advocate and a significant resource in our fight for fair competition in the public works industry. In fact, we have already witnessed a reduction in ABC-CCC's financial assistance as a result of SB 954. Interpipe opposes a bond measure known as Proposition X proposed by the Grossmont-Cuyamaca Community College District. Attached as Exhibit A is a true and correct copy, bearing the clerk's date stamp, of my official opposition statement entitled "Vote No on Measure X." which will appear in the voter pamphlet for the general election in November. My opposition to this bond is based on the project labor agreement it contains and Interpipe's interest in fair and open competition. When funds were requested from ABC-CCC to oppose this measure, we were advised that no funds are available due to ABC-CCC's costs in opposing SB 954 and commencing litigation to enjoin it. SB 954 has already succeeded in its goal of eliminating advocacy resources—which are available to unions—and restricting the free speech of all open shop contractors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santee, California on 10/27/16.

By: Mary Smith

Appendix K-6

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Appendix K-7

EXHIBIT A

Vote No on Measure X.

This is my personal story about how this bond, and the hidden deals behind it, harm me and my small business in East County.

My name is Mary Smith and I own Interpipe Contracting, Inc. We started in East County 31 years ago. We employ 36 people, most of whom live in East County. My daughters went to college in this district. We helped build the Health and Sciences Complex at Grossmont College and the Student Center at Cuyamaca College.

Despite our past success, and our commitment to pay prevailing wage and provide excellent benefits, this District wants to shut out my workers on this bond. Why? Because buried deep in the paperwork of this bond is a political deal to mandate a unionized workplace.

This political deal prevents my employees from working in their own community simply because they choose not to unionize. It's not fair to discriminate against hard working qualified construction workers based on union status. If this type of discrimination spreads, we will forced to lay off our local workers. Back-room political deals like this hurt local businesses and motivate industrious young people to leave California.

Please don't endorse this type of discrimination with your vote. Send this bond back to the drawing board and tell these politicians to fix it to include all local workers. We all deserve the right to work in East County.

Please Vote No on Measure X.

NoOnXEastCounty.Com

Mary Smith
Owners, Interpipe Contracting, Inc.
Santee, California

No. 17-55248 (Consolidated with 17-55263)

IN THE 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.

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.

On Appeal from the United States District Court for the Southern District of California, San Diego, Honorable Roger T. Benitez, District Judge

MOTION FOR AN EXPEDITED HEARING

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Counsel for Plaintiff-Appellant Associated Builders and Contractors of California Cooperation Committee, Inc.

INTRODUCTION

Pursuant to Local Rule 27-12, Appellant ABC-CCC hereby moves for expedited hearing of its appeal of the district court's denial of the motion for preliminary injunction and dismissal of its claims.

Good cause exists for expediting the hearing because Appellant is now suffering and will continue to suffer significant and irreparable constitutional harm: the loss of its ability to speak freely. Since SB 954 went into effect, ABC-CCC has lost approximately 99% of its funding, forcing it to shut down most of its

operations and to cease all advocacy. Decl. of Dick Johnson ¶ 6. This has caused ABC-CCC to refrain from participating in several ongoing public debates about the use of Project Labor Agreements in public contracts. *Id.* ¶7. If SB 954 is struck down, ABC-CCC will immediately be eligible for prevailing wage contributions. ABC-CCC seeks the speedy resolution of this lawsuit so that it can collect those contributions, which will allow it to resume its advocacy efforts. *Id.* ¶ 8.

This case involves important federal questions related to the exercise of free speech and equal protection: whether the government can discriminate among viewpoints through the use of a proxy and whether it can evade First Amendment scrutiny by characterizing a law in terms of its purpose. Preference should be given to these important constitutional issues. *Zukowski v. Howard, Needles, Tammen, & Bergendoff*, 115 F.R.D. 53, 55 (D. Colo. 1987) ("It is abundantly clear that Congress intended to give preference on crowded court dockets to federal questions.").

Appellees oppose the motion and Co-Appellant Interpipe Contracting supports it. Briefing has concluded and ABC-CCC is prepared to present argument as soon as practicable.

FACTUAL BACKGROUND

This case concerns SB 954, which restricts the types of payments that qualify towards contractors' responsibility to pay the "prevailing wage" when working on public projects. Employers can satisfy the prevailing wage requirement by paying a combination of cash and other benefits—including contributing to

an employee's pension fund, providing health benefits, or donating to an "industry advancement association." *See* SB 954. ABC-CCC is one such non-profit association, and it was formed to advocate from an "open-shop" perspective. ER 68. That is, it advocates against the use of project labor and collective bargaining agreements in public contracting.

Formerly, contributions to *any* industry advancement fund qualified towards an employer's obligation to pay the prevailing wage. Under SB 954, prevailing wage contributions may only be made if authorized by a union-approved collective bargaining agreement. ABC-CCC alleges that this essentially allows unions to control who receives prevailing wage contributions, and because the organization advocates contrary to union interests, it will no longer receive those contributions. ER 160. It therefore argues that the law discriminates against it based on its viewpoint in violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment.[1]

On November 1, 2016, ABC-CCC moved for a preliminary injunction on the basis that it would face an almost total loss of funding when the law went into effect on January 1, 2017, and it would therefore be forced to stop its advocacy activity. ER 54. In support of its motion, ABC-CCC provided declarations attesting to the fact that it was likely to lose a significant portion of its funding due to SB 954. *Id.* The attached declaration of ABC-CCC's Chairman shows that it does in fact face an almost complete loss of funding and that it has been compelled to cease its

[1] ABC-CCC also alleged that SB 954 was preempted by federal law, and that claim has been separately appealed by Co-Appellant Interpipe Contracting, Inc.

advocacy since the law went into effect. *See* Decl. of Dick Johnson. The district court denied the preliminary injunction motion on the basis that ABC-CCC was unlikely to succeed on the merits, and dismissed the causes of action for failure to state a claim. ER 3. This appeal followed.

ARGUMENT

Expedited hearing is warranted in this case. Ninth Circuit Rule 27-12 provides that "[m]otions to expedite briefing and hearing . . . will be granted upon a showing of good cause." 9th Cir. R. 27-12. Good cause expressly includes "situations in which . . . in the absence of expedited treatment, irreparable harm may occur." *Id.*; *see also* Fed. R. App. P. 2 ("On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs."); 28 U.S.C. § 1657(a) ("Notwithstanding any other provision of law, each court of the United States shall . . . expedite the consideration of any action . . . if good cause therefor is shown.").

SB 954 is causing ABC-CCC to suffer an ongoing constitutional harm: the loss of First Amendment rights—which this Court has held "unquestionably constitutes irreparable injury." *See Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir 2012) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). ABC-CCC is an industry advancement fund that advocates against the use of project labor and collective bargaining agreements in public projects. Prior to SB 954, it was entitled to receive prevailing wage contributions, which

comprised most of its annual budget. Decl. of Dick Johnson ¶¶ 3-5. Since SB 954 has gone into effect, prevailing wage contributions have completely ceased and donations have therefore declined by 99%. *Id.* ¶ 6. That decline has forced it to scale back its operations and to stop its advocacy activity altogether. *Id.*

ABC-CCC is missing important opportunities to contribute to the debate over public contracting. Johnson Decl. ¶¶ 7, 8. During the past few weeks, several California agencies have considered using Project Labor Agreements—including Santa Rosa Junior College District, Antelope Valley College, Anaheim Union High School District, Qualcomm Stadium in San Diego, Kern Community College, Kern High School District, and others. *Id.* If ABC-CCC had funding, it would have participated in these debates. *Id.* But because it can no longer receive prevailing wage contributions, it no longer has the resources necessary to advocate its open-shop viewpoint. *Id.* ABC-CCC seeks a speedy resolution of this case so that it may accept prevailing wage contributions and therefore continue its vigorous advocacy efforts from an open-shop perspective. *Id.*

ABC-CCC sought preliminary injunctive relief to avoid the exact harm it is currently suffering. Those same considerations apply now, except now the law has actually gone into effect and it currently prohibits ABC-CCC from exercising its First Amendment rights—an "unquestionabl[e] . . . irreparable injury." *Farris*, 677 F.3d at 868. It therefore asks the Court to expedite the hearing in the same way that it normally does for appeals of motions for injunctive relief. *See* 9th Cir. R. 34-3 (automatically expediting the briefing schedule in actions for preliminary injunctive relief).

CONCLUSION

This is a case of great public significance: whether the state may evade the First Amendment's requirement of viewpoint neutrality by using a proxy, or by characterizing a law as a regulation of "conduct." While the lawsuit remains pending, SB 954 continues to stifle an important voice in the debate over public contracting in California solely because of its viewpoint. ABC-CCC therefore respectfully requests that the Court expedite hearing to as soon as is practicable.

DATED: September 5, 2017.

Respectfully submitted,

DAMIEN M. SCHIFF
ANASTASIA P. BODEN
OLIVER J. DUNFORD
Pacific Legal Foundation

By s/ Anastasia P. Boden
ANASTASIA P. BODEN

Counsel for Plaintiff-Appellant
Associated Builders and Contractors of
California Cooperation Committee, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Anastasia P. Boden

ANASTASIA P. BODEN

No. 17-55248 (Consolidated with 17-55263)

IN THE 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.

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.

On Appeal from the United States District Court for the Southern District of California, San Diego, Honorable Roger T. Benitez, District Judge

DECLARATION OF DICK JOHNSON IN SUPPORT OF MOTION FOR EXPEDITED HEARING

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Counsel for Plaintiff-Appellant Associated Builders and Contractors of California Cooperation Committee, Inc.

I, Dick Johnson, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge and, if called as a witness, I could and would competently testify thereto under oath.

2. I am the Chairman of the Board of Directors of Appellant Associated Builders and Contractors of California Coordination Committee (ABC-CCC).

3. Before SB 954 was enacted, ABC-CCC had an annual budget of approximately $1,000,000/year, which came predominantly from prevailing wage contributions.

4. ABC-CCC used those donations to fund studies, put on conferences, testify in front of legislatures, and otherwise advocate from an open-shop perspective, *i.e.* to advocate against the use of Project Labor Agreements and unionized labor in public contracting.

5. Since SB 954 went into effect on January 1, 2017, prevailing wage contributions to ABC-CCC have stopped entirely, causing ABC-CCC's budget to drastically decline. Monthly donations to ABC-CCC have gone from $ 100,000 month to just over $1000/month.

6. Because ABC-CCC's budget has been cut by 99%, it can no longer afford to engage in advocacy activity. It has been forced to cut staff, including its Executive Director, and the organization is now in a holding pattern until the lawsuit concludes.

7. At this time, ABC-CCC is missing important opportunities to pa1ticipate in the debate over public contracting. During the past few weeks, several California agencies have considered using Project Labor Agreements including Santa Rosa Junior College District, Antelope Valley College, Anaheim Union High School District, Qualcomm Stadium in San Diego, Kern Community College, Kern High School District, and others. If ABC-CCC had funding, it would have participated in these debates.

8. So long as the lawsuit remains pending and SB 954 is still on the books, ABC-CCC does not expect to receive prevailing wage contributions and it will not

have sufficient funds to engage in speech activity. If SB 954 were overturned, ABC-CCC could accept prevailing wage contributions and resume its advocacy activity.

9. I declare under penalty of pe1jury that the foregoing 1s true and correct.

DATED: September 1, 2017.

/s/ Dick Johnson
DICK JOHNSON

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Anastasia P. Boden
ANASTASIA P. BODEN