No. 18-1092

In the

Supreme Court of the United States

ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE,
Petitioner,

v.

XAVIER BECERRA, *et al.*
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does a plausible allegation that a facially "neutral" law acts as a proxy for viewpoint discrimination state a valid claim for relief under the First Amendment?

2. Does a law that determines which private parties may receive a certain type of private donation constitute a government subsidy of speech, or instead a restriction on private speech?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing First Amendment issues similar to those raised in this case, including *Janus v. Am. Fed. of State, County, and Mun. Emp.*, 138 S.Ct. 2448 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298 (2012).

SUMMARY OF ARGUMENT

A prevailing wage law protects unionized employers and employees by requiring all employers to pay the "prevailing" (or unionized) wage.[2] This law stops nonunion employers from competing against unionized employers based on the price of labor. California has a minor exception from the requirement to pay the prevailing wage on public works contracts. Under the law, employers are permitted to credit against the prevailing wage rate certain items, including a contribution made to an "industry advancement fund."

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

[2] Institute for Justice, Davis-Bacon Act, https://ij.org/case/brazier-construction-co-inc-v-reich/ (last visited April 16, 2019)

Prior to the enactment of the law at issue in this case, this credit applied equally to unionized and nonunion shops, keeping all employers and employees on an equal footing. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 884-85 (9th Cir. 2018). California amended that law, however, to allow a payment to an industry advancement fund to be credited against the prevailing wage payment to employees only if the fund is approved in a collective bargaining agreement. *Id.* at 885.

This amendment has two important results: (1) only union-backed industry advancement funds are eligible to receive funding; and (2) because of this scheme, nonunion employees will be paid more for work on public works projects (because none of their prevailing wage salary can be diverted to an industry advancement fund) than unionized employees. The law does not benefit employees.

The only winner in this scheme are the union-backed industry advancement funds and the viewpoints they espouse. As the court below recognized, because the law selects the preferred speaker (union-backed industry advancement funds) it has the effect of also promoting specific viewpoints (promoting project labor agreements and opposing "open shops"). *See id.*

While the California Legislature attempts to characterize this law as a protection of employees, the court below justified this diversion of funds for political purposes as a state subsidy of speech. *Id.* at 896. In actual practice, the law as amended functions as neither a subsidy nor a protection of workers. No state money is transferred, and the state incurs no costs – so it cannot be a subsidy. Further, enhancing

the political action voice of a union at the expense of the employees neither protects workers nor qualifies as a legitimate (let alone) compelling government purpose.

Review is warranted because the decision below introduces confusion into First Amendment analysis by creating a new "government subsidy" doctrine that would allow governmental entities to favor particular speakers and viewpoints. Further, the decision conflicts with a number of decisions of this Court including *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Introduces Confusion into the Government Subsidy Analysis.

This Court has ruled that the First Amendment does not require government to "subsidize" speech. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 360-61 (2009); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188 (2007). As this Court explained in *Ysursa*, the government was not required to assist the union's speech "speech by granting the unions the right to charge [government-compelled] agency fees for election activities." *Ysursa*, 555 U.S. at 361.

A subsidy exists where an organization receives a tax advantage for its speech activities that is not offered to other organizations. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983); *but see Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141-43 (2011) (noting a distinction between tax credits and government expenditures). The Court has also found a subsidy where government spends

funds to assist another's speech. For instance, in *Ysursa*, this Court characterized "publicly administered payroll deductions" as a subsidy. *Ysursa*, 555 U.S. at 359. Similarly, a "state-bestowed entitlement" to require public employees to pay an agency shop fees to a union as a condition of public employment operated as a form of subsidy. *Davenport*, 551 U.S. at 189 (2007).

The Ninth Circuit vastly expands this subsidy analysis to situations where there is no government expenditure or tax advantage. The money at issue here never belonged to the government. It is the property of either the employer or the employee. The state is merely acting as a regulator in determining how that money may be spent. Unionized employers can spend a portion of employee wages on union-approved industry advancement funds, but nonunionized employers may not.

The court below recognized that this regulation will affect the content of the resulting speech. Since the new law took effect, industry advancement funds supporting open shops and opposing "project labor agreements" no longer receive funding from contractors working on public works projects. *Interpipe*, 898 F.3d at 885). In this respect, there is at least a strong suspicion that "viewpoint discrimination is inherent in the design and structure of this" law. *See National Institute of Family and Life Advocates*, 138 S.Ct. at 2379 (Kennedy, J., concurring). Here the state offers no subsidy but instead acts in its role as regulator to determine what voices will be heard. When the state acts in the role of regulator, content-based distinctions are more likely to "impermissibly interfere with the marketplace of ideas." *Davenport*, 551 U.S. at 188.

The state argues that the law at issue merely assures that the affected employees have consented to the deduction. *Interpipe*, 898 F.3d at 901. But that "consent" comes only through the collective bargaining agreement. *Id.* at 883. Using the collective bargaining agreement as a proxy for employee "consent" to use wages for political purposes is foreclosed by this Court's decision in *Janus*.

In *Janus*, this Court ruled that forcing public employees to subsidize a union as a condition of continued employment violated the First Amendment. *Janus*, 138 S.Ct. at 2459-60. The Court in *Janus* recognized that it is clear that "'a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.'" *Id.* 2470. Neither, however, may government require an individual to give up their First Amendment rights as a condition of working for a private employer on a public works project. Yet that is precisely what California suggests here in its argument for "collective consent."

Even if "employee consent" was the purpose of allowing only unions to select an industry advancement fund to receive a portion of employee wages, the means chosen misses the mark. The law counts everything in the collective bargaining agreement as the product of employee consent. Yet, as this Court's ruling in *Janus* establishes, that is simply not the case. The union operates as the "exclusive representative" of employees in a bargaining unit. The union's collective bargaining agreement restricts the rights of individual employees to meet separately with the employer on employment matters. *See* 29 U.S.C. § 159.

Dissenting employees have no voice, even if they would withhold consent.

The scheme based on employee consent is also underinclusive. Underinclusiveness is determined by assessing how well a law serves a government interest. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 66-67 (1983). The statute does not treat industry advancement contributions to which nonunionized employees consent the same as industry advancement expenses approved in collective bargaining agreements. In fact, California law does not provide nonunion shops any means by which to obtain employee consent to spend industry advancement contributions.

By restricting the "employee consent" process to a fictional "collective consent" the law prohibits employees in nonunion shops from contributing to industry advancement funds using prevailing wage contributions in the same manner as employees of a unionized employer. The law could have permitted consent to be obtain through an individual contract, a signed written statement, or any other means that do not require that a union speak on behalf of the employee. Yet no such alternative consent mechanism exists in the law. It appears that this notion of "consent" is merely a means of masking viewpoint discrimination.

"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. Entertainment Merchants Assn.*, 564 U.S. 786, 792 (2011). Underinclusiveness often occurs in the form of selective targeting or "selectivity". *National Institute of Family and Life Advocates*, 138 S. Ct. at 2379; *see also Williams-Yulee*

v. Fla. Bar, 135 S.Ct. 1651, 1681 (Scalia dissenting). Underinclusiveness suggests a real possibility that "individuals were targeted because of their beliefs." *National Institute of Family and Life Advocates*, 138 S. Ct. at 2379. The Ninth Circuit's brand new "subsidy" analysis, however, invites governments to engage in content and viewpoint discrimination by permitting one group to speak and erecting barriers to speech by others. Review is necessary to resolve the confusion in First Amendment law created by the Ninth Circuit.

II. Review Is Warranted Where the Lower Court's Analysis Conflicts with the Decisions of this Court on Speaker-Based Speech Discrimination.

Just last term, this Court noted that "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are often in accord with its own views.'" *National Institute of Family and Life Advocates*, 138 S.Ct. at 2378. The regulation at issue here is much less subtle. As the Ninth Circuit noted, the speaker-based discrimination here favors union-supported speech at the expense of speech by organizations that favor open shops and oppose project labor agreements. California has chosen to support one voice and burden those that oppose the chosen voice.[3]

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[3] That the California Legislature and Governor chose to favor unions with this law should come as no surprise. Unions are staunch supporters of the overwhelming majority party in California government (at the time SB 954 was passed the California Democratic party held the governorship along with a two-thirds majority in both the state houses). This is also the party most favored by union political donations. Building Trade Unions, for

The Ninth Circuit, however, relied on its earlier ruling in *First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017). *First Resort* upheld a San Francisco ordinance that was similar in effect to the state law this Court struck down in *National Institute of Family and Life Advocates v. Becerra*. Where the state law in *National Institute* required pro-life pregnancy centers to post information regarding the availability of abortions, *First Resort* instead prohibited advertising by pro-life pregnancy centers that did not disclose in their advertising that they did not refer women for abortions. *See First Resort*, 860 F.3d at 1269-70. The panel in *First Resort* (the same panel that produced the decision this Court overturned in *National Institute of Family and Live Advocates*) ruled that the First Amendment was not implicated by the ordinance. Because the ordinance characterized the offending ads as "unlawful," they were thus rendered unprotected commercial speech. *Id.* at 1272. The court below relied on *First Resort* for the proposition that a motive to favor one speaker's speech over another is not a basis to find that a law unconstitutionally discriminates based on viewpoint.[4] *Interpipe*, 898 F.3d at 900.

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instance, dedicated 86% of their candidate and party spending on Democratic candidates in 2018. Building Trade Unions: Long-Term Contribution Trends, OpenSecrets.org (last updated 2018), https://www.opensecrets.org/industries/totals.php?cycle=2018&ind=P04 (last visited April 17, 2019).

[4] The *First Resort* court relied on a passage from this Court's decision in *United States v. O'Brien*, 391 U.S. 367, 383 (1968) stating that Court does not consider the illicit motives of the legislature in enacting a law. This passage is now most often cited by dissenting opinions as a point that the majority did not follow. *See*, *e.g.*, *United States v. Windsor*, 570 U.S. 744, 795 (2013) (Scalia, J., dissenting); *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 783 (2011) (Kagan, dissenting);

Further, the Ninth Circuit's ruling conflicts with this Court's decision in *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015). In *Reed*, this Court rejected the Ninth Circuit's conclusion that speaker-based discrimination means that the law is content neutral. Instead, this Court noted that speaker-based restrictions too often are used to control speech content. *Reed*, 135 S.Ct. at 2230. If that is the case, then strict scrutiny applies. *Id.* (citing *Turner Broadcasting v. Federal Communications Comm'n*, 512 U.S. 622, 658 (1994)). Characterization of a law "as speaker based is only the beginning—not the end—of the inquiry." *Id.* The Ninth Circuit, however, declined to engage in that inquiry. *Interpipe*, 898 F.3d at 900-01.

The ruling below also conflicts other the rulings of this Court. Just last term in *National Institute of Family Life Advocates*, this Court noted that "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.'" *National Institute of Family and Life Advocates*, 138 S.Ct. at 2378; *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 834-35 (1995); *see also Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 340 (2010).

This Court has noted that judges should inquire beyond the face of a statute to determine whether the regulation is, in fact, "a façade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 811 (1985) (citing *Perry Education Ass'n*, 460 U.S. at 49). The

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City of Mobile v. Bolden, 446 U.S. 55, 135 (1980) (Marshall, J., dissenting).

court below, however, steadfastly declined to look into why California allowed unions, and only unions, to designate funds for payment to industry advancement funds. This Court should grant review to resolve the conflict.

CONCLUSION

The Ninth Circuit decision at issue here has introduced confusion into the law of the First Amendment. The court found a "subsidy" where none existed, and in so doing upheld a speaker-based discrimination that is thinly-veiled viewpoint discrimination. The Court should grant review in order to resolve the confusion created by the court below.

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Respectfully submitted,

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