

No. _____

In the
Supreme Court of the United States

COUNCIL FOR EDUCATION AND
RESEARCH ON TOXICS,

Petitioner,

v.

CALIFORNIA CHAMBER OF COMMERCE,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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JANUARY 24, 2023

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BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Does a preliminary injunction issued by a district judge enjoining a state attorney general and nongovernmental organizations from filing public interest lawsuits in state court—prior to any determination of their merits—constitute an unlawful prior restraint on the exercise of the organizations’ First Amendment petition rights?
2. Does the “illegal objective” exception to the prior restraint doctrine apply outside the context of the National Labor Relations Board’s authority to block retaliatory employer lawsuits to allow a district judge to enjoin the filing of public health lawsuits in state court, because the judge predicts such lawsuits may violate federal law?
3. Can a district judge issue a preliminary injunction enjoining a public benefit organization from filing public interest lawsuits in state court because such lawsuits may violate defendants’ First Amendment right against false compelled speech where the public benefit organization has already prevailed on such First Amendment defense after a trial on the merits in state court?

PARTIES TO THE PROCEEDINGS

Petitioner and Intervenor-Defendant-Appellant below

- Council for Education and Research on Toxics, a California public benefit corporation

Respondent and Plaintiff-Appellee below

- California Chamber of Commerce

Respondent and Defendant below

- Rob Bonta in his capacity as Attorney General of the State of California, Defendant. (The California Attorney General did not appeal the preliminary injunction and was therefore not a party to the proceedings in the Ninth Circuit).

Non-Parties who were declined leave to Intervene below

- Healthy Living Foundation
- Penny Newman

CORPORATE DISCLOSURE STATEMENT

The Council for Education and Research on Toxics is a public benefit corporation that has no parents or subsidiaries and has no stockholders.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
No. 21-15745

California Chamber of Commerce v. Rob Bonta
Final Judgment Affirming Injunction: Mar 17, 2022
Rehearing En Banc Denial: Oct 26, 2022

United States District Court
for the Eastern District of California
No. 2:19-CV-02019-ADA-JDP
California Chamber of Commerce v. Rob Bonta
Order Entering Preliminary Injunction: Mar 30, 2021

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PETITION FOR A WRIT OF CERTIORARI

The Council for Education and Research on Toxics (CERT) respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit affirming the district court's issuance of a preliminary injunction enjoining the state attorney general and all nongovernmental organizations from filing public health lawsuits in California state courts.



OPINIONS BELOW

The published decision of the Ninth Circuit Court of Appeals is included at App.1a and is reported as *California Chamber of Commerce v. Council for Education and Research on Toxics*, 29 F.4th 468 (March 17, 2022).

The published order denying rehearing en banc, which included a dissenting Statement Respecting Denial in which in which four other Circuit Judges joined, is included at App.78a and is reported as *California Chamber of Commerce v. Council for Education and Research on Toxics*, __ F.4th __, 2022 WL 14725243 (October 26, 2022).

The decision of the district court is included at App.34a and found at *California Chamber of Commerce v. Becerra*, 529 F.Supp.3d 1099 (E.D. Cal., March 30, 2021).



JURISDICTION

Petitioner's appeal of the preliminary injunction was denied on March 17, 2022 (App.1a), whereupon Petitioner sought rehearing en banc, which was denied on October 26, 2022 (App.78a).

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within ninety days of the Ninth Circuit's denial of Petitioner's motion for rehearing en banc. 28 U.S.C. § 2101(c).



CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.



STATEMENT OF THE CASE

A. Prior Restraint of 1st Amendment Rights

“Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.” *Alexander v. U.S.*, 509 U.S. 544, 550 (1993). “The First Amendment historically provides greater protection from prior restraints than after-the-fact penalties.” *BE & Const. Co. v. N.L.R.B.*, 536 U.S. 516, 530 (2002), citing *Alexander* at 553-554. “[E]njoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning. But this analogy at most suggests that injunctions may raise greater First Amendment concerns, not that after-the-fact penalties raise no concerns. Likewise, the fact that *Bill Johnson’s* [461 U.S. 731(1983)] allowed certain *baseless* suits to be enjoined tells little about the propriety of imposing penalties on various classes of *nonbaseless* suits.” *BE & K Constr.*, at 530.

“[A] preliminary injunction poses a danger that permanent injunctive relief does not: that potentially protected speech will be enjoined prior to an adjudication on the merits of the speaker’s . . . First Amendment claims.” *DVD Copy Control Ass’n, Inc. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1,21 (2003) (Moreno, J., concurring), citing *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973).

The prior restraint doctrine applies to *all* expressive activities within the ambit of the First Amendment.

Thomas v. Collins, 323 U.S. 516, 530 (1945); *Borough of Duryea v. Guarnieri, supra*, 564 U.S. 379, 388 (2011). “[T]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.” *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

“[P]rior restraints . . . are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). There is a “heavy presumption against [their] constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

“This presumption exists even when the party seeking the restraint alleges that the speech is false or will have harmful ramifications.” *Exeitis USA Inc. v. First Databank, Inc.*, 2017 WL 6539909 at *4 (N.D. Cal. 2017), citing *N.Y. Times Co. v. US*, 403 U.S. at 714 (denying injunction prohibiting publication of Pentagon Papers even in light of threat to national security).

“Prior restraints are only allowed in certain narrow circumstances constituting ‘exceptional cases,’ such as to protect military secrets in wartime or to enjoin trademark violations.” *Allen v. The Ghoulish Gallery*, 2007 WL 1555739 at *3 (S.D. Cal. 2007), citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 540-541 (1987).

Lawsuits that seek to enforce duly adopted public health laws to protect the people from cancer and reproductive harm hardly fall within the rare exceptions to prior restraint doctrine such as protecting military secrets in wartime.

B. The Present Case

In the present case the California Chamber of Commerce (CalChamber) sought to enjoin the California Attorney General and “all those in privity with him from filing and/or prosecuting new lawsuits to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food products.” CalChamber alleged such lawsuits violate First Amendment rights of its members against false compelled speech.

The Council for Education and Research on Toxics (CERT) is a public benefit corporation that had successfully litigated such cases for more than 15 years. Indeed, CERT had even prevailed on the false compelled speech defense at a state court trial in 2015. [13-ER-3395-3412]

Upon learning of the CalChamber case, CERT promptly sought and was granted leave to intervene in the case as a defendant. CERT opposed CalChamber’s motion for a preliminary injunction, arguing that issuing the preliminary injunction would constitute an unlawful prior restraint on CERT’s speech and petition rights under the First Amendment.

The district court nevertheless issued the preliminary injunction, writing: “if the lawsuit seeking to be enjoined ‘has an illegal objective,’ it is ‘not protected by the Petition Clause.’” 529 F.Supp.3d at 1116, citing *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). (App.61a).

CERT filed an emergency appeal of the injunction in the Ninth Circuit and a motions panel granted CERT’s motion to stay the injunction, finding CERT was likely to prevail on the merits of its claim.

(App.27a) However, the merits panel affirmed the issuance of the preliminary injunction, citing *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983). (App.1a, 20a).

CERT filed a motion for rehearing en banc and the Court ordered CalChamber to respond. The Ninth Circuit denied the petition for rehearing. *California Chamber of Commerce v. Council for Education and Research on Toxics*, ___ F.4th ___, 2022 WL 14725243 (October 26, 2022). (App.78a).

C. Dissent from Denial of En Banc Hearing

Notably, 5 Judges of the Ninth Circuit dissented from the denial of hearing en banc. (App.80a).

The dissent observed that “the panel opinion expands the so-called “illegal objective” exception, originating from a footnote in a labor lawsuit, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 737 n.5 (1983), far beyond any prior decision of the Supreme Court or the appellate courts: it allows a single judge to enjoin potential plaintiffs from filing any sort of lawsuit if the judge predicts that the lawsuits will fail upon a defense grounded in a federal right. The labor-specific “illegal objective” exception does not countenance such an injunction for non-labor lawsuits.” 2022 WL 14725243 at *1. (App.88a).

The dissent concluded that “[t]he merits panel’s opinion contradicts decades of settled First Amendment precedent regarding the “illegal objective” exception. (App.82a). The opinion transforms a narrowly tailored labor law doctrine into a broad tool permitting the preclusion of the filing of good-faith, reasonably based lawsuits when a judge predetermines the merits of those lawsuits—or, in the case of a preliminary injunc-

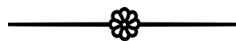
tion, predicts the likely merits. Nothing in Supreme Court precedent sanctions such a severe restriction on the First Amendment’s protection of the right to petition for redress.” (App.82a).

The dissent observed that “when the Tenth Circuit was presented with the opportunity to extend the reach of the ‘illegal objective’ doctrine beyond its defined limits in labor law—the only . . . instance . . . of an appellate court confronting the question—the court refused, specifically grounding its analysis in the Petition Clause.” (App.85a), 2022 WL 14725243 at*3, citing *CSMN Investments, LLC v. Cordillera Metropolitan Dist.*, 956 F.3d 1276, 1283, 1289-90 (10th Cir. 2020).

In that case the Tenth Circuit concluded: “[G]ood reasons counsel against extending this *per se* rule beyond the labor-relations context. . . . By adopting an unlawful-objective exception to Petition Clause immunity, we would eliminate immunity even in cases in which the party petitioning for redress does so for benign reasons. We reject that result. Petition Clause immunity exists to promote access to the courts, allowing people to air their grievances to a neutral tribunal. In fact, “the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force” and ensures that litigants can argue for “evolution of the law.” *Id.* at 1290, quoting *BE & K Const. Co. v. N.L.R. B.*, *supra*, 536 U.S. at 532.

The dissent also observed that “[t]he panel opinion cites no cases to defend its novel application of the ‘illegal objective’ exception and offers no reply to the Tenth Circuit’s persuasive reasoning.” (App.85a). Instead, the panel submits two cases—one about an injunction against relitigation, *Wood v. Santa Barbara*

Chamber of Commerce, Inc., 705 F.2d 1515, 1523 (9th Cir. 1983), and another about intervention, *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986)—and a fleeting reference to the All Writs Act and the Anti-Injunction Act for the proposition that federal courts may preliminarily enjoin lawsuits in certain instances.” The dissent concluded that “neither case and neither law cited by the panel justifies a federal court’s decision to enjoin a non-labor lawsuit using the NLRB-protective ‘illegal objective’ doctrine, especially when no appellate court has done so before.” 2022 WL 14725243 at *4. (App.86a).



REASONS FOR GRANTING THE PETITION

A writ of certiorari should be granted for the following reasons:

First, the Ninth Circuit decision is contrary to this Court’s prior restraint jurisprudence as expressed in *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516 (2002), *Alexander v. U.S.*, 509 U.S. 544 (1993), *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973), and *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731(1983). (Supreme Court Rule 10(c)).

Second, the Ninth Circuit decision directly conflicts with the decision of the Tenth Circuit in *CSMN Investments, LLC v. Cordillera Metropolitan Dist.*, 956 F.3d 1276, 1283, 1289-90 (10th Cir. 2020). (Supreme Court Rule 10(a)).

Third, the question presented in this case involves an important issue of federal law, *i.e.*, the First Amend-

ment right of access to the courts when challenged by the assertion of a federal defense, which is an important constitutional issue that should be settled by this Court. (Supreme Court Rule 10(c)).



CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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