No. 22-699

In the Supreme Court of the United States

COUNCIL FOR EDUCATION AND RESEARCH ON TOXICS, PETITIONER

v.

CALIFORNIA CHAMBER OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

TRENTON H. NORRIS
Counsel of Record
S. ZACHARY FAYNE
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center
10th Floor
San Francisco, CA 94111
(415) 471-3100
trent.norris@arnoldporter.com

QUESTION PRESENTED

A California law known as "Proposition 65" requires businesses to warn consumers about products containing chemicals that are "known to the state of California to cause cancer," even if a link to cancer in humans has not been established. The law allows private parties—often referred to as "bounty hunters"—to sue to enforce the provision. Respondent California Chamber of Commerce ("CalChamber") sued the State to challenge application of Proposition 65 to food and beverage products containing acrylamide, a substance that forms naturally in many foods when cooked. The American Cancer Society has concluded that "dietary acrylamide isn't likely to be related to the risk for most common types of cancer," and the Food and Drug Administration has stated that "warning labels based on the presence of acrylamide in food might be misleading." CalChamber argued that forcing businesses to espouse one side of an unresolved scientific debate about whether dietary acrylamide causes cancer in humans violates its members' First Amendment rights. Petitioner, a private enforcer of Proposition 65, intervened in the lawsuit. The district court concluded that CalChamber was likely to succeed on its claims that Proposition 65 violated the First Amendment and entered a preliminary injunction enjoining the State and those in privity with it from filing additional acrylamide suits while CalChamber's lawsuit is pending. The State did not appeal, but petitioner did, and the court of appeals affirmed, holding that the interlocutory injunction order was appropriate as to petitioner.

The question presented is:

Whether a district court may preliminarily enjoin petitioner from filing new lawsuits to require Proposition 65 acrylamide warnings that the district court found likely to be unconstitutional during the pendency of a lawsuit that will resolve the constitutionality of the warning requirement.

RULE 29.6 STATEMENT

CalChamber is a nongovernmental corporation. It does not have a parent corporation. No publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes and Regulations Page(s)

Other Authorities

In the Supreme Court of the United States

No. 22-699

COUNCIL FOR EDUCATION AND RESEARCH ON TOXICS, PETITIONER

v.

CALIFORNIA CHAMBER OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–26a) is reported at 29 F.4th 468. The order denying rehearing en banc (Pet. App. 78a–88a) is reported at 51 F.4th 1182. The order of the court of appeals staying the district court judgment (Pet. App. 27a-33a) is unreported. The opinion of the district court (Pet. App. 34a-77a) is reported at 529 F. Supp. 3d 1099.

INTRODUCTION

The district court held that CalChamber was likely to succeed on the merits of its First Amendment challenge to the application of California's Proposition 65 labeling law to food and beverages containing acrylamide, holding that, in light of substantial controversy over whether dietary acrylamide increases human cancer risk, the law unconstitutionally compelled businesses to espouse the State of California's position regarding an unresolved scientific debate. The court thus issued a preliminary injunction

precluding the State and petitioner from bringing additional enforcement actions under the law pending resolution of CalChamber's lawsuit. The State did not appeal, and instead promulgated an alternative form of warning, the constitutionality of which the district court has not yet adjudicated. Petitioner, an intervenor that has made millions of dollars bringing private enforcement lawsuits under the law, appealed the interlocutory order. The court of appeals affirmed, concluding that the district court had properly applied the relevant factors and had correctly concluded that CalChamber was likely to succeed in establishing that application of the labeling law to dietary acrylamide violated the First Amendment. The court further held that the district court had appropriately barred the parties to this action from bringing new suits involving acrylamide under the same labeling law pending a final resolution on the merits in this case, which is ongoing.

Petitioner does not seriously dispute that the district court correctly determined that application of California's prescribed warning to acrylamide in food and beverage products is likely unconstitutional. It nevertheless contends that the preliminary injunction against new lawsuits raising the same issues represents an unconstitutional prior restraint, and argues, for the first time in any court, that the decision below conflicts with decisions of this Court and another court of appeals.

The petition should be denied. The preliminary injunction represents a garden-variety application of a court's authority to manage its docket and control duplicative litigation. The decisions below are correct and do not conflict with any decision of this Court or another court of appeals. And, in any event, the interlocutory posture of this action and petitioner's failure to preserve its claims of error render it an exceedingly poor vehicle to resolve the question presented.

STATEMENT

A. Legal Framework

1. California's Safe Drinking Water and Toxic Enforcement Act of 1986, popularly known as "Proposition 65," prohibits businesses with ten or more employees from knowingly and intentionally exposing Californians to chemicals "known to the state to cause cancer" without providing required warnings, unless an affirmative defense applies. Cal. Health & Safety Code § 25249.6. The State agency responsible for implementing Proposition 65—the Office of Environmental Health Hazard Assessment ("OEHHA")—maintains "a list of those chemicals known to the state to cause cancer." *Id*. § 25249.8(a). As relevant here, a chemical is "known to the state to cause cancer" if it is so identified by an "authoritative" body, *id*. § 25249.8(b), and "must be listed even if it is known to be carcinogenic * * * *only in animals*." *Am. Chemistry Council* v. *OEHHA*, 55 Cal. App. 5th 1113, 1142 (2020) (emphasis added); see also *AFL-CIO* v. *Deukmejian*, 212 Cal. App. 3d 425, 441 (1989); Cal. Code Regs. tit. 27, § 25306(e)(2).

Proposition 65 requires that businesses provide a "clear and reasonable warning" before "expos[ing] any individual to" any listed chemical. Cal. Health & Safety Code § 25249.6. Although the statute does not specify what warning text and methods suffice, in August 2016, OEHHA adopted regulations providing that warnings for food and beverage products are "clear and reasonable" if they state:

> **WARNING:** Consuming this product can expose you to [name of chemical], which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov/food.

Cal. Code Regs. tit. 27, § 25607.2(a)(2). This statement is commonly referred to as the "safe harbor" warning.

2. Proposition 65 imposes penalties of up to $2,500 per day for each failure to provide an adequate warning.

Cal. Health & Safety Code § 25249.7(b). The State Attorney General, district attorneys, and certain city attorneys are authorized to bring an action to enforce the warning requirement. *Id*. § 25249.7(c).

Beyond these governmental enforcers, the statute authorizes any person—even a person or organization that has not been injured—to bring a civil action to enforce the statute "in the public interest," provided they have first satisfied certain pre-suit filing requirements. Cal. Health & Safety Code § 25249.7(d). But California courts have made clear that the ability to file such private actions does not create individual property rights, because individuals sue to "vindicat[e] public rights" acting "only in the public interest; there is no provision for an individual to sue on his or her own behalf." *Consumer Advocacy Grp. Inc.* v. *ExxonMobil Corp.*, 168 Cal. App. 4th 675, 692-93 (2008). Private enforcers are eligible to recover 25 percent of the penalty, with the rest going to the State. *Id*. § 25249.12(c), (d). And such private "attorneys general" can recover attorneys' fees. Cal. Code Civ. Proc. § 1021.5. These provisions incentivize private enforcers, who have come to be known as "bounty hunters."

B. Regulation Of Acrylamide

1. OEHHA added the industrial chemical acrylamide to the Proposition 65 list in 1990 based on a determination by the U.S. Environmental Protection Agency ("EPA") that acrylamide was a "probable" human carcinogen and the classification of acrylamide by the International Agency for Research on Cancer ("IARC") as "possibly carcinogenic to humans." C.A.E.R. 205, 275. IARC has since re-classified acrylamide as "probably carcinogenic to humans." *Ibid*. The determinations by both EPA and IARC were based on animal studies, and both agencies have concluded that human studies provide limited or no evidence of carcinogenicity in humans. *Ibid.* Neither agency has classified acrylamide as a "known" human carcinogen.

Twelve years after the 1990 listing, researchers made the surprising discovery that cooking or roasting causes acrylamide to form naturally in many plant-based foods, including potatoes (e.g., French fries, chips), grains (e.g., breakfast cereals, cookies, toast), and coffee. C.A.E.R. 181-82. Acrylamide forms regardless of where the food is heated; the U.S. Food and Drug Administration ("FDA") has observed that consumer exposure to acrylamide "may be greatest through home cooking." C.A.E.R. 190.

Private enforcers—occasionally joined by the California Attorney General—have pursued Proposition 65 enforcement actions for failures to warn about acrylamide in food and beverage products. By late 2020, private enforcers had served more than 900 pre-litigation notices regarding dietary acrylamide targeting more than 350 companies, including many CalChamber members. C.A.E.R. 145-47.

2. The State admitted in litigation in 2008 that "[t]he State of California does not know that acrylamide causes cancer in humans, and is not required to make any finding to that effect in order to list the chemical under Proposition 65." C.A.E.R. 289; see also C.A.E.R. 303 (State witness). OEHHA has since officially recognized that acrylamide in certain food products—namely, coffee—does *not* pose a risk of cancer in humans. Cal. Code Regs. tit. 27, § 25704; see also C.A.E.R. 367 (similar).

Numerous scientific studies have found no link between dietary acrylamide and cancer in humans. Based on dozens of studies, the National Cancer Institute explained in December 2017: "[A] large number of epidemiologic studies (both case-control and cohort studies) in humans have found no consistent evidence that dietary acrylamide exposure is associated with the risk of any type of cancer." C.A.E.R. 171. And in February 2019, the American Cancer Society concluded that "reviews of studies done in groups of people (epidemiologic studies) suggest that dietary

acrylamide isn't likely to be related to risk for most common types of cancer." C.A.E.R. 176. There is growing evidence that the mechanisms that drive tumor formation in experimental animals are not relevant to humans at real-world dietary acrylamide exposure levels (which typically are "many hundreds of times" smaller than those used in laboratory experiments). Pet. App. 65a; C.A.E.R. 1290-91, 1298-1300. Further, the FDA has expressed concern about cancer warnings for acrylamide in food, advising that "warning labels based on the presence of acrylamide in food might be misleading," and cautioned that such warnings may cause consumers to avoid foods that are part of a healthy diet. C.A.E.R. 191, 194.

C. Proceedings Below

1. CalChamber is a nonprofit business association with approximately 14,000 members, many of whom produce or sell food or beverage products that contain acrylamide, ranging from roasted nuts to breakfast cereals to black olives. *See* C.A.E.R. 1627-28. As a result of California's listing of acrylamide as a chemical "known to the state to cause cancer" and aggressive private enforcement of the statutory warning requirement by bounty hunters, CalChamber's members must either provide a false and misleading cancer warning on their products or face a continuing threat of Proposition 65 litigation. *Ibid*.

CalChamber sued the California Attorney General to vindicate its members' First Amendment right not to espouse the State's side of an unresolved scientific debate. Soon afterwards, petitioner—a non-profit corporation regularly represented by a plaintiffs' firm that has brought numerous Proposition 65 suits—moved to intervene.[1]

---

[1] See Beth Mole, *The Secretive Nonprofit That Made Millions Suing Companies Over Cancer Warnings*, Ars Technica, June 6, 2019, https://bit.ly/2ZeWjcX.

CalChamber acquiesced to petitioner's intervention "[i]n the interest of expediting these proceedings and the Court's consideration of the merits of its claims." C.A. Supp. E.R. 9. CalChamber moved for a preliminary injunction, asking the district court to enjoin the Attorney General and those in privity or acting in concert with him (including private enforcers) from "filing and/or prosecuting *new* lawsuits to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products." C.A.E.R. 114. In support, CalChamber submitted expert declarations from an epidemiologist, who reviewed extensive research and concluded that studies have found no consistent or reliable evidence that dietary acrylamide increases the risk of any type of cancer in humans, C.A.E.R. 892-93; from a toxicologist, who explained the mounting evidence that the mechanisms that drive tumor formation in experimental animals are not relevant to humans at real-world levels of dietary exposure to acrylamide, *id.* at 1271, 1293-95, 1300; and from a professor of marketing, who conducted a consumer survey and found that California consumers understood the Proposition 65 safe harbor warning for acrylamide in food to "convey the message that [consuming that] food increases their risk of getting cancer," *id.* at 1390.

The Attorney General opposed and submitted an expert declaration arguing that acrylamide is a human carcinogen. C.A. Supp. E.R. 84-116. Petitioner also opposed the motion, arguing that the requested preliminary injunction would impose an unconstitutional prior restraint on its First Amendment rights. C.A.E.R. 89-111.

2. The district court granted CalChamber's motion, enjoining the Attorney General and "those in privity or acting in concert with [him]" from "fil[ing] or prosecut[ing] a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and

beverage products" "[w]hile this action is pending and until a further order of this court." Pet. App. 77a.

The court found that CalChamber was likely to succeed on the merits because neither the State nor petitioner had shown that a Proposition 65 cancer warning for dietary acrylamide is "purely factual and uncontroversial," and thus lawful under *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Pet. App. 69a. The court noted that "dozens of epidemiological studies have failed to tie human cancer to a diet of food containing acrylamide," and "California has * * * decided that coffee, one of the most common sources of acrylamide, actually reduces the risk of some cancers," based on "a review of epidemiological evidence similar to the evidence [CalChamber] cites." Pet. App. 65a. "In short, the safe harbor warning * * * elevates one side of a legitimately unresolved scientific debate about whether eating foods and drinks containing acrylamide increases the risk of cancer." Pet. App. 65a-66a.

The court emphasized that the constitutional problems were a product of the existing safe harbor warning. Because "Proposition 65's enforcement system can impose a heavy litigation burden on those who use alternative warnings," as a practical matter it requires businesses to give the safe harbor warning, *id.* at 67a-69a, which is highly misleading, in part because it "implies incorrectly that acrylamide is an additive or ingredient" rather than a common and unavoidable product of heating food that likewise results from home cooking, *id*. at 64a. The court also concluded that CalChamber met the other requirements for preliminary injunctive relief. Pet. App. 74a-77a.

The district court rejected petitioner's argument that enjoining future lawsuits constituted an unconstitutional prior restraint. *Id.* at 62a. The court reasoned that "[f]ederal courts have * * * enjoined lawsuits preemptively in many circumstances," *id.* at 59a-60a & nn.14-19

(collecting authorities), and petitioner had cited "no decision denying a preliminary injunction against likely unconstitutional private litigation because the injunction would amount to a prior restraint," Pet. App. 59a. "The court is aware of no authority interpreting the First Amendment as preserving a person's right to enforce a state law that contradicts the Constitution," and "if the lawsuit seeking to be enjoined 'has an illegal objective,' it is 'not protected by the Petition Clause.' " Pet. App. 54a (quoting *Jones* v. *Rd. Sprinkler Fitters Local Union No. 669*, No. 13-3015, 2013 WL 5539291, at *2 (C.D. Cal. July 24, 2013)).

The district court stressed that "[t]he injunction requested here is * * * quite narrow" and "leaves private parties and the State with many tools for increasing public awareness about the risks of acrylamide in foods." Pet. App. 75a. "[Petitioner] and other private enforcers can send demand letters and notices of violations. They can litigate existing claims and pursue appeals. They can pursue public relations campaigns. They can fund research. They can buy advertisements." *Ibid.*

3. The State did not appeal. Petitioner, however, did.

a. Petitioner moved to stay the preliminary injunction pending appeal. A divided motions panel granted petitioner's motion in part, staying the injunction's effect with respect to non-parties. Pet. App. 27a-33a. The majority noted that no court had yet made "a final determination that a Proposition 65 warning is, in fact, unconstitutional with respect to acrylamide exposure." Pet. App. 28a. The motions panel also stated that the "breadth of the injunction"—prohibiting Proposition 65 lawsuits "with regard to acrylamide exposure by *any* private actor, including those who are not parties to the underlying action"—"exacerbates the concerns underlying the prior restraint doctrine." Pet. App. 28a-29a. Judge Forrest dissented, emphasizing that CalChamber "has raised serious questions regarding whether the warning required by Proposition 65 as [it]

relates to acrylamide is permissible" and that "infringement of First Amendment rights for even minimal periods of time[] unquestionably constitutes irreparable injury." Pet. App. 33a, 31a.

b. The merits panel of the court of appeals unanimously affirmed entry of the preliminary injunction. Pet. App. 1a-26a. The court of appeals agreed with the district court that the labeling requirement was likely unconstitutional, reasoning that "the safe harbor warning is controversial because of the scientific debate over whether acrylamide in food causes cancer in humans," noting compelling scientific evidence that "dietary acrylamide isn't likely to be related to risk for most common types of cancer," and "rais[ing] serious doubt regarding the validity of extrapolating from rodent studies" to humans. Pet. App. 16a. It also concluded that the district court did not abuse its discretion in "finding the [Proposition 65] warning is misleading," "as the FDA acknowledged," because "[e]ven the State of California has stipulated that it 'does not know that acrylamide causes cancer in humans.'" Pet. App. 17a. And it concluded that "the record supports the district court's finding that Prop. 65's enforcement regime creates a heavy litigation burden on manufacturers who use alternative warnings," and that "only the safe harbor warning is actually useable in practice." *Ibid*. Thus, "California and [petitioner] did not meet their burden to show the warning requirement was lawful under *Zauderer,*" Pet. App. 18a—indeed, petitioner had "not even discuss[ed] *Zauderer*." Pet. App. 20a.

Although the court of appeals agreed that the "prior restraint doctrine does apply to enjoined lawsuits," it concluded that "the district court's finding at the preliminary injunction stage that Prop. 65 acrylamide in food lawsuits are likely unconstitutional prevents [petitioner] from claiming the doctrine's protection." *Ibid*. The court of appeals reasoned that "the preliminary injunction against

likely unconstitutional litigation is not an unconstitutional or otherwise impermissible prior restraint." Pet. App. 23a. The court emphasized that the injunction was lawful "as applied to [petitioner]," and that, "as an intervenor-defendant, [petitioner] is in a different position from other private enforcers who are not parties to the case." Pet. App. 26a. The court thus "d[id] not reach whether the injunction here is overly broad against other possible private enforcers," and "express[ed] no view on the merits of whether the injunction was overbroad as it applies or purports to apply to other private enforcers who were not named as defendants and who did not intervene." Pet. App. 25a n.20. The court also highlighted that "[petitioner] and other private enforcers [could] send demand letters and notices of violations, litigate existing claims and pursue appeals, pursue public relations campaigns, fund research, and buy advertisements." Pet. App. 23a-24a.

4. The court of appeals denied rehearing en banc. Pet. App. 78a-79a. Judge Berzon, who was on the motion panel that granted the stay, dissented, joined by four other judges. Although the panel had addressed only the lawfulness of applying the injunction against the parties to the case, Judge Berzon read the injunction as "clos[ing] the courtroom doors to all those seeking to enforce" Proposition 65 with respect to dietary acrylamide. Pet. App. 80a. Though not raised by petitioner, she concluded that the doctrine that suits having an "illegal objective" can be validly enjoined consistent with the right to petition should be limited to the context of National Labor Relations Board suits. Pet. App. 83a. She stated that, to her knowledge, the "illegal objective" doctrine had been applied almost entirely "in labor law cases concerning the NLRB's authority," Pet. App. 84a & n.3, and the Tenth Circuit had declined to apply it outside that context, Pet. App. 85a (citing *CSMN Invs. LLC* v. *Cordillera Metro. Dist.*, 956 F.3d 1276 (10th Cir. 2020)).

5. After the Ninth Circuit denied rehearing, OEHHA promulgated an additional, alternative safe harbor warning for exposures to acrylamide from food. It provides that a warning complies with Proposition 65 if it reads:

> **CALIFORNIA WARNING:** Consuming this product can expose you to acrylamide, a probable human carcinogen formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide.

OEHHA, *Safe Harbor Warning Regulation for Exposures to Acrylamide from Food*, Nov. 1, 2022, https://bit.ly/3y8MTmN. The regulation took effect on January 1, 2023. Businesses seeking to comply with their obligations to warn consumers about exposures to acrylamide in food are now entitled to use either this new language or the original safe harbor language specifically addressed by the district court in issuing the preliminary injunction.

6. The proceedings below are ongoing. CalChamber challenges the new safe harbor warning, arguing that it is at least as misleading and controversial as the original. CalChamber is filing a motion for summary judgment in the next several weeks.

REASONS TO DENY THE PETITION

The decision below was correct and conflicts with no decision of this Court or another court of appeals. In any event, this case is an exceedingly poor vehicle to address the question presented. Further review is not warranted.

A. The Ninth Circuit's Judgment Was Correct

The court of appeals correctly held that preliminarily enjoining petitioner from filing new lawsuits enforcing Proposition 65's warning requirements as applied to

acrylamide in food and beverage products—while a pending lawsuit to which petitioner is a party resolves the constitutionality of such warnings—is not an unconstitutional prior restraint. Petitioner's contrary arguments distort this Court's jurisprudence and, if adopted, would wreak havoc on courts' ability to manage their dockets and resolve disputes efficiently.

1.a. The court of appeals correctly held that a lawsuit with an illegal objective may be enjoined without violating the Petition Clause of the First Amendment.

In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court held that, consistent with the Petition Clause, "a suit that has an objective that is illegal under federal law" may be enjoined. *Id.* at 737 n.5. *Bill Johnson*'s concerned an order of the National Labor Relations Board, which had enjoined a state-court proceeding "brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lack[ed] a reasonable basis in fact or law." *Id.* at 733. While this Court held that the injunction at issue exceeded the Board's authority, see *id.* at 748, the Court clarified that the Board retained authority to enjoin "a suit that has an objective that is illegal under federal law." *Id.* at 737 n.5. Indeed, the Court had previously "upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the [National Labor Relations] Act." *Id.* (citing *NLRB* v. *Granite State Joint Bd., Textile Workers Union of Am., Loc. 1029*, 409 U.S. 213 (1972), and *Booster Lodge No. 405, Int'l Ass'n of Machinists & Aerospace Workers* v. *NLRB*, 412 U.S. 84 (1973)). In this case, the court of appeals thus correctly recognized that "courts may enjoin a lawsuit with 'an objective that is illegal' without violating the Petition Clause." Pet. App. 20a (quoting *Bill Johnson's*, 461 U.S. at 737 n.5).

In fact, courts routinely enjoin related litigation, and no decision has suggested that such injunctions

categorically impose prior restraints in violation of the Petition Clause. The court of appeals noted that CalChamber "offer[ed] examples of preliminary injunctions against litigation to support its position that enjoining future lawsuits does not constitute an unlawful prior restraint on [petitioner]'s right to petition." Pet. App. 22a. The district court likewise "cited cases as well as federal statutes, such as the All Writs Act and the Anti-Injunction Act, which show that enjoining prospective lawsuits does not per se violate the First Amendment." *Ibid*. Indeed, the district court noted that "[f]ederal courts have * * * enjoined lawsuits preemptively in many circumstances"—"to quiet post-settlement donnybrooks, to resolve class actions and multidistrict litigation, to consolidate admiralty claims in a single venue, and to sanction vexatious litigants or prevent frivolous lawsuits, among other reasons." Pet. App. 59a-60a (footnotes omitted) (citing *Flanagan* v. *Arnaiz*, 143 F.3d 540, 544-45 (9th Cir. 1998); *Atl. Coast Line R.R. Co.* v. *B'hood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970); *Nitsch* v. *Dreamworks Animation SKG Inc.*, No. 14-04062, 2016 WL 4424965, at *8 (N.D. Cal. July 6, 2016); *In re Baldwin-United Corp.*, 770 F.2d 328, 331 (2d Cir. 1985); *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1017 (9th Cir. 2000) (per curiam); *Wood* v. *Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523 (9th Cir. 1983); *De Long* v. *Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990); *Orange Cnty.* v. *Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986)). "In rare circumstances, district courts * * * can even enjoin a litigant from pursuing claims in another country," though "th[is] power should be used sparingly." Pet. App. 61a & n.20 (quoting *Seattle Totems Hockey Club, Inc.* v. *Nat'l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981), and citing *Sun World, Inc.* v. *Lizarazu Olivarria*, 804 F. Supp. 1264, 1270 (E.D. Cal. 1992) (same)).

Neither petitioner nor the dissent from the denial of rehearing en banc below offered any principled basis to

distinguish the injunction here from the kinds of injunctions courts routinely enter to manage their dockets and efficiently resolve disputes. Reversing the decision below thus would, at a minimum, throw a common tool courts use for the administration of justice into serious doubt.

b. The court of appeals also correctly held that a lawsuit with an objective that is *likely* unconstitutional may be *preliminarily* enjoined pending a full hearing on the merits. As the court of appeals explained, "[f]or a court to grant a preliminary injunction, a plaintiff 'must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" Pet. App. 12a (quoting *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (bracketed text by court of appeals).

Those requirements apply equally to preliminary injunctions against related lawsuits. While petitioner argued that the district court could not enter an injunction against future Proposition 65 acrylamide lawsuits "until after the court made a final determination on the merits of CalChamber's claim," petitioner "cited no binding precedent * * * that the 'falsity' of the compelled speech must be proven at trial, and thus by definition before a preliminary injunction can issue." Pet. App. 21a. And in fact, this Court has stated that speech may be restricted consistent with the prior restraint doctrine so long as there has been "an adequate determination that [the speech] is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390 (1973). Because this Court has "not define[d] the parameters of an 'adequate determination,'" the court of appeals held narrowly that "[s]uch adequacy would * * * turn on the law and facts in individual cases." Pet. App. 23a & n.18. But the "stringent" traditional prerequisites for a preliminary

injunction, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975), are one form that an "adequate determination" may take.

Indeed, in *Schenck* v. *Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), this Court expressly held that a preliminary injunction restricting First Amendment rights was *not* a prior restraint. *Schenck* involved a preliminary injunction against certain expressive activities around abortion clinics. See *id.* at 361. The Court upheld the injunction in part, explaining that it was not a "prior restraint" because it was based on prior unlawful conduct and "alternative channels of communication were left open." *Id.* at 374 n.6.

Here, this preliminary injunction likewise rests on a finding that Proposition 65 acrylamide lawsuits are unlawful. Proposition 65 only authorizes private enforcers to sue "in the public interest," and both courts below found a preliminary injunction *against* such suits over acrylamide in food and beverage products to be in the public interest. Pet. App. 23a, 75a. The injunction also leaves ample alternative channels of communication open. As the district court and court of appeals both noted, petitioner and other private enforcers remain free to "send demand letters and notices of violations, litigate existing claims and pursue appeals, pursue public relations campaigns, fund research, and buy advertisements." Pet. App. 23a-24a. The *only* thing petitioner cannot do is commence new lawsuits enforcing Proposition 65 as to acrylamide in food and beverage products pending resolution of this case. As a practical matter, therefore, the injunction simply centralizes petitioner's litigation over the constitutionality of Proposition 65 as applied to food and beverage products in one case. Under the injunction, the parties will litigate CalChamber's compelled speech arguments in *this* case, rather than having petitioner file new cases and forcing CalChamber's

members to litigate their First Amendment rights piecemeal as a defense in those separate cases.

c. The court of appeals also correctly applied these principles to the facts of this case. The district court "f[ound] at the preliminary injunction stage that Prop. 65 acrylamide in food lawsuits are likely unconstitutional" because they compel businesses to deliver the State's preferred message about an unresolved scientific controversy. Pet. App. 2a. Such lawsuits thus have "an objective that is illegal" under *Bill Johnson's*. *Ibid*. Accordingly, "[t]he serious constitutional issue raised by CalChamber gave the district court sufficient reason to enjoin Prop. 65 acrylamide litigation until the case was finally decided on the merits." Pet. App. 22a. The court of appeals thus correctly "h[e]ld that the preliminary injunction against *likely unconstitutional* litigation is not an unconstitutional or otherwise impermissible prior restraint." Pet. App. 23a.

2. Petitioner's abbreviated petition appears to challenge the decision below on three main grounds. Each lacks merit.

a. In its description of the dissent from denial of rehearing en banc, petitioner appears to argue that the illegal objective doctrine is limited to the labor-law context. See Pet. 6-8. Petitioner never made this argument below, and the court of appeals never passed on it. Instead, petitioner argued only that lawsuits enforcing Proposition 65 as to acrylamide in food and beverage products do not have an illegal objective because they are not "both objectively baseless and subjectively motivated by an unlawful purpose." C.A. Reply at 11 (citation omitted); see also Amended Pet. For Reh'g En Banc 12-13 (same). The court of appeals rejected that argument, explaining that "[s]uits that have 'an objective that is illegal under federal law' may be enjoined without proving subjective intent." Pet. App. 20a-21a n.16 (quoting *Bill Johnson's*, 461 U.S. at 737 n.5).

Petitioner does not mention, let alone challenge, that ruling by the court of appeals.

In any event, petitioner's belated suggestion that the illegal objective doctrine is limited to the labor-law context is wrong. As explained, the illegal objective doctrine stems from cases where this Court upheld administrative orders enjoining litigation to enforce fines that were uncollectible by statute. Neither petitioner nor the dissent from the denial of rehearing en banc explains why the right not to pay uncollectible fines deserves more protection than the right not to be compelled by the government to make a false and misleading statement. Indeed, the right against compelled speech is fundamental. As this Court has explained, "the right of freedom of thought protected by the First Amendment * * * includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

b. Petitioner also appears to suggest that the preliminary injunction here was improper because the court of appeals did not reach the final merits of CalChamber's First Amendment arguments and instead merely "predict[ed] the *likely* merits." Pet. 7 (emphasis added). That objection, however, amounts to an attack on the very notion of a preliminary injunction.

Under the Judiciary Act of 1789, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Grupo Mexicano de Desarrollo S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (citation omitted). Federal courts thus possess all remedial powers consistent with "traditional principles of equity jurisdiction," including the power to issue preliminary injunctions. *Id.* at 319 (citation omitted). A plaintiff like CalChamber accordingly may obtain a preliminary injunction upon showing (among other things) that it "is *likely* to

succeed on the merits." *Winter*, 555 U.S. at 20 (emphasis added).

This Court has never suggested that injunctions supposedly implicating the right to petition are subject to different limitations. Neither petitioner nor Judge Berzon identified any basis for treating such injunctions differently. The court of appeals thus properly recognized that the prior restraint doctrine under the First Amendment requires only an "adequate determination" of the merits, based "on the law and facts in individual cases." Pet. App. 23a & n.18 (quoting *Pittsburgh Press*, 413 U.S. at 390).

c. Finally, petitioner briefly references a separate case where petitioner "prevailed on the false compelled speech defense at a state court trial in 2015." Pet. 5. That decision—to which CalChamber was not a party—has no bearing on the preliminary injunction entered in *this* case, and petitioner does not explain why it should. Moreover, the decision in that case required a warning for acrylamide in coffee, but the State of California itself has since determined that such warnings are *not* required. As explained, regulations adopted in 2019 now provide that "[e]xposures to chemicals in coffee * * * that are created by and inherent in the processes of roasting coffee beans or brewing coffee *do not pose a significant risk of cancer*," and therefore do not require any Proposition 65 warning. Cal. Code Regs. tit. 27, § 25704 (emphasis added). That regulation was the basis for the state trial court's entry of judgment *against* petitioner in that case, and that judgment was upheld on appeal against petitioner's challenge. *Council for Educ. & Rsch. on Toxics* v. *Starbucks Corp.*, 84 Cal. App. 5th 879, 887 (2022). Furthermore, the California appellate court specifically declined to address the First Amendment issue. *Id.* at 901 n.14.

The 2015 state trial court decision is irrelevant for other reasons too. The decision does not even mention prior restraint or this Court's decision in *Bill Johnson's*. See

C.A.E.R. 3409-10. Instead, the decision relies heavily on the notion that Proposition 65 warnings are "commercial speech" that supposedly "is entitled to only 'limited' and 'subordinate' First Amendment protection." C.A.E.R. 3409. The decision also predates this Court's decision in *National Institute of Family and Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018), which made clear that "a lower level of scrutiny" applies only to compelled disclosures of "purely factual and uncontroversial information." *Id.* at 2372 (citation omitted). Based on the record in *this* case, the district court found—and petitioner does not dispute—that the warning at issue here "is controversial because of the scientific debate over whether acrylamide in food causes cancer in humans." Pet. App. 15a.

B. Petitioner Identifies No Division Of Authority

The decision below is not only correct; it does not conflict with any decision of this Court or of any other court of appeals or state high court.

1. Petitioner asserts that the decision below conflicts with "this Court's prior restraint jurisprudence." Pet. 8. Wrong.

First, petitioner cites *Bill Johnson's*. Pet. 8. As explained, however, that case expressly held that "a suit that has an objective that is illegal under federal law" may be enjoined. 461 U.S. at 737 n.5. While petitioner suggests for the first time in its petition that *Bill Johnson's* is limited to the labor-law context, nothing in *Bill Johnson's* itself suggests that its holding is limited to the context in which it happened to arise. A Proposition 65 lawsuit that seeks to compel CalChamber's members to engage in false and misleading speech about an unresolved scientific controversy has an objective that is every bit as "illegal" as the lawsuits seeking to collect invalid fines referenced in *Bill Johnson's*. Injunctions against those two types of lawsuits thus are equally proper. Neither petitioner nor the dissent from denial of rehearing en banc offers any reason to conclude

otherwise. And because petitioner never argued below that *Bill Johnson's* is limited to the labor-law context, the court of appeals never had the opportunity to address that argument. Even if this Court were inclined to clarify the scope of the illegal objective doctrine announced in *Bill Johnson's*, the Court should wait to do so in a case where the relevant arguments were fully pressed and passed upon below. See p. 26, *infra.*

Second, petitioner cites *BE & K Construction Co.* v. *NLRB*, 536 U.S. 516 (2002). Pet. 8. While that case states that "enjoining a lawsuit could be characterized as a prior restraint," 536 U.S. at 530, the decision below is not to the contrary. Indeed, the court of appeals acknowledged that "enjoining a lawsuit could be characterized as a prior restraint"; it simply concluded that here, enjoining lawsuits seeking to enforce Proposition 65 as to acrylamide in food and beverage products is not a prior restraint because, under *Bill Johnson's*, such lawsuits have an objective that is likely illegal. Pet. App. 20a (citation omitted).

BE & K also overruled certain dicta in *Bill Johnson's*, but that is irrelevant here. *Bill Johnson's* discussed two types of lawsuits that the NLRB may enjoin—lawsuits with an illegal objective, and lawsuits brought to retaliate against the exercise of federal labor rights. See 461 U.S. at 737-44, 737 n.5. With respect the second type of lawsuit, while *Bill Johnson's* concerned an ongoing lawsuit, the Court also stated that the Board may impose liability for a completed lawsuit that is subjectively retaliatory, even if the lawsuit was not objectively baseless. See *id.* at 747. In *BE & K*, however, the Court rejected that dicta, holding that the Board may not impose liability for a completed lawsuit unless it is subjectively retaliatory *and* objectively baseless. See 536 U.S. at 531-37. None of that matters here. This case does not concern lawsuits that may be enjoined because they are retaliatory. It concerns lawsuits that may be enjoined because they have an illegal objective. As the

court of appeals explained, lawsuits with an illegal objective "may be enjoined without proving subjective intent." Pet. App. 20a-21a n.16.

Third, petitioner cites *Alexander* v. *United States*, 509 U.S. 544 (1993). Pet. 8. There, this Court noted that "[t]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." 509 U.S. at 550. But *Alexander* did not involve an injunction against a lawsuit—it concerned a forfeiture order, which this Court held was "not * * * a prior restraint." *Id.* at 554. Moreover, *Alexander* did not hold or suggest that all injunctions restricting speech constitute prior restraints. The following year, this Court held that a permanent injunction limiting protest activity outside an abortion clinic was not a prior restraint, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 766, 763 n.2 (1994), and three years after that it held the same for a preliminary injunction, *Schenck*, 519 U.S. at 374 n.6. Similarly, in *Pittsburgh Press*, the Court held that a cease-and-desist order directing a newspaper to stop publishing discriminatory job ads was not a prior restraint. See 413 U.S. at 389-90.

Finally, petitioner cites *Pittsburgh Press*. Pet. 8. As just explained, however, that case *rejected* a claim that an injunction restricting speech constituted a prior restraint. See 413 U.S. at 389-90. Indeed, the Court expressly stated that while it has "str[uck] down an injunction against further publication of a newspaper found to be a public nuisance, it has never held that all injunctions are impermissible." *Id.* at 390. Rather, the Court explained that "[t]he special vice of a prior restraint is that communication will be suppressed * * * before an adequate determination that it is unprotected by the First Amendment." *Ibid.* Here, the court of appeals held that the district court's determination that the enjoined lawsuits are likely unconstitutional was, based on the totality of the circumstances,

just such an "adequate determination" sufficient to justify a preliminary injunction pending a full hearing on the merits. Pet. App. 22a.

2. Petitioner also contends that the decision below conflicts with the Tenth Circuit's decision in *CSMN Investments*. Pet. 8. To begin, petitioner never cited *CSMN Investments* at any point below—Judge Berzon cited it for the first time in her dissent from the denial of rehearing en banc. The court of appeals thus had no opportunity to reconcile its decision with that case.

In any event, *CSMN Investments* is inapposite. There, a property owner's association and local government (together, the "Association") brought unsuccessful appeals challenging a land-use decision allowing a property owner to convert a lodge and spa into a private addiction-treatment center. See 956 F.3d at 1278-81. The property owner then brought suit against the Association under the Americans with Disabilities Act and the Fair Housing Act, as well as the Equal Protection Clause via 42 U.S.C. § 1983. See *id.* at 1281. In response, the Association argued that it was immune under the *Noerr-Pennington* doctrine, arguing that it could not be held liable merely for petitioning the courts for redress of grievances. See *id.* at 1281-82. The property owner then replied that *Noerr-Pennington* immunity did not apply because the Association's unsuccessful appeals had an illegal objective. See *id.* at 1289. The Tenth Circuit rejected that argument, holding that, outside the labor-relations context, there is no categorical exception to *Noerr-Pennington* immunity for lawsuits with an illegal objective. See *id.* at 1289-90.

CSMN Investments did not involve the prior restraint doctrine, an injunction against a related lawsuit, or indeed any kind of injunction. Rather, it involved the *Noerr-Pennington* doctrine, which concerns the circumstances in which statutes impose liability for *past* petitioning activity. For that reason, unlike this case, *CSMN Investments* did not

implicate courts' routine use of injunctions against related lawsuits to manage their dockets and resolve disputes efficiently.

Conversely, this case, unlike *CSMN*, does not involve the *Noerr-Pennington* doctrine. While petitioner raised *Noerr-Pennington* in the district court, the court of appeals noted that "it abandoned that argument on appeal." Pet. App. 3a.

C. This Interlocutory Preliminary Injunction Order Is A Poor Vehicle To Resolve The Question Presented

1. Petitioner is appealing a preliminary injunction order, which is non-final. Absent extraordinary circumstances, the interlocutory posture of a case is reason alone to deny review. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (the lack of final judgment "alone furnishe[s] sufficient ground" for denying certiorari); *Va. Mil. Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (statement of Scalia, J., respecting denial of cert.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting denial of cert.) ("issues will be better suited for certiorari review" after entry of final judgment).

There are good reasons why this Court is "generally hesitant to grant review of non-final decisions." *Taylor* v. *Riojas,* 141 S. Ct. 52, 55 (2020) (per curiam) (Alito, J., concurring). Litigation is unpredictable, and later developments may change the character of—or entirely obviate the need to address—the question presented.

That is the case here. The proceedings below are ongoing. If the district court finds that the safe harbor warning does not violate the First Amendment, then the preliminary injunction will be dissolved, mooting the question presented. If the district court finds the warning intrudes on the First Amendment, the court can still amend

the nature and scope of the injunction. See *Mount Soledad Mem'l Ass'n* v. *Trunk,* 567 U.S. 944 (2012) (statement of Alito, J., respecting denial of cert.) ("Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari."). Even to the extent the contours of the injunction remain unchanged, the district court—and, to the extent there is an appeal, the court of appeals—may further explain the basis for the injunction. Indeed, although the panel addressed only the lawfulness of applying the injunction against the parties to the case, Judge Berzon's dissent to en banc review read the injunction as "clos[ing] the courtroom doors to all those seeking to enforce" Proposition 65 with respect to acrylamide. Pet. App. 80a. The district court may well address this separate issue.

Furthermore, the focus of the proceedings has already changed in ways that implicate the merits. After the Ninth Circuit denied rehearing, OEHHA promulgated a *new* safe harbor warning that CalChamber is likewise challenging as misleading and in violation of the First Amendment. See p.12, *supra*. The preliminary injunction was issued based on the constitutionality of the *original* warning language, but the district court has not yet addressed the constitutionality of the *new* warning language. Given that the Attorney General chose not to appeal the preliminary injunction concerning the original warning, the focus of the proceedings below may shift primarily to the new warning, which is not the basis of the current injunction. At a minimum, a petition after final judgment would allow the Court to assess the case on a full and final record.

2. This case also presents waiver and related problems that make it a poor vehicle for review. Two key bases for the petition—the notion that the illegal objective doctrine announced in *Bill Johnson's* is limited to the labor-law context, and a purported conflict with the Tenth Circuit's

decision in *CSMN Investments*—were never raised by petitioner, much less briefed in the court of appeals. See pp. 17-21, *supra*. These purported "conflicts" were first raised in Judge Berzon's opinion dissenting from the denial of en banc review. Pet. App. 85a. Beyond the waiver problem, this Court has made clear that, under the principle of party presentation, courts "do not, [and] should not, sally forth each day looking for wrongs to right," and this Court generally will not resolve issues raised only by judges. See *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

3. Even putting all these problems aside, if the purported conflicts here had been raised and were real (and they are not), the issue would benefit from further percolation. This Court's "ordinary practice" is to "deny[] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box* v. *Planned Parenthood of Ind. & Ky., Inc.,* 139 S. Ct. 1780, 1782 (2019) (per curiam); *id.* at 1784 (Thomas, J., concurring) ("[F]urther percolation may assist our review of this issue of first impression."); *Arizona* v. *Evans,* 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

Given the multitude of vehicle problems, this interlocutory case is ill-suited for this Court's plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

TRENTON H. NORRIS
Counsel of Record
S. ZACHARY FAYNE
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center
10th Floor
San Francisco, CA 94111
(415) 471-3100
Trent.Norris@arnoldporter.com

MARCH 2023