No. 22-699

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent paints the injunction here as a "garden-variety" effort by the district court "to manage its docket and control duplicative litigation." Resp. Br. at 2. Hardly.

I. First, the district court's order was not some ordinary exercise of federal equitable power. It was an extraordinary one.

As the injunction makes plain, "until" the district "court . . . order[s]" otherwise, "*no person* may file or prosecute a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products." App. 6a–7a (emphasis added). That includes both public officials—i.e., "the Attorney General and his officers, employees or agents"—and "private enforcers." *Id.* at 7a. This attempt to enjoin all non-parties exceeds the normal bounds of narrow and party-specific equitable relief.

As this Court has long made clear, injunctions against "all other individuals, persons, or corporations," rather than the particular parties at suit, are generally improper. *Reagan v. Farmers' Loan & Tr. Co.*, 14 S. Ct 1047, 1050 (1894). Indeed, just two Terms ago, the Court affirmed that while "a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions," it cannot "lawfully enjoin the world at large" or "enjoin [the] challenged laws themselves." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) (internal quotation marks omitted). An injunction which says that "no person may . . . prosecute" a lawsuit to "enforce" a state law does exactly that. App. 7a.

II. All the more remarkable is not just *whom* the lower courts here enjoined, but *how* they did so. The

panel decision resisted examining petitioner's "subjective motivat[ion]." App. 20a n.16. Instead, buried in a footnote, the panel focused exclusively on whether prospective suits would have "an objective that is illegal under federal law." App. 20a. That sort of focus excerpts a snippet of dictum from a labor law case—*Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 737 n.5 (1983)—removes it from its context, and elevates it to binding precedent for an entire circuit.

No other circuit has accepted that same invitation. Instead, in the four decades since *Bill Johnson's*, "every circuit court decision invoking the 'illegal objective' doctrine" has "used the doctrine only in labor law cases concerning the NLRB's authority." App. 84a (citing cases). In fact, the Tenth Circuit has expressly rejected "extending this . . . rule beyond the labor-relations context." *CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1290 (10th Cir. 2020).

Even the Ninth Circuit has held that "NLRA cases" are matters "that we treat differently from all others" in pre-enforcement litigation. *White v. Lee*, 227 F.3d 1214, 1236 (9th Cir. 2000). The panel's decision to embrace and expand a doctrine based on dicta flouts that admonition and creates a split in authority.

III. Finally, it is little wonder why the lower courts here tried to dodge questions of subjective intent. Only a few short years ago, Petitioner prevailed in a merits trial in state court, where defendants claimed that an acrylamide warning constituted unconstitutionally compelled speech. Pet. Br. at 5. Petitioner is thus not, as Respondent would so characterize, some "bounty hunter[]" acting in bad faith. Resp. Br. at 4. To the contrary, Petitioner has followed and applied the law as intended. It has

sought to enforce a "'landmark' statute aimed at protecting the public from exposure to toxic chemicals." App. 80a.

This fundamental point underscores why "[p]reliminary injunctions barring speech 'are classic examples of prior restraints,'" *California Chamber of Com. v. Becerra*, 529 F. Supp. 3d 1099, 1114 (E.D. Cal. 2021) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)), which "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). It is also why, outside the labor law context, the proper lens for evaluating such questions is the Petition Clause.

Case law interpreting that Clause has held that a petition or lawsuit lacks constitutional protection only if it is a "mere sham." *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). Lawsuits are shams when they are both "objectively meritless" *and* subjectively motivated to achieve an unlawful aim "through the use of the governmental *process*—as opposed to the *outcome* of that process." *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993). Neither prong is met here.

The Court should thus grant review to clarify that federal courts (i) may not enjoin nonparties from bringing private suits under state law, (ii) should not expand a common law doctrine outside its limited, labor-law confines, and (iii) should examine the claims here under traditional Petition Clause precedent, rather than through some other lens.

I. THE INSTANT INJUNCTION PRESENTS AN UNPRECEDENTED AND UNWARRANTED EXPANSION OF FEDERAL EQUITABLE POWER.

Federal courts have never been able to enjoin all future private enforcement of laws with citizen-suit provisions. Such actions directly contradict long-established Supreme Court precedent.

More than a century ago, this Court rejected an injunction against "all other individuals, persons, or corporations . . . from instituting or prosecuting any suit or suits against [a] railroad company." *Reagan*, 14 S. Ct at 1050. Instead, it limited the injunction to "restrain[] the defendants from enforcing the rates already established." *Id.* at 1060. In other words, *Reagan* explicitly limited the relief available, transforming an impermissible private enforcement injunction into a standard defendant-oriented injunction.

In the years post-*Reagan*, injunctions against private enforcement by non-parties have largely "been unsuccessful . . . in [the cases in] which [they have] been invoked." Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 Notre Dame L. Rev. 1825, 1860 (2022). That is because such injunctions violate the basic principle that "one is not bound by a judgment" in which one "is not designated as a party." *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008). The federal rules likewise make clear that injunctions should be limited to "the parties"; their "officers, agents, servants, employees, and attorneys"; and persons otherwise "in active concert or participation." Fed. R. Civ. P. 65(d)(2).

Whole Woman's Health crystallizes these points. It explains that "[t]he equitable powers of federal courts are

limited by historical practice" and there is no such support that allows a court to issue "an injunction against any and all unnamed private persons who might seek to bring their own" lawsuits. 142 S. Ct. at 535. Holding to the contrary would upset basic principles of standing and limited federal jurisdiction.

If anything, the lower court's invocation of equitable relief raises even greater concerns than the nationwide injunctions previously considered by this Court. In many of those cases, a federal court was enjoining a *federal* law, regulation, or order. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) ("This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies.") (Thomas, J., concurring); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit.") (Gorsuch, J., concurring).

But here, the district court went a step further—by enjoining *all* future litigation regarding a *state* law, without even trying to limit that injunction to litigation proceeding in federal court. App. 77a. That action implicates serious federalism concerns. A single federal judge has, in one fell swoop, prevented *any* actor, in either state or federal court, from enforcing a state law adopted by a majority of the electorate through popular initiative.

The injunction's classification of private enforcers as "in privity" with the California Attorney General does not save it. App. 77a. As *Whole Woman's Health* explains, a State may not escape scrutiny by "delegat[ing] its enforcement authority" through "private attorneys general acts" or "statutes allowing for private rights of action." 142 S. Ct. at 535. Such a theory would "overthrow this

Court's precedents and expand the equitable powers of federal courts," *id.*, without any justification for "abandoning traditional limits on their equitable authority"—exactly as the district court did here. *Id.* at n.2.; *see also Texas v. United States Dep't of Labor*, 929 F.3d 205, 213 (5th Cir. 2019) (rejecting a private enforcement injunction because private enforcers are "not in privity with the [relevant government agency] and not otherwise bound by the injunction" against that agency).

Finally, Respondent's insistence that this injunction is "quite narrow" and one which "courts routinely enter" is unavailing. Resp. Br. at 9, 15. In support of this point, Respondent cites only cases that enjoined future lawsuits by the *parties to the current litigation*—not unrelated nonparties. *Id.* at 14.

Shorn of these cases, Respondent relies on the panel opinion's offhand comment that two federal statutes—the All Writs Act and the Anti-Injunction Act—"show that enjoining prospective lawsuits does not per se violate the First Amendment." *Id.* But as Judge Berzon's dissent from denial of rehearing en banc observes, this "fleeting reference" does not give Respondent some free pass. App. 86a. Neither Respondent nor the lower courts offer any cases to support this cursory statutory reference; that lack of authority exposes the extraordinary nature of the injunction at issue.

II. THE NINTH CIRCUIT'S USE OF THE ILLEGAL OBJECTIVE TEST CONFLICTS WITH TREATMENT BY OTHER COURTS.

To make matters worse, the Ninth Circuit here not only exercised extraordinary equitable powers, but did so

to create a circuit split when it did not need to do so—and indeed, when it should not have done so. To justify the preliminary injunction, it invoked *Bill Johnson's Restaurants*, which, it claims, allows injunctions against suits that have "an objective that is illegal under federal law." App. 20a n.16.

That is not what *Bill Johnson's* held. Rather, *Bill Johnson's* held "that it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by . . . the NLRA." 461 U.S. at 744. In other words, even on its face, *Bill Johnson's* makes clear that it dealt with (1) labor practices, (2) concerning employees, (3) for exercising labor-related rights. Even then, courts should only enjoin baseless lawsuits that evince an *intent* to retaliate—i.e., lawsuits with an improper subjective motivation.

The Ninth Circuit's opinion makes no mention of this holding. Instead, it prioritizes a single footnote, which discusses what remedy *might* have been available for a suit with an illegal objective under federal law. *Id.* at 737 n.5. But as *Bill Johnson's* itself notes, it was "not dealing with" such "a suit"—making any discussion dictum. *Id.*

Even if that were not the case, every circuit that has applied the illegal-objective test—as Judge Berzon catalogued—has confined it to the labor relations context. App. 84a–85a. Why? Because "[t]he First Amendment rights of employers [and employees] in the context of the labor relations setting are limited to an extent that would rarely, if ever, be tolerated in other contexts." *White*, 227 F.3d at 1236 (internal quotation marks omitted). "The employer's right of expression has to be balanced against

'the equal rights of the employees to associate freely,' giving special consideration to 'the economic dependence of the employees on their employers.'" *Id.* at 1237 (quoting *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Consequently, "[r]egulations controlling such expressive activity would almost certainly be invalid outside the labor relations setting." *Id.*

Consistent with that guidance, the Tenth Circuit, in *CSMN Investments*, explicitly declined an invitation to extend the "unlawful-objective rule" outside *Bill Johnson's* specific context. 956 F.3d at 1289–90. The unlawful-objective rule "speaks only to what the NLRB must show to enjoin an ongoing lawsuit." *Id.* at 1290. And there are "good reasons counsel[ing] against extending [the] rule." *Id.* at 1290. As the decision notes, the rule bypasses inquiry into "subjective motivation," which "would eliminate immunity even in cases in which the party petitioning for redress does so for benign reasons." *Id.* That sort of result conflicts with the First Amendment's Petition Clause—which "exists to promote access to the courts, allowing people to air their grievances to a neutral tribunal." *Id.* "Both the subjective and objective components are necessary to protect important First Amendment rights." *Id.*

The decision below cannot be reconciled with *CSMN*. Indeed, the Ninth Circuit did not even try to do so. Nowhere in its decision does it explain why transporting and expanding the illegal-objective rule was warranted here, how courts should decide future cases when presented with this plain split, and why its own guidance in *White* was set aside.

III. THE PETITION CLAUSE PROTECTS AGAINST THE PRIOR RESTRAINT AT ISSUE.

As *CSMN* spotlights, the *proper* frame for examining the issues at hand is the Petition Clause. That Clause protects the right to petition "all departments of the Government" for redress, including the courts. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

Accordingly, this Court has recognized that "[t]hose who petition government for redress are generally immune from . . . liability," under the *Noerr-Pennington* doctrine. *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). Although *Noerr-Pennington* arose initially in the antitrust context, its fundamental principles—drawn from the First Amendment—have been recognized in virtually every arena *other* than labor law. *See BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002); *White*, 227 F.3d at 1237 ("We therefore conclude, as we have concluded in other contexts . . . that the principles in the *Noerr-Pennington* doctrine apply to this case."); *CSMN Invs.*, 956 F.3d at 1283.

Under *Noerr-Pennington*, a petition lacks constitutional protection only when it is both "objectively meritless" and subjectively motivated by a desire to achieve an unlawful aim. *Pro. Real Est.*, 508 U.S. at 60–61.

There is little to suggest that either Petitioner or a non-party's Prop. 65 lawsuit would fall afoul of either prong. Granting a preliminary injunction based on an initial finding of a likelihood of success does not mean that a lawsuit is baseless. *Cf. Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (reversing preliminary injunction); Ronald J. Ventolla II & Samuel W. Sil-

ver, *The Value of First Impressions: Considering the Effect of Motions for Preliminary Injunctive Relief on Ultimate Results in IP Cases*, 7 Landslide 8, 11 (2014) (one in six preliminary injunctions in trademark cases reversed).

And even *if* objective baselessness were satisfied, no party has offered any suggestion of an improper subjective motivation. In fact, the Ninth Circuit disclaimed any such analysis. App. 20a n.16. Granting review and clarifying the correct constitutional test to apply here would thus change the outcome of this case.

* * *

One final note. In a last-ditch effort to avoid review, Respondent trots out two predictable bogeymen: waiver and the purported interlocutory posture of the case. *See, e.g.*, Resp. Br. at 17, 24. Neither is apposite.

First, the issues at hand have been "pressed or passed upon." *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 473 (2002). Throughout the proceedings below, Petitioner has pointed out the remarkable and unprecedented expansion of injunctive relief. *See* Ninth Cir. Br. at 29 ("[T]he preliminary injunction compels private enforcers either to utter false compelled speech . . . or not to speak at all."); App. 24a. The Ninth Circuit—both the panel and the dissent for rehearing—passed on the issue, too. App. 24a & App. 82a n.1.

Further, both Petitioner and the lower courts examined the unlawful-objective rule. *See* Ninth Cir. Br. at 9–12; App. 82a–88a. And, contrary to the panel's characterization, Petitioner *did* raise *Noerr-Pennington* below and

did not "intentional[ly] relinquish[] or abandon[]" the argument at any time. *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (internal quotation marks omitted). At a hearing before the district court, Petitioner's counsel argued that "issuing a preliminary injunction would also violate *Noerr-Pennington.*" Ninth Cir. Br. at 14. Petitioner moved for summary judgment on *Noerr-Pennington* grounds. *Id.* at 5. In the Ninth Circuit, Petitioner further expounded on the First Amendment concerns with the district court's action. *See, e.g.*, *id.* at 22–23 ("[F]iling Proposition 65 lawsuits in the public interest to compel compliance with the law constitutes activity that is protected under the last clause of the First Amendment as activity that seeks 'to petition the Government for a redress of grievances.'"). As this Court has explained, it "crafted the *Noerr–Pennington* doctrine" to do exactly the same: i.e., "to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014). Any waiver arguments are unavailing.

Second, the crux of Respondent's procedural argument is that this Petition concerns a preliminary rather than permanent injunction. However, this Court regularly reviews preliminary injunctions. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020) (reviewing grant of preliminary injunction); *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (reviewing denial of preliminary injunction). In fact, as this Court has pointed out, granting or denying a preliminary injunction pending disposition of an appeal can be critical because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese*

v. Cuomo, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

So too here. If the Court declines review, it would effectively countenance a wholesale expansion of federal equitable power. It would revive and elevate dicta from decades ago which was, until now, limited in application. And it would abandon a commitment to the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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