NO. 25-6874

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA CHAMBER OF COMMERCE; CALIFORNIA RESTAURANT ASSOCIATION; WESTERN GROWERS ASSOCIATION,

Plaintiffs - Appellees,

v.

ROB BONTA, ATTORNEY GENERAL OF STATE OF CALIFORNIA; LILIA GARCIA-BROWER, LABOR COMMISSIONER; CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT,

Defendants - Appellants.

On Appeal from the U.S. District Court for the Eastern District of California, No. 24-cv-3798, The Honorable Daniel J. Calabretta

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ASSOCIATED BUILDERS AND CONTRACTORS, THE NATIONAL RETAIL FEDERATION, THE NATIONAL FEDERAL OF BUSINESS SMALL BUSINESS CENTER, THE RESTAURANT LAW CENTER, THE INTERNATIONAL FRANCHISE ASSOCIATION, AND THE COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF APPELLEES AND AFFIRMANCE

Stephanie A. Maloney
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
T: (202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Bryan Killian
Pranav Mulpur
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004
T: (202) 739-3000
bryan.killian@morganlewis.com

Counsel for All Amici

CONTENTS

AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS & STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE* [1]

The **Chamber of Commerce of the United States of America** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Associated Builders and Contractors is a national construction industry trade association established in 1950 with 67 chapters and more than 23,000 members. Founded on the merit shop philosophy, ABC helps members offer a robust employee value proposition, develop people, win work and deliver that work safely, ethically and profitably for the

1 All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

Established in 1911, the **National Retail Federation** is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To ensure that the retail community's position is heard, the NRF often files amicus curiae briefs expressing the views of the retail industry on a variety of topics.

The **National Federation of Independent Business Small Business Legal Center, Inc.** is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the **National Federation of Independent**

Business, Inc., which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The **Restaurant Law Center** is the only independent public policy organization created specifically to represent the interests of the food-service industry in the courts. The industry is comprised of over one million restaurants and other foodservice outlets employing 15.7 million people—approximately ten percent of the U.S. workforce, making it the second-largest private-sector employer in the United States. Through regular participation in amicus briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues significantly impacting its members and highlights the potential impact of pending cases like this one.

Founded in 1960, the **International Franchise Association** is the oldest and largest trade association in the world devoted to representing the interests of franchising. The IFA's membership includes franchisors, franchisees, and suppliers. The IFA's mission is to safeguard and

enhance the business environment for franchising worldwide. In addition to serving as a resource for franchisors and franchisees, the IFA and its members advise public officials across the country about the laws that govern franchising. Through its public-policy programs, it protects, enhances, and promotes franchising on behalf of more than 1,400 brands in more than 300 different industries.

The **Coalition for a Democratic Workplace** represents millions of businesses that employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the NLRB that threatens the wellbeing of employers, employees, and the national economy.

Amici regularly advocate for the First Amendment rights of their members. An employer's free speech right to communicate his views on political issues, such as unionization, is firmly established and constitutionally protected. *Amici* have a strong interest in this appeal, as the law at issue flouts decades of constitutional precedent by prohibiting so-called "captive-audience meetings"—mandatory workplace meetings where an employer discusses political issues like unionization with its

employees. Regulating employers' conduct based on the content and viewpoint of their speech injures *amici* and their members and violates the First Amendment, as the district court correctly held. This Court should affirm that holding.

STATEMENT OF THE ISSUE

Whether California violated the First Amendment's prohibition of content- and viewpoint-discriminatory regulation when it forbade employers from holding mandatory meetings to talk with employees about religious or political topics (including unionization) but not when they hold mandatory meetings to talk about other topics.

SUMMARY OF ARGUMENT

Governments across the country have been experimenting with a new strategy for silencing speech that labor unions oppose. At least a dozen States, including California, have enacted laws subjecting employers to private suits and/or civil penalties if they require employees to attend meetings where the employer presents its views on religious or political matters, including unionization. Law-abiding employers in these States face a no-win choice: either stop talking about unionization at mandatory meetings, or talk about unionization only in optional meetings.[2]

California's permutation of this trend is Senate Bill 399. Under this law, a California employer faces penalties if it mandates that employees

2 Most of the States ban mandatory workplace meetings on "religious matters" and "political matters," specially defined to include unionization: California (Cal. Labor Code § 1137) (hereinafter "SB 399"); Connecticut (Conn. Gen. Stat. § 31-51q); Illinois (Ill. Pub. Act 103-0722 (July 31, 2024)); Maine (Me. Rev. Stat. tit. 26, § 600-B); Minnesota (Minn. Stat. § 181.531); New Jersey (N.J. Stat. §§ 34:19-9–19-11); New York (N.Y. Lab. Law § 201-D); Oregon (Or. Rev. Stat. § 659.785); Vermont (Vt. Stat. tit. 21, § 495o); and Washington (Wash. Rev. Code § 49.44.250). Alaska approved a similar ban by initiative, which soon will be codified at Alaska Stat. § 23.10.490, *available at* https://www.elections.alaska.gov/petitions/23AMLS/23AMLS-Bill.pdf. Hawaii's ban applies only to unionization and political matters. *See* Haw. Rev. Stat. § 377-6.

attend a meeting where the employer addresses a disfavored topic (like unions) or expresses a disfavored viewpoint (like urging employees to reject union representation).

California insists that SB 399 does not violate the First Amendment. As California sees it, because SB 399 targets an employer's act of mandating attendance at meetings, it regulates only *conduct* rather than *speech*. That defense is demonstrably false. California has not forbidden *all mandatory meetings*; it has forbidden only mandatory meetings *about unionization* and other *disfavored topics*. SB 399 is content-discriminatory by definition. And by targeting only *employers'* speech, SB 399 is also viewpoint-discriminatory.

The district court's preliminary injunction of enforcement of SB 399 must be affirmed.

ARGUMENT

California forbids employers from holding mandatory meetings to discuss their opinions on religious and political matters (including unionization) with their employees. As such, California conditions an employer's ability to take an action (mandate employee attendance at a meeting) on what the employer says at the meeting. By linking employer conduct to employer speech in this flagrantly content-discriminatory way, California violates the First Amendment rights of employers. Plaintiffs raised these constitutional concerns, and the district court agreed that California unconstitutionally regulates employers' speech. Viewed correctly, the First Amendment requires affirming the district court.[3]

3 Amici agree with the district court and Plaintiffs that SB 399 also falls short under *Machinists* and *Garmon* preemption. *See Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 65 (2008) (explaining that *Garmon* preemption precludes state interference with federal labor law, while *Machinists* preemption forbids both the state and federal government from regulating conduct intended to be left to the free market). However, the constitutional argument provides this Court the cleanest way to resolve this dispute, allowing the Court to sidestep any discussion about whether non-labor-related portions of the law are severable.

I. California impermissibly regulates speech.

1. Throughout its brief on appeal, California downplays free-speech concerns by contending that SB 399 regulates only conduct—specifically, the conduct of disciplining employees who refuse to attend a meeting. But the First Amendment is not so easily evaded. A targeted prohibition or regulation of conduct taken specifically for disfavored content-based speech purposes is a regulation of speech itself. Under binding Supreme Court precedent, the State's efforts to "silence unwanted speech by burdening its utterance [rather] than by censoring its content" violate the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). For, by conditioning the regulation of employers' conduct on the content of their speech, SB 399 "impose[s] a specific, content-based burden on protected expression." *Id.* at 565; *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (holding a statute that imposed financial burden on criminals' speech-derived income is content-based and impermissible under the First Amendment). This burden is made even heavier by SB 399's discrimination against employers' political views—speech at the "core of what the First Amendment

is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality op.); *accord First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

When confronted with a substantively similar restriction on mandatory employee meetings, the Eleventh Circuit explained why such regulations affect speech, not just conduct. *See Honeyfund.com Inc. v. Governor*, 94 F.4th 1272 (11th Cir. 2024). *Honeyfund* concerned a statute that "bar[red] employers from holding mandatory meetings for their employees if those meetings endorse[d] viewpoints the state finds offensive." *Id.* at 1275 (analyzing Fla. Stat. § 760.10(8)). The Eleventh Circuit saw through the state's "attempt[s] to control speech by recharacterizing it as conduct," and held that the statute likely violated the First Amendment. *Id.* at 1275, 1283. "When the conduct regulated depends on—and cannot be separated from—the ideas communicated, a law is functionally a regulation of speech." *Id.* at 1278.

SB 399 operates like the unconstitutional statute in *Honeyfund*. It enumerates a list of topics and prohibits employers from sharing views on those topics during mandatory employee meetings. The conduct

regulated depends entirely on the content of the speech. Under both statutes, "[t]he only way to discern which mandatory [meetings] are prohibited is to find out whether the speaker disagrees with [the State]." *Id.* at 1277; *see Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163–64 (2015). Like *Honeyfund*, California's attempt to "hid[e] speech regulations in conduct rules is not only a dubious constitutional enterprise—it is also a losing constitutional strategy." *Honeyfund*, 94 F.4th at 1278 (quotation omitted). SB 399 is a speech-based regulation subject to ordinary First Amendment principles.

2. SB 399 is both content- *and* viewpoint- discriminatory. Content-based restrictions of speech are "presumptively unconstitutional." *Reed*, 576 U.S. at 163. A restriction is "content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* SB 399 does exactly that. By applying only to speech on religious and political matters, California allows mandatory meetings on topics the State favors and disallows mandatory meetings on topics it disfavors. In other words, SB 399 draws distinctions based on the

message an employer conveys. This meets the "commonsense meaning of the phrase 'content based.'" *Id.*

Moreover, SB 399 regulates only *employer* speech. Laws that target and apply only to particular speakers are viewpoint-discriminatory because they exclude an entire category of speakers and their viewpoints from debate on a topic. *See Sorrell*, 564 U.S. at 564–565 (equating speaker-based restrictions with viewpoint-discrimination). Silencing employers from commenting on unionization is obviously an effort to promote pro-union viewpoints and inhibit alternative views.

II. California misunderstands the Supreme Court's cases about captive audiences and unwilling listeners.

Trying to find an escape hatch from the First Amendment, California claims that employers have no right to talk to "unwilling listeners" when listeners comprise a "captive audience." Appellants' Br. at 20, 26. California's reliance on this rationale is entirely misplaced. *First*, the captive-audience rationale is a narrow, time-place-manner restriction, which is constitutional only if content-neutral. Since SB 399 is content-discriminatory, the captive-audience rationale cannot save SB 399. *Second*, the

unwilling-listener rationale applies only to limited places where heightened privacy is expected; the workplace is absent from that list.

1. Whatever authority the government has to regulate for unwilling listeners, the government cannot exercise that authority in content- or viewpoint-discriminatory ways. The Supreme Court affirmed that principle of neutrality in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). There, the Court discussed a range of First Amendment precedents exemplifying the difference between content-neutral and content-discriminatory regulations of speech, including two cases where the government (like California here) had relied on the unwilling-listener rationale. *See id.* at 386 (discussing *Frisby v. Schultz*, 487 U.S. 474 (1988), and *Carey v. Brown*, 447 U.S. 455 (1980)). *Frisby* upheld a content-neutral ban on residential picketing, whereas *Carey* struck down a content-discriminatory partial ban on residential picketing that exempted labor protests. Because the *Frisby* ban was content-neutral, the Court accepted the government's assertion that the ban was necessary to protect home occupants from the inescapable annoyance of outside picketing. *See Frisby*, 487 U.S. at 487. Because the *Carey* ban was content-discriminatory, however, the

government had to justify the discrimination—"the exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Carey*, 447 U.S. at 465.

In other words, speech restrictions premised on protecting unwilling listeners are essentially "time, place, or manner" restrictions and are constitutional if and only if they are content-neutral. *See Hoye v. City of Oakland*, 653 F.3d 835, 852 (9th Cir. 2011) (explaining that courts only accept the unwilling-listener rationale "to justify a content-neutral time place, and manner restriction."); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "time, place, or manner" restrictions are constitutional only if "justified without reference to the content of the regulated speech"). Thus, the Supreme Court has *never* relied on the unwilling-listener rationale to uphold a content-discriminatory restriction of speech, like the law at issue here. The few instances raised by California where the Court allowed a speech restriction under the unwilling-listener rationale all involved a content-neutral restriction. *See*

Appellants' Br. at 20 (citing *Hill v. Colorado*, 530 U.S. 703 (2000) and *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728 (1970)).

- In *Hill*, the Supreme Court distinguished *Carey* by explaining that, unlike there, the statute in *Hill* does not "draw[] distinctions based on the subject that the … speaker may wish to address." 530 U.S. at 723.
- And in *Rowan*, the Supreme Court explained that Congress enacted a content-neutral, unwilling-listener protection "to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the" speech "in a government official." 397 U.S. at 737.

Far from sustaining SB 399, these cases prove that California cannot avail itself of the unwilling-listener rationale. SB 399 is content-discriminatory, not content-neutral: employers cannot hold mandatory meetings *to discuss politics and unionization*, but may hold mandatory meetings *to discuss other topics*. *See supra* 10–11. Because the First Amendment does not tolerate subjecting union-related mandatory meetings to special restrictions while allowing mandatory meetings on other topics to proceed freely, SB 399 violates the First Amendment.

2. California also errs by relying on the unwilling-listener rationale without accounting for *where* the speech occurs. The unwilling-listener rationale allows for regulation of speech "only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (citation omitted). Thus, the unwilling-listener rationale saved a law banning *residential* picketing, *see Frisby*, 487 U.S. at 476–477, a law allowing *homeowners* to opt out of unwanted *residential* mailings, *see Rowan*, 397 U.S. at 738, and a law barring loud sound trucks *in residential neighborhoods*, *see Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949).

Beyond the home, the list of places protected by the unwilling-listener rationale contains a single, well-recognized outlier—*Hill*.[4] That is

4 California cites *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), as if it held that public transportation is a place where the government can silence speech to protect unwilling listeners. Appellants' Br. at 27. All *Lehman* held is that a public transportation system is not a public forum, so the public operator of that system has broad discretion to reject advertisements to display on buses and trains, same as any private transportation provider could. *See Lehman*, 418 U.S. at 302–303. California's reliance on cases like

(footnote continued on next page)

because there are few nonresidential places where listeners have "substantial privacy interests" tantamount to those which we have inside our homes. *Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of government … to shut off discourse solely to protect others from hearing it is … dependent upon a showing that *substantial privacy interests* are being invaded in an essentially intolerable manner." (emphasis added)).[5]

Lehman is misleading because "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

5 *Hill* is a well-known outlier, and this Court should not extend *Hill*'s dubious application of the unwilling-listener rationale beyond its particular facts. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 & n.65 (2022) (explaining that *Hill* "distorted First Amendment doctrines"); *Hoye*, 653 F.3d at 845 n.6 (citing Colloquium, *Prof. Michael McConnell's Response*, 28 Pepp. L. Rev. 747, 747-48 (2001)) (explaining that "*Hill*'s reasoning, if not always its result, has been criticized by scholars of various stripes."); *see also Bruni v. City of Pittsburgh*, 941 F.3d 73, 93 (3d Cir. 2019) (explaining that *Reed* "rebuked *Hill* several times"); *Price v. City of Chicago*, 915 F.3d 1107, 1109 (7th Cir. 2019) (explaining that *Hill* "is hard to reconcile" with later precedent); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1298 & n.174 (2007).

The Supreme Court has rejected extending the unwilling-listener rationale to a wide range of other places. *See, e.g.*, *Id.* at 21–22 (courthouse); *Erznoznik*, 422 U.S. at 212 (sidewalks and public streets); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (cemetery); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (high school football games). In some sense, listeners in those places may be required attendees, but the unwilling-listener rationale requires more. It asks whether the listeners have strong privacy interests in the particular place. Without the privacy-interest element, the doctrine would easily slide into a heckler's veto. "The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences [f]or many purposes.'" *Erznoznik*, 422 U.S. at 208, 210 (quotation omitted).

The Constitution does not give *listeners* a trump card. The First Amendment protects *speakers*. For unwilling listeners, the simple answer is that "learning how to tolerate speech … of all kinds is part of learning how to live in a pluralistic society, a trait of character essential to a tolerant citizenry." *Kennedy*, 597 U.S. at 538 (quotation omitted); *see*

303 Creative v. Elenis, 600 U.S. 570, 602 (2023) ("If liberty means anything at all, it means the right to tell people what they do not want to hear." (quotation omitted)).

California wrongly assumes that the unwilling-listener rationale should extend outside the home to cover employees inside the workplace. The Supreme Court has never held that employees have a right not to hear unwanted speech while at work, and it has repeatedly rejected similar efforts to erode First Amendment protections by expanding the locations protected under the unwilling-listener rational. Lower courts have gotten the message. As discussed earlier, the Eleventh Circuit rejected Florida's identical argument for shielding employees from disfavored speech at work. *See Honeyfund.com*, 94 F.4th at 1281 n.5. It may be impractical for employees to avoid listening to employers, but the unwilling-listener rationale applies only where listeners have intense, home-like privacy interests. No court has suggested that employees have such heightened privacy interests inside their employers' workplace. And this Court should not be the first.

CONCLUSION

The district court should be affirmed.

Dated: January 23, 2026

Respectfully submitted,

s/ Bryan Killian

Bryan Killian
Pranav Mulpur
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004
T: (202) 739-3000
bryan.killian@morganlewis.com
Counsel for All Amici

Stephanie A. Maloney
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
T: (202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,455 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Century, 14-point font.

Dated: January 23, 2026 s/ Bryan Killian