No. 18-1092

In the
Supreme Court of the United States

ASSOCIATED BUILDERS & CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC.
Petitioner,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; ANDRE SCHOORL, in his official capacity as Director of the California Department of Industrial Relations; JULIE A. SU, in her official capacity as California Labor Commissioner, Division of Labor Standards Enforcement,
Respondents.

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

REPLY BRIEF

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QUESTIONS PRESENTED

California law formerly permitted nonprofit advocacy organizations of all viewpoints to receive a certain type of private donation—called a "prevailing wage contribution." But a recent legislative amendment, known as SB 954, limits eligibility for those donations to organizations selected in a collective bargaining agreement (CBA). Petitioner, an advocacy organization that primarily subsisted off of prevailing wage contributions and that stood to lose its funding, sued on the theory that the purportedly "neutral" criterion of designation in a CBA acts as a proxy for union-favored viewpoints. It alleged that, in practice, no CBA will authorize funding to a group that speaks contrary to union interests, and pointed to SB 954's over- and under-inclusiveness as evidence of the law's true, discriminatory purpose. The Ninth Circuit rejected this viewpoint-discrimination-by-proxy theory, held that the law was a facially neutral government speech subsidy, and affirmed the district court's dismissal of the complaint under Fed. R. Civ. P. 12 without leave to amend.

The questions presented are:

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

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

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INTRODUCTION

When does a court look past a law's facial neutrality to determine whether the "neutral" façade acts as a proxy for viewpoint? Almost never, according to the opinion below. Certiorari is needed to resolve the now worsened circuit split regarding how to evaluate claims of covert viewpoint discrimination.

The Government opposes certiorari on three bases. It alleges: 1) the Ninth Circuit did not "eliminate" plaintiffs' ability to plead viewpoint discrimination by neutral proxy, 2) there is no circuit split, and 3) SB 954 is immune from constitutional attack thanks to application of the Court's government speech subsidy doctrine. None of these arguments is persuasive.

First, the Ninth Circuit made it significantly more difficult, if not impossible, to plead proxy claims. Under the opinion below, courts may not look beyond a law's neutral face unless there are "indicia" of discrimination. A law's legislative history and practical effect do not qualify as relevant indicia. The *only* relevant indicia are under- and over-inclusiveness and even then, courts may invent justifications (including those not put forward by the government) to rationalize a law's ill-fit. That is a high burden for plaintiffs to overcome before they've been afforded any discovery and are arguing against a motion to dismiss.

Second, circuit courts are split about whether and how to evaluate proxy claims. The Second, Seventh, and Tenth Circuits accept the theory and consider a combination of the law's practical effect, over- and

under-inclusiveness, and legislative history. The Sixth Circuit has outright rejected the theory and, in the opinion below, the Ninth Circuit makes it practically impossible to plead it. Certiorari is needed to clarify whether, and how, plaintiffs can plead a proxy claim.

Last, the opinion below vastly expands the government speech subsidy doctrine. Government speech subsidies occur when the government is expending its own resources to facilitate private speech. That is not the case here. SB 954 merely regulates which organizations are eligible to receive a certain type of private donation. Because speech subsidies are subject to a lower level of scrutiny, the decision threatens to water down the First Amendment's protections for a vast array of speech entitled to higher scrutiny.

ARGUMENT

I

IT IS MORE THAN PLAUSIBLE THAT SB 954 IS VIEWPOINT DISCRIMINATORY

In the Government's own words, the Legislature enacted SB 954 because it "was concerned that the law's previous wording" allowed prevailing wage contributions to flow to speech "favored by the employer," and it sought to close that "loophole." Opp. at 3. In other words, the Legislature enacted SB 954 to deprive certain viewpoints—those of non-unionized employers—of funding, simply because the Government did not like what those employers have to say. This is quintessential viewpoint

discrimination. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015).

That discrimination is evident from the way the law operates. Although the Government contends that SB 954 facilitates employee consent over wage allocations, CBAs are a poor proxy for consent. Not all union members are entitled to vote on a CBA. *See Sergeant v. Inlandboatmen's Union of the Pac.*, 346 F.3d 1196, 1203 (9th Cir. 2003). In fact, not all CBAs require a vote at all. Project Labor Agreements (PLAs)—a special type of CBA—are negotiated between a union and the government project owner prior to any contractor even bidding on the project. *See Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002). In these situations, employees do not have any say over the terms of the contract. Indeed, under a PLA, non-union employees are forced to work under contracts that allocate prevailing wage contributions to union-supported advocacy organizations.

Even when employees are entitled to vote, CBAs are usually ratified by majority vote—meaning that nearly half of employees may labor under a CBA they disagree with. And even then, those who voted in favor of the CBA may disagree with the prevailing wage contribution; employees do not have a line-item veto. In short, SB 954 does not prevent prevailing wage contributions from going to advocacy organizations without the employee's consent; it prevents prevailing wage allocations from going to advocacy organizations without the *union's* consent.

SB 954's discriminatory intent is also evident from its over- and under-inclusiveness. The law is over-inclusive because it does not allow prevailing wage contributions to an advocacy organization even if an employer gets *actual, individual* consent—if those contributions were not negotiated through a CBA. This result makes little sense if the goal is "consent," but it is perfectly sensible if the goal is to channel prevailing wage contributions to union-supported speech.

SB 954 is under-inclusive because it does not require a CBA for any other prevailing wage contribution—including contributions to pension funds, healthcare, apprenticeship programs, vacation time, and other purposes. An employee might reasonably prefer to forgo vacation days in order to increase pension fund allocations. Nevertheless, SB 954 allows employers to make that call, and receive a corresponding credit, without employee consent. The only contribution that SB 954 targets is the one that goes toward political speech.

This over- and under-inclusiveness raises serious doubts about whether the government is pursuing a truly neutral purpose. *See, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018). But even on its face, the connection between SB 954 and viewpoint is plain: an advocacy organization only qualifies for prevailing wage contributions if it is authorized to receive them by a

union-negotiated CBA. This naturally favors union-supported speech.[1]

Because public contracting is competitive, groups are unlikely to donate to Industry Advancement Funds without the incentive of a prevailing wage credit. Appendix I-11, 12. These contributions are therefore vital to the Funds' existence. It is no coincidence that since SB 954, ABC-CCC has lost virtually all of its funding. *See* Appendix M-3. If it were permitted to obtain discovery, ABC-CCC could have obtained evidence showing that all prevailing wage contributions since SB 954 have gone to funds with pro-union viewpoints. But ABC-CCC was denied that opportunity under the Ninth Circuit's impossible pleading standard.

II

THE NINTH CIRCUIT ELIMINATED THE MOST NATURAL WAY TO PLEAD PROXY

ABC-CCC argued below that 1) SB 954's requirement of a CBA has the practical effect of discriminating against open-shop viewpoints, 2) the law is over- and under-inclusive with regard to its purported purpose, and 3) the legislative history shows the State's true discriminatory motive. Yet the Ninth Circuit held that there were no indicia of viewpoint discrimination and ABC-CCC failed to state

[1] If SB 954 had instead stated that in order to facilitate individual employee consent, funds may only receive prevailing wage contributions if negotiated *outside* of a CBA, surely that would raise the specter of anti-union discrimination.

a claim under the First Amendment.[2] The Government argues in opposition that the opinion below does not totally eliminate proxy claims. But it's hard to see how one might plead such a claim given the Ninth Circuit's rejection of several relevant factors.

For example, the Panel ignored ABC-CCC's arguments related to legislative intent. It held that a court may only look past the face of the text to evidence like legislative history if the plaintiff first shows indicia of viewpoint discrimination. App. A-39. The Panel then severely limited what evidence may be considered indicia of discrimination.

Under the Panel's decision, a law's discriminatory effect on a given viewpoint does not qualify as such indicia. The Panel reasoned that a "facially neutral statute restricting speech for a legitimate end is not discriminatory simply because it affects some groups more than others." App. A-41. But that conclusion puts the cart before the horse. ABC-CCC alleged that SB 954 restricts speech for an *improper* purpose: to tilt the scale in favor of certain viewpoints. Disproportionate effect is evidence of whether the end is legitimate to begin with. Indeed, how could one ever prove a proxy claim if not by examining a law's impacts on speech?

Moreover, ABC-CCC did not argue that a law that disproportionately burdens one viewpoint is necessarily discriminatory—it merely argued that

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[2] Certainly the Government has no obligation to make prevailing wage contributions available to Industry Advancement Funds at all. But if it does, it must offer them even-handedly.

such an effect is reliable evidence of *potential* discrimination. Because proxies will ipso facto affect the targeted viewpoint,[3] other Circuits consider the practical effect of supposedly "neutral" criteria. *See Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566, 593–94 (7th Cir. 2002) (criteria that considered the length of time that a student organization had been in existence was viewpoint discriminatory in practical effect); *Amidon v. Student Ass'n of State University of New York at Albany*, 508 F.3d 94, 102 (2nd Cir. 2007) (referendum policy based on student body vote created a "substantial risk that funding [would] be discriminatorily skewed in favor of [groups] with majoritarian views").

The only criteria that the Ninth Circuit accepted as evidence of viewpoint discrimination are a law's under- and over-inclusiveness. But even then, when ABC-CCC made such an argument, the Panel invented justifications—based on no evidence, given dismissal on the pleadings—for the law's ill-fit. ABC-CCC had alleged, for example, that SB 954 is over-inclusive with regards to "ensuring employee consent" because it does not allow non-CBA employers to take a prevailing wage credit even when they obtain actual, individual consent. In response, the Ninth Circuit reasoned that such over-inclusiveness was rational[4] because otherwise employers might coerce

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[3] If the criteria corresponded perfectly, the jig would be up and the law would cease to be a proxy.

[4] Here again, the Panel undercut all proxy claims by conjuring "rational" justifications for under- and over-inclusiveness. Given that many laws will pass rational basis but not strict scrutiny,

employees into agreeing to the contribution. Such consent would be "illusory."[5]

But consent is no more coerced or illusory outside the context of a CBA than within it. Not all employees are entitled to vote on a CBA. In fact, *no* employee is entitled to vote on a PLA, and other CBAs are usually ratified on a majoritarian basis.[6] The Panel turned a blind eye to this over-inclusiveness.

ABC-CCC also argued that SB 954 is under-inclusive because the legislature does not require other prevailing wage contributions, like healthcare benefits, pension contributions, vacation time, or outlays to apprenticeship programs to be negotiated through a CBA. If the government's goal is to ensure consent, surely it makes sense to protect consent over such important allocations as healthcare benefits, pension contributions, etc. Instead, the *only* contribution targeted by SB 954 is the contribution that supports expressive activity.

Again, the Panel dismissed these arguments. It reasoned that unlike traditional employee benefits,

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it's self-defeating to dismiss evidence of a poor fit on the grounds that the fit is rational.

[5] Now, for the first time, the Government advances a similar argument, stating that the law does not allow negotiation outside of a CBA because such a scheme "would effectively negate the wage floor" and permit individuals to "negotiate reductions in their own wages." Opp. at 15. But SB 954 allows individuals to "negotiate reductions in their own wages," so long as they negotiate them through a CBA.

[6] Even if there were some basis to prefer majority consent over individual consent, SB 954 only allows majority consent when expressed through a CBA.

contributions to Industry Advancement Funds like ABC-CCC do not directly benefit the employee. But the Government does not contend that all contributions to Funds fail to directly benefit workers; it contends that contributions to *funds like ABC-CCC* fail to directly benefit workers—because of the policies they advocate for. Ninth Cir. Doc. 28 at 34 n.7 (it would be "unfair" if prevailing wage contributions were used to advocate for lowering the minimum wage). That is, it was not concerned about contributions to Industry Advancement Funds, per se. It was concerned about contributions to Funds that have certain beliefs. This is exactly why SB 954 continues to allow contributions to Funds without *real* consent—so long as the union approves through a CBA.

The Panel's analysis creates a heightened pleading standard for claims of discrimination by proxy. At the pleading stage, courts are supposed to consider whether allegations are plausible, not probable, so that plaintiffs with credible allegations may gather evidence to prove their claims.

The opinion below is not a one-off in the Ninth Circuit. The court has been particularly inhospitable to claims of covert viewpoint discrimination, and particularly quick to accept the Government's claims of neutrality. *See, e.g.*, *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017) (refusing to consider legislature's purpose because law was facially viewpoint neutral); *National Institute of Family and Life Advocates v. Harris*, 839 F.3d 823, 836 (9th Cir. 2016) (legislative intent is insufficient to trigger strict scrutiny where law is facially neutral).

Certiorari is needed to restore the ability of plaintiffs to make claims of covert viewpoint discrimination.

III

THERE IS A CIRCUIT SPLIT ON HOW TO EVALUATE PROXY CLAIMS

The Government agrees that the Second, Seventh, and Tenth Circuits accept proxy claims. It argues, however, that there is no circuit split because the Sixth and Ninth Circuits allegedly accept such claims. But a plain reading of Sixth and Ninth Circuit precedent shows that courts are, in fact, divided.[7]

In *Bailey v. Callaghan*, 715 F.3d 956, 965 (6th Cir. 2013), the majority's refusal to accept the plaintiff's discrimination-by-proxy theory was at the center of the dissent. The plaintiffs had argued that the law's selective denial of payroll deductions for *some* unions acted as a "proxy for viewpoint discrimination," but because the law was facially neutral, the majority declined to assess whether the "real purpose" was discrimination. *Id.* at 960.

In contrast to the majority, Judge Stranch would have held that "the facial neutrality of a speech regulation does not resolve its legitimacy." *Id.* at 965. Because the majority accepted the law at face value,

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[7] The Eighth Circuit has also been reluctant to probe beneath facially viewpoint neutral laws. *See Phelps-Roper v. Ricketts,* 867 F.3d 883 (8th Cir. 2017) ("Regardless of any evidence of the Nebraska legislature's motivation for passing the [law], the plain meaning of the text controls, and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face.").

it abandoned its duty to "ferret out hidden viewpoint bias" by using factors like "underinclusiveness," "official statements," and a poor means-ends fit. Considering these factors, it was plain that the law's true purpose was to discriminate against school unions because they have "a particular viewpoint that [the Act] seeks to muzzle." *Id.* at 966.

Judge Stranch's dissent is equally applicable to the Ninth Circuit's opinion below. There, the Panel refused to look at anything other than under- and over-inclusiveness and, even then, it invented excuses for the poor means-ends fit rather than letting the claim move forward to discovery. Practically speaking, this makes it difficult, if not impossible, to plead that a neutral statute acts as a proxy for viewpoint. This creates a conflict that this Court should resolve.

IV

THE LAW IS NOT A GOVERNMENT SPEECH SUBSIDY

Government speech subsidies are limited to instances where the government spends or forgoes its own resources to facilitate private speech. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). SB 954 does not direct government resources toward private speech. Instead, it limits the ability of certain private individuals to fund private speakers.

The Government contends that a decision "not to aid an entity's speech is not the same as restricting that speech." Opp. Br. at 18. That's true, but

irrelevant to whether a law is a government subsidy. Not every law that "aids" speech is a subsidy. For example, even though the government has wide latitude to restrict obscene speech, it is not "subsidizing" obscene speech when it allows it.[8] And when it does choose to allow obscene speech, it may not discriminate based on viewpoint. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). A government subsidy occurs when the state channels public funds or resources toward private speech—not when it merely regulates it.

The Government further contends that even if a government subsidy must entail the use of government funds, SB 954 satisfies that standard because it regulates money that originated as public money. But at some point, money that starts in the public fisc is no longer the government's. When a public school teacher pays for groceries with funds from her paycheck, we would not say she's paying with government money, or that the government is subsidizing her groceries. Similarly here, the money is no longer properly considered government property at the time it reaches a Fund. Whether it is considered the contractor's money or the employee's, it's private.

The government speech subsidy doctrine is important because when subsidizing speech, the

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[8] While the Government cites to *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007), that opinion never actually calls the law at issue a subsidy; it merely states that similar principles were operating in that case.

government can engage in speaker-based discrimination. The classification of SB 954 as a government subsidy was outcome determinative in this case, because the law's speaker-based distinctions alone should have been sufficient to subject it to strict scrutiny. And while the Government argues that there is no First Amendment concern in this case, impermissible government motive (and in particular, viewpoint discrimination) is the primary concern of the First Amendment. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996). By subjecting a host of speech to lower scrutiny and eliminating claims of speaker-based discrimination, the Ninth Circuit has made it more difficult for courts to fulfill their roles as guards of viewpoint neutrality.

CONCLUSION

ABC-CCC respectfully requests that the Court grant the Petition.

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Respectfully submitted,

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