

No. _____

In the
Supreme Court of the United States

INTERPIPE CONTRACTING, INC.;
ASSOCIATED BUILDERS & CONTRACTORS OF
CALIFORNIA COOPERATION COMMITTEE, INC.,

Petitioners,

v.

XAVIER BECERRA, in his official capacity as
Attorney General of the State of California;
CHRISTINE BAKER, in her 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**

**APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES**

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*Counsel for Petitioner Associated Builders &
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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5, Petitioner Associated Builders and Contractors, California Cooperation Committee (ABC-CCC) respectfully requests a **60-day extension** of time in which to file its petition for writ of certiorari in this Court, to and including **February 18, 2019**.

Petitioner will seek review of an opinion of the United States Court of Appeals for the Ninth Circuit filed on July 30, 2018, attached as Exhibit A. The Ninth Circuit denied a petition for rehearing on September 21, 2018. *See* Exhibit B. The time to file a petition for writ of certiorari in this Court currently expires on December 20, 2018, and this application has been filed more than ten days before that date. This Court has jurisdiction under 28 U.S.C. § 1257.

This case involves a challenge under the First and Fourteenth Amendments to a California law (SB 954, Cal. Lab. Code § 1773.1(a)(8)) that effectuates viewpoint discrimination in favor of union-approved speech. In California, public contractors must pay their employees the “prevailing wage,” a predetermined rate set by the California Department of Industrial Relations. They can satisfy this requirement both by paying cash and providing benefits, including contributing to various worker programs and funds. Prior to SB 954, employers could contribute to any “industry advancement association”—that is, a non-profit group that advocates for the industry—and receive a corresponding credit to their prevailing wage obligation. SB 954 changed the law so employers can only receive a credit if the contribution is

authorized by a union-approved collective bargaining agreement (CBA). This effectively makes only union-approved speech and speakers eligible for prevailing wage contribution credit.

Petitioner ABC-CCC is nonprofit association that was formed to advocate in favor of “open-shop” policies, meaning a system wherein employees are free from coercion to adhere to collective bargaining. As an “open-shop” advocate, ABC-CCC naturally advocates to minimize the role of unions in public contracting, and therefore advocates contrary to union interests. Because no union will authorize a contribution to a group like ABC-CCC in a collective bargaining agreement, ABC-CCC is essentially disqualified from receiving funds pursuant to a CBA. ABC-CCC brought suit under 42 U.S.C. Sec. 1983 on the theory that SB 954’s allowance for prevailing wage credit only for contributions made pursuant to a CBA acts as a proxy for viewpoint and discriminates in favor of union-approved speakers. ABC-CCC argues that this viewpoint discrimination violates the First and Fourteenth Amendments.

The district court denied the Petitioner’s motion for a preliminary injunction and dismissed for failure to state a claim. The Ninth Circuit affirmed and held that the law does not violate the First Amendment because the law is facially viewpoint neutral, and the court declined to inquire whether the law’s “neutral” criteria act as a proxy for viewpoint.

The petition to be filed by ABC-CCC will present the Court with important constitutional questions regarding the scope of government speech subsidies and the ability of plaintiffs to bring a claim that a facially “neutral” law acts as a proxy for

viewpoint discrimination. The petition will address whether a law is subject to the lower “government speech subsidy” standard merely because it bans private funds from going to private speakers, but permits other such allocations. It will present as well the question of whether a plaintiff plausibly alleges a claim of covert viewpoint discrimination when it alleges that a law has the effect of discriminating against groups of one viewpoint, and is both over- and under- inclusive with regard to its purported purpose. Prior to the Ninth Circuit’s decision, the viability of such a claim was well-settled law. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994) (“even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys”); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) (facial neutrality “cannot save an exclusion that is in fact based on the desire to suppress a particular point of view”). The Ninth Circuit has effectively eliminated claims of covert viewpoint discrimination, thereby inviting the government to engage in this nefarious act so long as it can come up with a loose-fitting neutral proxy. These questions to be raised by ABC-CCC’s petition pose significant ramifications for the First Amendment rights of people across the country and are ripe for review by this Court.

Petitioner’s counsel has a significant workload between now and the current due date of the petition. The obligations of counsel include a petition for writ of certiorari at this Court, substantial discovery obligations, and a motion for summary judgment in the Eastern District of Virginia. Further, Petitioner’s counsel is of counsel at a nonprofit public interest foundation where the resources necessary

during these high volume times are limited. Petitioner therefore requests an extension to allow counsel to fully research the issues presented and draft a petition for writ of certiorari that concisely and cogently frames the issues for the Court. The unopposed 60-day extension sought herein will work no hardship on any party, and no action is pending that could be adversely affected by the requested extension of time. Petitioner has requested no previous extension from this Court.

WHEREFORE, Petitioner respectfully requests that an order be entered extending the time to file a petition for writ of certiorari to and including

February 18, 2019.

DATED: November 26, 2018.

Respectfully submitted,

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