No. _____

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

PETITION FOR WRIT OF CERTIORARI

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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 S.B. 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 S.B. 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?

LIST OF ALL PARTIES

The Petitioner is Associated Builders and Contractors-California Cooperation Committee, which was a Plaintiff and Appellant below. Respondents are Interpipe Contracting, Inc., which was a Plaintiff and Appellant below, but appealed and now petitions separately; as well as 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 Regulations; and Julie A. Su, in her official capacity as California Labor Commissioner-Division of Labor Standards Enforcement, all of whom were Defendants and Appellees below. Andre Schoorl has been substituted in automatically per Fed. R. App. P. 43(c)(2).

CORPORATE DISCLOSURE STATEMENT

Petitioner is a 501(c)(6) nonprofit organization incorporated under the laws of California. Petitioner is not a publicly held corporation, does not issue stock, and does not have a parent corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Associated Builders and Contractors-California Cooperation Committee (ABC-CCC) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit affirming dismissal is reported at *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879 (9th Cir. 2018), and reprinted in Appendix A. The district court's opinion is reported at *Associated Builders and Contractors of California Cooperation Committee, Inc. v. Becerra*, 231 F. Supp. 3d 810 (S.D. Cal. 2017), and reprinted in Appendix B.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied ABC-CCC's Petition for Rehearing En Banc on September 21, 2018, Appendix D, and entered its mandate on October 1, 2018. Appendix E. On November 29, 2018, Justice Kagan granted ABC-CCC's application for an extension to file a Petition for Certiorari to and including February 18, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment, as incorporated against the states by the Fourteenth Amendment, provides in relevant part that the states "shall make no law . . . abridging the freedom of speech."

S.B. 954 provides in relevant part that employers on public works projects may only make prevailing wage contributions to industry advancement funds "if the payments are made pursuant to a collective bargaining agreement to which the employer is obligated." Cal. Stats. 2016, Ch. 213, § 1, Cal. Labor Code § 1773.1(a)(9). The law is reprinted in full in Appendix F.

STATEMENT OF THE CASE

If the First Amendment's prohibition on viewpoint discrimination is to mean anything, it must mean that the government may not discriminate against disfavored viewpoints even if it does so covertly. State actors must be prohibited from discriminating based on viewpoint whether they do so openly *or* in secret, and courts must be empowered to search behind neutral façades when a party plausibly alleges pretext.

ABC-CCC, a nonprofit advocacy organization, brought a First Amendment lawsuit on the theory that a California law, S.B. 954, uses purportedly "neutral" criteria to advance covert viewpoint discrimination. The statute limits eligibility for a certain type of private donation (called a "prevailing wage contribution") to nonprofits selected in a union-

negotiated collective bargaining agreement (CBA). ABC-CCC argued that, although the requirement of being selected in a CBA may be viewpoint neutral on its face, it acts as a proxy for viewpoint because no CBA will allocate funding to an organization that speaks contrary to union interests. Appendix G-10. In support, ABC-CCC alleged that it had not received, and will not receive, funds pursuant to a CBA, Appendix G-3, 4, 7, 8, and argued that the law was dramatically over- and under-inclusive with regard to its purportedly neutral purpose. *See* 9th Cir. Doc. No. 12 at 13-14.

For example, although the state contended that S.B. 954 ensures that employees have consent over how their wages are allocated, CBAs actually do very little to promote that goal. Some CBAs do not even require an employee vote, and, even when they do, voters have to vote straight up or down. They are not permitted to reject specific terms and therefore might vote for a CBA even if it allocates prevailing wage contributions to organizations with which they disagree. Moreover, CBAs are usually approved based on a majority vote, meaning in some cases that up to 49.9% of employees might disagree with the terms under which they must work.

Not only does S.B. 954 fail to ensure employee consent, in some ways it stifles it. The law *prohibits* prevailing wage contributions outside of the context of a CBA even when an employer obtains actual, individual consent. In sum, the law does not ensure that employees consent to how prevailing wage contributions are distributed; it ensures that prevailing wage contributions only go to organizations selected through the majoritarian collective

bargaining process—a process largely controlled by unions.

ABC-CCC further pointed to statements made by the defendants throughout the litigation, which indicated that the state intended to stop prevailing wage contributions from reaching speech it did not like. *See* 9th Cir. Doc. No. 28 at 34 n.7 (stating that a motivating factor in passing S.B. 954 was that it would be "unfair" for workers' wages to be allocated to places that "lobby to reduce their wages"). ABC-CCC argued that, together, the law's natural effect, its over- and under-inclusiveness, its legislative history, and statements made by the state during litigation demonstrated the law's covert discriminatory intent and effect.

The district court rejected this theory of viewpoint-discrimination-by-neutral-proxy. It held that S.B. 954 was a facially neutral government subsidy of speech, opined that the law's legislative history and natural effect were irrelevant to whether the law was discriminatory, and dismissed without leave to amend under Fed. R. Civ. P. 12. The Ninth Circuit affirmed.

This case has far-reaching implications for the government's ability to effectuate viewpoint discrimination. Under the Ninth Circuit's opinion, the government is free to discriminate against speech it doesn't like—so long as it selects a loose-fitting neutral proxy. The circuit courts are split on whether an allegation of proxy states a claim under the First Amendment, and even those that accept such claims need guidance on which factors to consider.

Moreover, the Ninth Circuit's opinion drastically expands the definition of "government speech

subsidy." S.B. 954 discriminates among *private* organizations in whether they may receive *private* donations—donations which have no bearing on the public fisc. Because government speech subsidies are subject to a lower level of scrutiny than restrictions on private speech,[1] the opinion below subjects a wide array of restrictions on private speech to a less stringent level of protection than required by the First Amendment.

A. Factual Background

ABC-CCC advocates from an "open-shop" or "merit-based" viewpoint, meaning that it advocates against the mandatory use of union labor in public contracting. Appendix G-3, 7, 8. It was formed specifically for the purpose of advocating against the use of Project Labor Agreements (PLAs) in public projects, and advocating generally for the open-shop industry. *Id.*; Appendix I-4-9. PLAs are a hotly contested issue in California. They require public contractors—unionized or not—to agree to abide by the terms of a union-negotiated collective bargaining agreement prior to bidding on any public project. In practice, these agreements often require the bidders—unionized or not—to use a certain percentage of union labor. ABC-CCC believes that PLAs drive up the cost of public projects and it therefore funds studies, mailers, and lobbying efforts to discourage their use. Appendix G-3, 7, 8. Its speech often puts it at odds

[1] For example, the government is permitted to engage in speaker-based discrimination in the government speech subsidy context, while speaker-based discrimination automatically subjects restrictions on private speech to strict scrutiny. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009).

with unions, which seek to maximize their influence over public contracting through the use of PLAs.

ABC-CCC survives primarily off of a specific type of private donation called a "prevailing wage contribution." Appendix G-8; Appendix I-11; Appendix M-3. In California, public contractors must pay employees the "prevailing wage," a predetermined rate set by the Department of Industrial Relations. *See* Cal. Lab. Code § 1770. Contractors can satisfy this requirement by offering employees a combination of cash and other benefits, including allocating money to an employee's healthcare plan or pension, allotting vacation time, or contributing to various apprenticeship, worker protection, or other programs. Appendix F. Before S.B. 954, employers could contribute to any industry advancement fund (that is, a nonprofit organization that advocates for the industry) and receive a corresponding credit to their prevailing wage obligation. *Id.*; Appendix G-18. Funds of all viewpoints were eligible for such contributions, *id.*, and ABC-CCC's revenue was primarily derived from these contributions. Appendix G-8; Appendix I-11; Appendix M-3.

In response to union lobbying,[2] the California legislature passed S.B. 954 in 2016, and severely restricted eligibility for prevailing wage contributions. Appendix H-13, 14, 21, 25, 26, 28. Under the amended

[2] The sponsor of S.B. 954, a union, and other proponents urged that S.B. 954 was necessary to prevent prevailing wage contributions from funding what the proponents viewed as the *contractors'* industry advancement—as opposed to the employees' advancement. In other words, proponents sought to stop prevailing wage contributions from going toward speech the proponents disagreed with. Appendix H-14, 21, 28.

prevailing wage law, industry advancement funds may only receive prevailing wage contributions if authorized to receive them under a union-negotiated collective bargaining agreement. S.B. 954 therefore gave unions immense influence—if not outright veto power—over which advocacy groups receive prevailing wage contributions. ABC-CCC believes that S.B. 954 therefore discriminates in favor of union-favored speech. Appendix G-9, 10.

There is no doubt that eligibility for a prevailing wage contribution presents a big advantage for funding one's speech. Like ABC-CCC, most industry advancement funds receive their funding from prevailing wage contributions. Indeed, unions often set up industry advancement funds for the purpose of funding them through prevailing wage contributions negotiated in CBAs. And because public contracting is a highly competitive industry, the credit toward an employer's prevailing wage obligation is a big incentive to donate to these funds. In the absence of a prevailing wage credit, employers will not contribute to industry advancement funds. Appendix I-11, 12 (declaration attesting that employers would cease contributing to ABC-CCC once the prevailing wage credit was lost); J-3 (same); K-4 (same); M-3 (declaration that ABC-CCC lost 99% of its funding post-S.B. 954). Without eligibility for prevailing wage contributions, industry advancement funds will therefore lose almost all funding for their speech. At the time of filing, ABC-CCC anticipated that it would lose over 90% of its funding as a result of the law. Appendix I-12. Documents show that in reality, it lost 99% of its funding. Appendix M-3. Not surprisingly, ABC-CCC has not received any prevailing wage contributions pursuant to a CBA, and left without the

incentive of a prevailing wage credit, employers have for the most part stopped contributing to ABC-CCC altogether. ABC believes that this was the very purpose of S.B. 954: to ensure that prevailing wage contributions are channeled solely to organizations that engage in union-favored advocacy.

B. Procedural History

ABC-CCC therefore brought suit under 42 U.S.C. § 1983, seeking equitable relief against those state officials responsible for S.B. 954's enforcement. In the lawsuit, ABC-CCC alleged that S.B. 954's "neutral" requirement that industry advancement funds receive prevailing wage contributions pursuant to a CBA acts as a proxy for viewpoint and discriminates in favor of union-approved speech.[3] ABC-CCC alleged that this viewpoint discrimination violates the First and Fourteenth Amendments. ABC-CCC supported its claim by noting that the law has a poor fit with the government's stated purpose: ensuring that employees have consent over how their wages are allocated. *See* 9th Cir. Doc. No. 12 at 13-14. CBAs, after all, need not even be approved by employee vote. And S.B. 954 prohibits prevailing wage contributions outside of the context of a CBA even if an employer obtains actual, individual employee consent. The law is, however, perfectly tailored to ensuring that prevailing wage contributions are only allocated

[3] S.B. 954 may also discriminate against employers, based on whether they are unionized and negotiate bargaining terms pursuant to a CBA. But such employer discrimination does not change the fact that, on its face, the law treats advancement funds differently based on whether they receive contributions pursuant to a CBA.

through collective bargaining, and therefore only reach union-favored speakers.

ABC-CCC argued that, while industry advancement funds may not have the right to be eligible for prevailing wage contributions, they have a First and Fourteenth Amendment right to be on equal footing with other speakers of competing viewpoints when the government chooses to permit such private contributions. If California permits prevailing wage contributions to advocacy organizations, it cannot place its thumb on the scales so as to ensure that those contributions are directed only toward union-favored speech. It must allow prevailing wage contributions on a viewpoint-neutral basis, or not at all.

The district court dismissed the complaint without leave to amend and held that ABC-CCC had not pled a cognizable viewpoint discrimination claim. Appendix B; Appendix C. The Ninth Circuit panel affirmed, holding that S.B. 954 was a government subsidy of speech that was viewpoint-neutral on its face. Appendix A-38, 39. Given the statute's facial neutrality, it declined to permit ABC-CCC's discrimination claim to move forward. A-41, 42. Believing that the decision threatens to undermine important First Amendment protections and conflicts with circuit court and Supreme Court precedent, ABC-CCC petitioned for rehearing en banc, which was denied. Appendix D.

Because this case involves important questions concerning the government's ability to commit perhaps one of the most dangerous constitutional infractions—stifling disfavored viewpoints—ABC-CCC seeks review in this Court.

REASONS FOR GRANTING THE WRIT

The decision below eliminates the ability of plaintiffs to bring a claim under the First Amendment that a "neutral" law acts as a proxy for viewpoint discrimination. Whether the Panel regarded S.B. 954 as a government speech subsidy or a restriction on private speech, it should have allowed ABC-CCC's viewpoint discrimination claim to move forward. Covert discrimination claims have been accepted by this Court, and are vital to preventing the government from censoring speakers it does not like. Claims of "viewpoint-discrimination-by-proxy" are a subset of covert discrimination claims. If courts cannot peer behind purportedly "neutral" criteria after a plaintiff makes a plausible claim of proxy, the government will be able to get away with what is blatantly unconstitutional by conjuring up a loose-fitting neutral façade.

The Ninth Circuit's opinion also vastly expands the definition of "government speech subsidy." It held that S.B. 954 did not burden speech and instead merely subsidized speech, even though the money at issue is not the government's and the donations do not in any way affect the public fisc. It reasoned that, because the law was a state-authorized entitlement to donate private money to advocacy, it subsidized speech. Appendix A-38. This holding subjects many speech regulations to the less protective government speech subsidy standard, and immunizes them from the First Amendment's restriction on speaker-based discrimination. In this case, that was outcome-determinative, because whether viewpoint-based or

not, S.B. 954 is facially speaker-based and should have been subject to strict scrutiny for that reason alone. The decision below should not stand.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE GOVERNMENT'S ABILITY TO ENGAGE IN COVERT VIEWPOINT DISCRIMINATION

A. The theory of viewpoint discrimination by neutral proxy is essential to unearthing covert viewpoint discrimination

Sometimes the government is more transparent about its motives than others. But as courts across the country have recognized, the government "rarely flatly admit[s] when it is engaged in viewpoint discrimination." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004). *See Bailey v. Callaghan*, 715 F.3d 956, 965 (6th Cir. 2013) (Stranch, J., dissenting) (courts "have never been so naïve as to expect the government to admit it is in engaging in viewpoint discrimination"). If the First Amendment's prohibition on viewpoint discrimination is to be effective, plaintiffs must have the opportunity to prove that a law is discriminatory, even when the government is not forthcoming about its motives.

Recognizing that need, this Court has permitted plaintiffs to bring a claim under the First Amendment on the theory that a facially viewpoint-neutral law is, in effect, viewpoint-discriminatory. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994) ("Our cases have recognized that 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."). *Cf. Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (upholding neutral ordinance that prohibited signs on public property because there was "no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it ha[d] been applied to appellees because of the views that they express"). For example, the Court has allowed a plaintiff to allege and prove that a facially neutral law was adopted for the purpose of discriminating against a disfavored viewpoint. *Hill v. Colorado*, 530 U.S. 703, 711 (2000) (looking at legislative history to determine whether the state had favored one viewpoint over another); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (noting that the "history of the Act's passage" indicated viewpoint discrimination). Alternatively, the Court has authorized a plaintiff to allege and prove that a neutral law is discriminatory "[i]n its practical operation." *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992). A plaintiff also is permitted to allege and prove selective enforcement against disfavored viewpoints. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812-13 (1985) (remanded to determine whether enforcement against particular party was based on "a desire to suppress a particular point of view"). These First Amendment causes of action permit plaintiffs to uncover subtle but no less unconstitutional governmental discrimination, and thereby prevent the state from evading the First Amendment by fabricating a "neutral" pretense.

One of the ways that the government may effectuate covert viewpoint discrimination is by using seemingly neutral criteria that act as proxies for

viewpoint.[4] For example, a university might limit eligibility for funding to student groups that have received funding in the past. Though this criterion is facially viewpoint neutral, it may serve the schools' purpose of discriminating against historically disfavored viewpoints. *See, e.g.*, *Southworth v. Bd. of Regents of the Univ. of Wisc. Sys.*, 307 F.3d 566, 593 (7th Cir. 2002) (the practical effect of university policy allotting money to student groups based on past funding was to disadvantage viewpoints that had been discriminated against in prior years under previous discriminatory criteria). Several circuits have therefore allowed plaintiffs to proceed on a discrimination-by-neutral-proxy theory. These courts typically look at a law's practical effect, the fit between the law's means and the stated ends, and legislative intent to determine whether the criterion is a façade for viewpoint discrimination. *See, e.g.*, *Southworth*, 307 F.3d at 593; *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998) (practical effect of fee waiver policy for applicants that were likely to "generate large favorable publicity" was to advantage "well-established political groups").

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[4] This Court has not ruled explicitly on "proxy" claims, but it has tacitly acknowledged such claims. For example, in *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998), a political candidate alleged that the requirement that a candidate receive strong popular support to participate in a televised debate acted as a proxy for viewpoint. Although the Court ultimately agreed with the jury that the various criteria used to gauge public support did not relate to the candidate's viewpoint and instead related to his status as a non-serious contender for office, the decision's analysis supports the viability of the claim.

This is exactly the type of claim that ABC-CCC brought. ABC-CCC alleged that the requirement that an industry advancement fund be designated in a CBA acts as a proxy for union-favored speech. It noted that the practical effect was to deny prevailing wage contributions to groups that opposed union interests, and it argued in support that the law was under- and over-inclusive with regard to the state's purported goal. It also pointed to legislative history and statements made by the state during litigation to demonstrate the law's discriminatory purpose. This claim of discrimination-by-neutral-proxy, like any claim of covert viewpoint discrimination, is critical to preserving the First Amendment's protection against viewpoint discrimination.

B. The Ninth Circuit rejected the theory of viewpoint discrimination by neutral proxy in the opinion below

The district court dismissed ABC-CCC's First Amendment claim without leave to amend, and the Ninth Circuit affirmed, merely because the law was neutral on its face. *See, e.g.*, Appendix A-41, A-44 to A-47 (holding that "facially neutral statutes" do not become discriminatory merely because they affect some groups more than others, or because they are over- or under-inclusive). The opinion below eliminates plaintiffs' ability to plead viewpoint-discrimination-by-neutral-proxy, in tension with this Court's precedent and in conflict with circuit courts across the country.

ABC-CCC's proxy claim was plausible. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether

they plausibly give rise to an entitlement to relief."). As a matter of common sense, a union will never negotiate or approve a CBA that authorizes a prevailing wage contribution to an organization that promotes an open-shop viewpoint generally, or that opposes the use of CBAs in public projects specifically. ABC-CCC, for instance, has never received a contribution pursuant to a CBA.[5] Because it subsists almost entirely off of prevailing wage contributions, the practical effect of S.B. 954 is to deprive it of the funding it uses for advocacy. Moreover, in support of its viewpoint-discrimination claim, ABC-CCC argued that the law has a poor fit to its supposed purpose of ensuring that employees consent over how their wages are allocated. SB 954's under- and over-inclusiveness strongly suggest viewpoint discrimination.

S.B. 954 is under-inclusive because CBAs do a poor job of ensuring consent on an individual basis. Not all employees are eligible to vote on CBAs; in fact, PLAs (a special type of CBA) are negotiated by unions prior to any contractor's bid on a project—and therefore do not require employee consent at all. Where nonunionized employees work on a union-negotiated PLA, they will have had no input on the terms they work under.

Even when employees are entitled to vote on a CBA, they must vote straight up or down; they do not

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[5] The fact that industry advancement funds like ABC-CCC are still eligible for *non*prevailing wage contributions is inapposite; eligibility for prevailing wage contributions gives union-supported advocacy organizations a huge fundraising advantage. S.B. 954 therefore disadvantages industry advancement funds that are ineligible for prevailing wage contributions.

have the ability to approve every term, or to veto specific terms. This means that an employee may disagree with a prevailing wage contribution but feel compelled to vote for the CBA on the whole. Moreover, CBAs are often ratified on a majority rule basis, meaning that nearly half of employees may disagree with the content of a CBA, but will still have the terms imposed on them anyway. At best, S.B. 954 serves the goal of majoritarian or, in some cases, representative consent. Not only do those two means of "consent" fail to ensure that employees actually consent to how prevailing wage contributions are allocated, they can *only* be effectuated through unionization—demonstrating exactly why S.B. 954 acts as a proxy for viewpoint.

What's more, the law leaves in place prevailing wage credits for many other sorts of contributions without consent. For example, because the requirement of a CBA only pertains to prevailing wage contributions to industry advancement funds, employers may still allocate contributions toward vacation time, pension funding, health care plans, or worker protection programs in ways that employees disagree with—all without consent. S.B. 954 simply does not ensure that employees consent to the allocation of their wages. It ensures that unions consent over which industry advancement funds receive prevailing wage contributions.

But S.B. 954 is also *over*-inclusive, because it does not allow prevailing wage contributions outside of the CBA arrangement even if the employer obtains *actual* consent. That is, even if an employer were to secure the individual consent of every employee to allocate a portion of his or her wages to an industry

advancement fund, that contribution would not qualify for a prevailing wage credit. S.B. 954 therefore denies prevailing wage credits even when the employer actually has ensured that employees consent over how their wages are allocated. It only permits them if the *union* has consented.

In support of its proxy argument, ABC-CCC also pointed to the government's own statements throughout litigation. In his brief on appeal, the Attorney General acknowledged that a motivating factor in passing S.B. 954 was that it would be "unfair" for a worker's wages to be reduced "*so that their employer could further lobby to reduce their wages*." 9th Cir. Doc. 28 at 34 n.7 (emphasis added). In other words, the government was not simply concerned about employers who allocate contributions without employee consent; it was concerned about employers' allocating contributions to speech that the government considers "*unfair*" without consent. Yet the government is perfectly fine with wages going toward speech without actual employee consent so long as that speech is *union*-approved. S.B. 954 is therefore better tailored to ensuring that prevailing wage contributions are channeled to union-approved speech than it is to ensuring that employees consent to how their wages are allocated.

Despite these plausible allegations, the Ninth Circuit upheld the district court's dismissal under Rule 12—effectively precluding all plaintiffs from bringing such proxy claims in the future. It disregarded ABC-CCC's allegations regarding S.B. 954's practical effect and held that a "facially neutral statute restricting expression for a legitimate end is not discriminatory simply because it *affects*

some groups more than others." Appendix A-41. But ABC-CCC did not argue that the law was discriminatory merely because it disproportionately affected open-shop viewpoints; it argued that the speaker-based requirement of being selected in a CBA acts as a *proxy* for viewpoint, and *necessarily* discriminates against groups with an open-shop perspective. ABC-CCC should have been permitted to proceed based on this plausible allegation of viewpoint discrimination by facially neutral proxy.

Even if S.B. 954 merely had a disproportionate effect on open-shop viewpoints, such an effect could demonstrate a credible claim of viewpoint discrimination by proxy sufficient to survive a motion to dismiss. To conclude otherwise, the Ninth Circuit used the example of a statute prohibiting outdoor fires. It reasoned that such a law would be constitutional even if it "affect[ed] anti-government protesters more than pro-government ones." Appendix A-41. But this example ignores the predicate point: if it were true that 99% of outdoor fires were started as anti-government flag burning protests, then a plausible inference could be drawn that the purportedly neutral fire-ban acts as a proxy for viewpoint. True, the statute might ultimately withstand constitutional scrutiny—but that should not preclude the claim from moving forward. ABC-CCC alleged just such a plausible factual predicate. Yet the Ninth Circuit's decision shuts the courthouse door on even plausible allegations of viewpoint discrimination by neutral proxy.

The Ninth Circuit also rejected ABC-CCC's argument that S.B. 954's over- and under-inclusiveness indicated viewpoint discrimination. In

response to ABC-CCC's argument that S.B. 954 is over-inclusive because it does not permit prevailing wage contributions outside of a CBA even if the employer receives actual consent, the Panel noted that nonunionized employers might leverage their bargaining power to coerce consent—thereby rendering the consent "illusory." Appendix A-44. But the prospect of "illusory" consent is no greater under a nonunionized employer than a unionized one. After all, union members often disagree with the policies that unions pursue.[6] *See Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018). Moreover, even if a non-CBA employer actually obtained *collective* employee consent, S.B. 954 would still forbid the contribution credit. Thus, by disregarding ABC-CCC's plausible allegations in favor of unsupported excuses, the Ninth Circuit has made it impossible for plaintiffs to base covert discrimination claims on over-inclusiveness in the future.

The same can be said for ABC-CCC's claims of under-inclusiveness. While the Ninth Circuit acknowledged that the law was under-inclusive

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[6] The Panel suggested that the prevailing wage credit for contributions to industry advancement funds might itself present a *Janus* problem, because money from the prevailing wage goes toward advocacy without employee consent. But the prevailing wage scheme is different because it permits employers to allocate funds from every contract a number of ways, including by donating to apprenticeship programs or advancement funds. The employee is only entitled to what's left after those allocations. Moreover, if the credit for prevailing wage contributions to industry advancement funds does present a *Janus* problem, it must be taken away for contributions to union-approved funds as well, as those are also made without actual employee consent.

because S.B. 954 does not require consent for other allotments of employee wages—including contributions to pensions, healthcare, apprenticeship, worker protection, or training programs—the Panel concluded that such under-inclusiveness was irrelevant to claims of viewpoint discrimination. According to the Panel, even though S.B. 954 might not "address all aspects" of its goal, it addressed the most important ones.[7] Appendix A-46. But plausible allegations of over- and under-inclusiveness are relevant to a covert viewpoint discrimination claim, even if the law ultimately is adjudged to be neutral.[8] *See, e.g.*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). In effect, the Ninth Circuit's decision puts the cart before horse, by employing an indulgent standard of review to pass over the otherwise troubling mismatch between S.B. 954's means and its purported purpose. *See, e.g.*, Appendix A-46

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[7] Specifically, the court held that the types of contributions left unaffected by S.B. 954 "directly benefit employees" and therefore do not necessitate consent in the same way. Appendix A-47. This direct/indirect distinction, however, was never advanced by the government. The reason for S.B. 954's distinctions, the government contended below, was to ensure employee "consent" in the allocation of their wages, 9th Cir. Doc. No. 28 at 32, 46; 9th Cir. Doc. No. 30 at 36, regardless of how that allocation might affect employees' interests.

[8] The Ninth Circuit also held that S.B. 954 was a reasonable method of furthering "collective consent." Appendix A-48. But that conclusion supports ABC-CCC's claim that the law is viewpoint discriminatory. The *only* way to achieve "collective consent" under S.B. 954 is through unionization, and any policy which favors collective consent therefore favors unions. Advancing "collective consent," *i.e.*, *unionization*, is not viewpoint-neutral, and is not a compelling state interest that justifies burdening First Amendment rights. *See Janus*, 138 S. Ct. at 2478.

(defending S.B. 954's under-inclusiveness on the ground that requiring collective consent is better than requiring no consent, yet failing to explain how collective consent is narrowly tailored to securing S.B. 954's purported purpose of protecting the rights of individual employees).

By disregarding ABC-CCC's plausible allegations, the Ninth Circuit foreclosed viewpoint-discrimination-by-proxy claims. If one cannot plead that a statute's natural effect and poor fit with the stated end indicate the existence of a proxy, one cannot plead this type of covert viewpoint discrimination at all. Such a holding invites the government to disadvantage speech that it does not like, so long as it can come up with a loose-fitting neutral rationale; in other words, the opinion invites covert viewpoint-based censorship.

II. COURTS ARE DIVIDED ON WHETHER VIEWPOINT DISCRIMINATION BY NEUTRAL PROXY IS A VALID FIRST AMENDMENT THEORY

Circuit courts are split on whether to accept the theory of "viewpoint discrimination by neutral proxy." The Second, Seventh, and Tenth Circuits have accepted proxy claims, while the Sixth and Ninth Circuits have rejected them.

In *Southworth*, 307 F.3d 566, the Seventh Circuit struck down a law under the theory of viewpoint discrimination by neutral proxy. There, a group of students challenged the University of Wisconsin-Madison's use of mandatory student activity fees to fund student groups. Eligibility for funding was

based, in part, on the number of years that the student group had existed, whether the group had received funding in the past, and, if it had received funding, how much. While these criteria said nothing about viewpoint on their face, in practice, they had the effect of viewpoint discrimination because of the University's discriminatory baseline. Until recently, the University had prohibited funding to partisan or religious activities. Thus, the "neutral" criterion of looking at past funding decisions put historically disadvantaged groups at a present disadvantage. For these reasons, the facially neutral funding criteria acted as proxies for viewpoint. *Cf. Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 646 (7th Cir. 2013) (considering, but rejecting on the facts, contention that allowing public safety employees unions access to payroll deduction program but not others acted as proxy for viewpoint).

Similarly, in *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 98 (2d Cir. 2007), the Second Circuit considered whether the criteria used to determine if student associations received funding at a public university were a "proxy" for viewpoint. One of the ways in which groups could obtain funding was by submitting a campus-wide student referendum asking whether the students should pay a certain dollar-amount to the requesting organization. To proceed by referendum, the organization first had to obtain a two-thirds vote of the student association senate, or submit a petition signed by at least 15% of the student body. Though such criteria were facially viewpoint-neutral, the Second Circuit held that the referendum procedure "create[d] a substantial risk that funding [would] be discriminatorily skewed in favor of [student groups]

with majoritarian views." *Id.* at 102. The court distinguished the challenged law from cases in which the "degree of interest" did "*not* necessarily [act as] a proxy" for viewpoint because here, the criteria "substantially capture[d]" the student body's "valuation" of the group, and thus were necessarily biased toward majoritarian viewpoints. *Id.*

Although the Tenth Circuit has not squarely ruled on proxy claims, it appears at least to be open to them. In *Oklahoma Corrections Prof'l Ass'n Inc. v. Doerflinger*, 521 Fed. App'x. 674, 679 (10th Cir. 2013), the court considered whether the criteria for a voluntary payroll deduction program violated the First Amendment. Even though the criteria at issue only distinguished among speakers, the Court recognized that speaker-based discrimination often acts as a façade for viewpoint discrimination. It therefore remanded to the district court for briefing on whether the law effectuated "viewpoint-discrimination-by-proxy." *Id.* at 680.

The Sixth and Ninth Circuits, by contrast, have rejected the proxy theory. In *Bailey*, 715 F.3d 956, the Sixth Circuit considered a law that barred schools, but not other public employers, from collecting membership dues for unions through payroll deductions. A group of public school unions argued that the law's selective denial for only *some* unions acted as a "proxy for viewpoint discrimination." *Id.* at 959. The Sixth Circuit refused to entertain this claim because the law was facially neutral, and it would not "look past the Act's facial neutrality" to assess whether its "real purpose" was discrimination.

In dissent, Judge Stranch argued that "the facial neutrality of a speech regulation does not resolve its

legitimacy." *Id.* at 965. Recognizing that courts "have never been so naïve as to expect the government to admit it is in engaging in viewpoint discrimination," Judge Stranch would have held that it was not only appropriate, but the "court's duty" as well, to "ferret out hidden viewpoint bias" by determining whether the law was reasonably related to its goals. *Id.* Like the Second, Seventh, and Tenth Circuits, Judge Stranch believed that "underinclusiveness," "official statements," and a poor means-ends fit suggest covert viewpoint discrimination. After considering these facts, Judge Stranch believed that the law's purpose was to discriminate against school unions in particular because "[s]chool unions have a particular viewpoint that [the Act] seeks to muzzle." *Id.* at 966.

Like the Sixth Circuit, the Ninth Circuit has effectively barred claims of viewpoint discrimination by proxy. Despite ABC-CCC's plausible allegations that S.B. 954's requirement of designation in a collective bargaining agreement (i) effectively barred advocacy organizations with an open-shop viewpoint—and only such organizations—from receiving prevailing wage contributions, (ii) was radically over- and under-inclusive, and therefore (iii) was intended to muzzle groups like ABC-CCC (as evidenced by the Attorney General's own statements throughout the litigation), the Ninth Circuit affirmed the district court's dismissal of the Complaint. This Court should resolve the now worsened circuit split.

III. THE NINTH CIRCUIT DRASTICALLY EXPANDED THE DEFINITION OF "GOVERNMENT SPEECH SUBSIDY," THEREBY SUBJECTING MUCH SPEECH TO LESSER PROTECTION

The Ninth Circuit's opinion also drastically expanded the definition of "government speech subsidy." S.B. 954 is not a government subsidy of speech. It does not involve the transfer of public funds to private parties and it does not use public money or a government mechanism to transfer those funds for private benefit. Instead, as the government itself argued, it controls the allocation of workers'—*i.e.*, *private*—funds. *See, e.g.*, 9th Cir. Doc. No. 30 at 29 ("SB 954 protects *workers* from being compelled to subsidize industry advancement funds with *their* wages.") (emphasis added); 9th Cir. Doc. No. 28 at 30 ("SB 954 legally regulates conduct by protecting workers from having *their* wages reduced.") (emphasis added).

Nevertheless, the panel held that S.B. 954 "takes the form of a state-authorized entitlement allowing employers to reduce their employees' wages to support the employers' favored [industry advancement funds]." Appendix A-38. It therefore regarded the law as a government subsidy of speech.

This not only twists the nature of prevailing wage contributions,[9] it twists the meaning of government

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[9] S.B. 954 does not permit employers to *reduce* their employees' wages, it controls the way that employers may allocate their wages. The prevailing wage law as a whole permits employers to allocate wages in various ways other than cash, including various benefits and contributions to certain worker funds. Appendix F-1. The law entitles employees to whatever cash is left

subsidy. An economic regulation that controls the way that private employers allocate private funds to private speakers does not "subsidize" speech. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (a restriction on the ability to "amass[] the resources necessary for effective . . . advocacy" which puts some speakers "to significant disadvantage" restricts, rather than subsidizes, speech). If it were otherwise, every campaign finance law regulating financial contributions would in fact be a state subsidy, immune from the First Amendment's restrictions on speaker-based discrimination. States could give exceptions to favored speakers within government-mandated buffer zones, because the mere ability to speak would be a "speech subsidy." In fact, using the Ninth Circuit's reasoning, *Janus* would have been considered a *government* speech subsidy case, rather than a case regarding compelled private speech. That is a gross misapplication of this Court's First Amendment jurisprudence.

Where laws neither use government funds to financially subsidize speech, nor require any government mechanism to facilitate speech, there is no government subsidy. Rather, in government subsidy cases there is at least some affirmative facilitation of speech by the government other than mere legalization. For example, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)—a prototypical government subsidy case—the

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over after the allocations. If the state is concerned about how much money is going toward non-cash allocations, it could limit the dollar amount that employers are permitted to allocate in the form of other benefits, rather than cutting off all allocations to speech it dislikes.

government gave up its own revenue through a tax credit to certain speakers. *Id.* at 544 (equating tax-deductible donations with "public funds," because the donor could reduce his or her taxable income, and thus any obligation to the government, by the amount of the donation). Similarly, in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), a public university directly funded the activities of student groups. Even *Ysursa*, 555 U.S. 353, which addressed a state law that regulated public employees' ability to donate their wages, did not hold that the law was a subsidy of speech *because* the money at issue—the employees' wages—originally came from the government. Instead, the law was a government subsidy because it required the state to "incur[] costs to set up and maintain the payroll deduction program." *Id.* at 375. *See id.* at 359 ("publicly administered payroll deduction" system constituted government "support" of speech). Thus, while the facilitation need not be monetary, it must be an affirmative facilitation. Here, there is no government outlay of any kind. S.B. 954 is entirely a regulation of the ways that private parties fund private speech. If anything, the law is a *reverse* subsidy; it results in contractors using private funds to support government-approved objectives.[10] Indeed, because the aim of the prevailing wage law is to inflate wages

[10] Even if S.B. 954 is a government subsidy of speech, the Ninth Circuit was wrong to affirm dismissal because ABC-CCC plausibly alleged that the law was viewpoint-discriminatory, and the government may not discriminate against disfavored viewpoints whether it is restricting private speech or doling out speech subsidies. *Rosenberger*, 515 U.S. at 829 (even in context of government speech subsidy, state may not engage in viewpoint discrimination).

above market prices to keep union labor competitive, it necessarily results in contractors using more of their funds than they otherwise would for the purpose of furthering government goals.

Dep't of Texas, Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n, 760 F.3d 427, 436 (5th Cir. 2014), is instructive. There, the government argued that a limitation on the way nonprofit organizations could spend funds raised from bingo games involved a government subsidy, and was therefore constitutional. The Fifth Circuit disagreed, noting that such an argument "contorts the definition of 'subsidy.'" *Id.* Whereas a subsidy involves a direct or indirect receipt of funds from the public fisc, the only "grant" at issue there was the legislative authority to gather revenue from bingo games. *Id.* The court held that it would be different if the state expended its own resources to conduct bingo games, and then distributed the money to organizations to use for their speech. But given that the state was restricting funds derived by private parties from private parties, there was no subsidy present. *Id.*

Similarly here, the only "grant" from the government is the legislative authority to gather funds through private prevailing wage contributions. The district court itself recognized that the law's purpose was the purported need to protect the *workers'* money—not the state's funds. Appendix B-31. Whether prevailing wage contributions are considered the employers' or workers' money, S.B. 954 restricts private funding of speech, and is not a government subsidy.

The danger of the Ninth Circuit's broad holding is demonstrated by the outcome in this case. Ultimately,

characterizing S.B. 954 as a government speech subsidy rather than a restriction on private speech was outcome-determinative, because under a speech subsidy analysis, speaker-based distinctions are allowed; it is only viewpoint-based discrimination that is banned. *Regan*, 461 U.S. at 548. Under a non-subsidy analysis, the fact that S.B. 954 was speaker-based would have subjected the law to strict scrutiny. *See Sorrell*, 548 U.S. 230. And given S.B. 954's breathtaking over- and under-inclusiveness, that scrutiny likely would have been fatal. *See Animal Legal Def. Fund. v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (statute that is both over- and under-inclusive cannot be narrowly tailored to any compelling government interest). Thus, construing laws that merely choose (or choose not) to permit speech as "government speech subsidies" will allow viewpoint-discriminatory laws to evade adequate scrutiny. In order to give speech the full protection warranted under the First Amendment, this Court should review the Ninth Circuit's decision.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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