No. 17-55248 (Consolidated with 17-55263)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTERPIPE CONTRACTING, INC.; ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC.,
Plaintiffs - Appellants,
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, Defendants - Appellees.

INTERPIPE CONTRACTING, INC., Plaintiff - Appellant,
and
ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA COOPERATION COMMITTEE, INC., Plaintiff,
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, Defendants - Appellees.

On Appeal from the United States District Court for the Southern District of California, San Diego, Honorable Roger T. Benitez, District Judge

APPELLANT'S REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Associated Builders and Contractors of California Cooperation Committee, Inc. states that it is not a publicly held corporation, does not issue stocks, and does not have parent corporations.

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INTRODUCTION

The use of project labor agreements—which require public contractors to abide by the terms of a union-negotiated collective bargaining agreement (CBA)—is a hotly contested issue in California. Associated Builders and Contractors of California Cooperation Committee, Inc. (ABC-CCC) is a non-profit industry advancement fund formed for the purpose of advocating an "open-shop" viewpoint. ER 68 (ABC-CCC funded study showing that Project Labor Agreements increase costs of public projects). That is, ABC-CCC advocates against the use of project labor and collective bargaining agreements in public projects. *See* ER 118. Its speech is funded almost entirely through prevailing wage contributions. ER 55, 56, 57, 58. But SB 954 now prohibits contributions to industry advancement funds like ABC-CCC unless the contribution is made pursuant to a CBA. This essentially gives unions influence—if not outright veto power—over which advocacy groups may receive prevailing wage contributions. It therefore discriminates against funds based on whether they advocate for or against union policies. ABC-CCC brought suit under the First and Fourteenth Amendments to be free of viewpoint-based discrimination.[1] ER 160. The district court dismissed the complaint and denied the

[1] Appellees characterize the right that ABC-CCC seeks to vindicate in various ways, *e.g.*, "the right to receive someone else's money," and the "constitutional right to use other people's money to fund their activities." The right that ABC-CCC asserts is neither of these. Rather, it is the right to be free from viewpoint-based discrimination. Under SB 954, the government allows prevailing wage contributions

preliminary injunction motion on the basis that ABC-CCC was unlikely to succeed on the merits. ER 3. This appeal followed.

Appellees Xavier Becerra, *et al.* ("the government"), do not argue that SB 954 could withstand the strict scrutiny required for laws that discriminate based on viewpoint. Instead, the government argues that the law evades First Amendment scrutiny altogether because it is aimed at protecting employee wages, and because it is facially neutral. Br. of Becerra at 30; Br. of Baker and Su at 30. It further argues that if the law regulates speech at all, it regulates a government subsidy of speech, and the government may withhold subsidies from whomever it wishes. Br. of Becerra at 38; Br. of Baker and Su at 32. But these arguments fail. The government may not evade First Amendment scrutiny by characterizing a law in terms of its purpose. *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 968 (1984). And even facially neutral laws may discriminate, in purpose or effect, based on viewpoint. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). Here, SB 954 burdens ABC-CCC's ability to fund its speech, and it does so based on ABC-CCC's open-shop viewpoint. It is therefore subject to strict scrutiny, a burden which it cannot satisfy.

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only when made to a preferred subset of otherwise qualifying industry advancement funds. The result is to deny these contributions to ABC-CCC or any other funds not selected in a union-approved collective bargaining agreement. That denial, and its resulting dramatic defunding of ABC-CCC and similar groups, is wholly a function of these groups' viewpoint.

SB 954 is not a government subsidy of private speech. A government subsidy occurs where the government outlays funds, foregoes revenue, or otherwise directly facilitates private speech through the use of public funds. *See Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 434 (5th Cir. 2014) (government subsidy of speech occurs when there is a "direct or indirect receipt of funds from the public fisc"). SB 954 does none of these things; it merely creates and removes the ability to make certain *private* donations to *private* organizations. But even if the law were a government subsidy of private speech, it still would be unconstitutional because the government may not allot subsidies based on the recipient's viewpoint. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (Congress may not "discriminate invidiously in its subsidies.").

ABC-CCC therefore respectfully requests that this Court reverse the judgment of dismissal, vacate the denial of the preliminary injunction, and remand for further proceedings.[2]

[2] ABC-CCC takes no position on whether this Court should remand with direction to grant the preliminary injunction based on the preemption claim, as Interpipe requests.

I

SB 954 IS SUBJECT TO FIRST AMENDMENT SCRUTINY

ABC-CCC brought a quintessential First Amendment claim. It alleged that SB 954 burdens the organization's ability to fund its speech based on its viewpoint and the law is therefore subject to strict scrutiny. The government argues that SB 954 is not subject to First Amendment scrutiny because (1) it does not compel ABC-CCC to speak nor does it outright prohibit ABC-CCC from speaking, and (2) it is "aimed at" regulating the conduct of protecting employees' wages. Both arguments fail. A law need not explicitly ban someone from speaking in order to be subject to First Amendment scrutiny. Like bans, "burdens on speech raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace," and they are therefore subject to the First Amendment. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The government may not avoid that scrutiny by characterizing a law in terms of its purpose. *See, e.g., Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

A. SB 954 Burdens Speech

The government argues that SB 954 does not regulate speech because no speech is directly "restricted or required." Br. of Baker and Su at 30; s*ee also id.* at 29 ("no speech is mandated or abridged."); Br. of Becerra at 32 (SB 954 "does not

prohibit anyone from speaking about any issue"). But discriminatory burdens on speech must satisfy "the same rigorous scrutiny" as discriminatory bans on speech. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (The government may no more "silence unwanted speech by burdening its utterance than by censoring its content."). Even laws that "say[] nothing about speech on [their] face" are subject to First Amendment scrutiny when the effect is to burden a speaker's ability to speak. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). Were the rule otherwise, the government might then erect all sorts of obstacles to speech that stop short of outright censorship without offending the First Amendment.

Laws that restrict the ability to fund one's speech are burdens on speech. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (laws that burden one's ability to "amass[] the resources necessary for effective . . . advocacy" restrict First Amendment rights); *Emily's List v. Federal Election Comm'n*, 581 F.3d 1, 4-5 (D.C. Cir. 2009) (First Amendment protects non-profits' ability to raise money for their speech). Thus the Supreme Court has struck down laws limiting the amount of money charitable solicitors may spend on soliciting, *Schaumburg*, 444 U.S. 620, and laws limiting the salary of professional fundraisers, *see, e.g.*, *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988); *Joseph H. Munson Co.*, 467 U.S. 947, even though those laws did not outright prohibit the speakers from

speaking. By limiting the amount of money that charities could use for solicitation, the laws had the effect of limiting how organizations could conduct protected speech activity. *Munson*, 467 U.S. at 960.

Similarly, laws that burden speakers' ability to receive contributions for use in political campaigns are subject to First Amendment scrutiny because they affect an organization's ability to engage in advocacy. *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1443 (2014) (First Amendment challenge to limit on political contributions brought by organization that wished to receive and use contributions for political advocacy). While limits on how a person funds his or her speech do not outright prohibit speech on any given topic, they burden the speaker's ability to fund television commercials, radio ads, or otherwise communicate, and are therefore subject to First Amendment scrutiny.

Thus, while SB 954 does not ban ABC-CCC from speaking, it nonetheless runs afoul of the First Amendment by burdening the organization's ability to amass contributions that fund its speech activities. ER 62, 63, 164, 165. Almost all of ABC-CCC's funding comes from prevailing wage contributions. *Id.* If employers are no longer allowed to donate through prevailing wage contributions, they will no longer contribute and ABC-CCC will be forced to cease its advocacy. *Id.* The government essentially concedes the close connection between SB 954 and speech when it notes that the law will prevent money from going toward lobbying that the

government considers "unfair." *See* Br. of Becerra at 34 n.7. The less money ABC-CCC can raise, the fewer studies it can afford to publish, the fewer mailers it can send out, and the fewer conferences it can fund. Because it burdens ABC-CCC's speech, the law is subject to First Amendment scrutiny.

B. The Government's Asserted Interest Does Not Convert SB 954 Into a Regulation of "Conduct"

The government also contends that SB 954 evades First Amendment scrutiny because it is a "labor standards regulation" aimed at protecting workers from having their wages reduced without their consent. Br. of Baker and Su at 30; *see also* Becerra Opp. Br. at 32 ("SB 954 is wholly focused on [the] conduct" of "prevent[ing] an employer from reducing a worker's prevailing wage without the worker's consent."). The government therefore argues that the law burdens "conduct" rather than speech. But the state cannot avoid the First Amendment by characterizing a law in terms of its purpose and then calling it a regulation of conduct. On the contrary, a law that regulates how speakers are paid is subject to First Amendment scrutiny regardless of its purpose. *See, e.g.*, *Schaumburg*, 444 U.S. 620 (statute limiting charitable organization's ability to raise money subject to First Amendment scrutiny despite the state's interest in "preventing fraud").

In *Joseph H. Munson Co., Inc.*, 467 U.S. at 968, the Supreme Court struck down a law that limited how much charities could pay their fundraisers. The Court held that, "[w]hatever the State's purpose in enacting the statute," the law was "a

direct restriction on the amount of money a charity can spend on fundraising activity," and was therefore a burden on speech subject to First Amendment scrutiny. *Id.* Likewise in *Riley*, 487 U.S. at 788, the Court struck down a law that dictated "reasonable fees" for fundraisers. The state argued that the law was merely an "economic regulation with no First Amendment implication" because its purpose was to ensure that the maximum amount of funds reached the charity and that the rates paid were fair. *Id.* at 790. The Court rejected the state's attempt to recast the law in light of its purpose. Though the law regulated only the "*financial* aspects" of charitable organizations, it burdened their ability to engage in fundraising, and was therefore subject to First Amendment scrutiny regardless of the state's reason for enacting it. *Id.* at 790-91.

Similarly here, the government's claim that the law is "aimed at" conduct is unavailing. The direct result of the law is to burden the ability of advocacy organizations to fund their speech. It is therefore subject to the First Amendment regardless of the government's attempt to convert it to conduct by referencing its purpose.

II

SB 954 EFFECTS SPEAKER- AND VIEWPOINT-BASED DISCRIMINATION

Prior to SB 954, any industry advancement fund could receive prevailing wage contributions to fund its advocacy activities. Post-SB 954, only industry

advancement funds that are beneficiaries of a CBA may receive prevailing wage contributions.[3] This distinction discriminates based on viewpoint. Industry advancement funds with a pro-union perspective remain eligible for prevailing wage contributions, while industry advancement funds that oppose the use of collective bargaining agreements are, as a practical matter, ineligible. CBAs give unions the ability to negotiate terms of employment that they find favorable.[4] No CBA will authorize a contribution to an industry advancement fund that advocates against the use of CBAs, and which therefore seeks to reduce unions' influence over the terms of public contracting. [5]

The government responds that the law is *facially* neutral. But even facially neutral laws can be discriminatory where the distinction acts as a proxy for

[3] The fact that this law creates a speaker-based distinction is enough to subject the law to strict scrutiny. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (speaker-based distinctions are prohibited because they "are all too often simply a means to control content."); *Sorrell*, 564 U.S. at 563 (speaker-based restriction on commercial speech subject to heightened scrutiny).

[4] This is especially true in the context of Project Labor Agreements, which require all bidding contractors to abide by the terms of a CBA that has been negotiated by the government project owner and the union prior to bidding. Bidding contractors have no say over the contents of the CBA. It is negotiated by the union and the government.

[5] In the context of public projects, CBAs will come into play under two circumstances: where a CBA is required by a Project Labor Agreement that has been negotiated by a union and the government prior to bidding, or where the contractor is a unionized contractor that has negotiated a CBA with a union. Under either scenario, it is improbable that a CBA will authorize a prevailing wage contribution to an open-shop industry advancement fund.

viewpoint. *See Turner Broad. Sys., Inc. v. NAACP*, 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*, 473 U.S. at 811 (government's stated neutral purpose "will not save a regulation that is in reality a facade for viewpoint-based discrimination); *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004) (The "mere recitation of viewpoint-neutral rationales" will "not immunize [government's] decisions from scrutiny," as they may be a "mere pretext for an invidious motive."). As the First Circuit has observed, "the government rarely flatly admits it is engaging in viewpoint discrimination." *Ridley*, 390 F.3d at 87. Thus, courts have looked to the practical effect of the law, the fit between the means and the government's stated ends, and legislative intent to determine whether a facially neutral law effects unconstitutional viewpoint discrimination.

Where a law has "the effect of excluding unpopular or minority viewpoints," it will be struck down regardless of whether it is neutral on its face. *See Southworth v. Bd. of Regents of Univ. of Wisconsin Sys.*, 307 F.3d 566, 593 (7th Cir. 2002). In *Southworth*, the Seventh Circuit struck down a university policy that allotted funding to student groups based on how long the groups had existed and how much funding they had received in prior years. Though the criteria were facially neutral, in practice they gave historically popular viewpoints an advantage and "discriminate[d] against

less traditional viewpoints." *Id.* The policy was therefore unconstitutional. *See also Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998) (though facially neutral, fee waiver policy for applicants likely to "generate large favorable publicity" discriminated based on content because only "respectable, popular politicians and respected, well-established political groups" were likely to qualify).

First Resort, Inc. v. Herrera, 860 F.3d 1263 (9th Cir. 2017), cited by the government, likewise demonstrates that plaintiffs may prove that facially neutral laws are, in practice, viewpoint discriminatory. There, an anti-abortion pregnancy center alleged that a law that prohibited false and misleading statements by pregnancy centers that did not provide abortion services, but which exempted centers that provided abortions, discriminated against it based on viewpoint. *Id.* at 1277. After reviewing the fully developed summary judgment record, this Court disagreed, noting that pregnancy centers holding various positions on abortion might choose not to provide abortions for reasons unrelated to their viewpoint,[6] and thus the law did not systematically discriminate against centers with anti-abortion perspectives. While the court did not agree with the plaintiff's argument that the distinction acted

[6] For example, a pro-choice pregnancy center might want to avoid the legal liabilities associated with performing abortions.

as a proxy for viewpoint,[7] *First Resort* stands for the proposition that a plaintiff who makes a plausible allegation of proxy is entitled to discovery to support its claim that a law is discriminatory in effect.[8]

Here, the effect of SB 954 is to prevent open-shop industry advancement funds from receiving prevailing wage contributions. ER 62, 63, 164, 165. Unions negotiate CBAs, and a union will not authorize a contribution to an open-shop industry advancement fund. The relationship between CBAs and viewpoint is plain on its face, but at the very least ABC-CCC is entitled to discovery to amass evidence that would prove its claims, like whether CBAs authorize contributions to open-shop funds, how many (if any) pro-union industry advancement funds were affected by the law, and how much money ABC-CCC lost as a result of SB 954.

A law may also be discriminatory where the "viewpoint-neutral ground is not actually served very well by the specific governmental action at issue." *Ridley*, 390 F.3d at 87; *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1124 (D. Ariz. 2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than

[7] Notably, this Court made its decision after employing a very low level of scrutiny, given that the case concerned inherently misleading commercial speech. *First Resort, Inc.*, 860 F.3d at 1271. This case involves fully protected, non-commercial and non-misleading speech.

[8] *First Resort* would be more like this case if the law challenged there allowed Planned Parenthood to determine who received the exemption.

disfavoring a particular speaker or viewpoint.") (citation omitted). In *Ridley*, the government asserted that it had rejected putting up public advertisements in support of marijuana reform because those ads would induce children to smoke marijuana. 390 F.3d at 87. But rejecting the ads did not actually further that purpose, both because the ads were not directed at children and because they advocated reform, not marijuana use. *Id.* at 88. The First Circuit concluded that the "loose" to "nonexistent" fit between the government's stated means and ends suggested that the policy was, in reality, based on the ads' viewpoint. *Id.*

Similarly here, SB 954 fails to further the interests that the government cites. The government principally relies on the argument that SB 954 ensures employee consent over the allocation of their wages, but CBAs do not actually ensure consent, and the law leaves open all sorts of contributions that may be made *against* an employee's will. *See* Sec. III, *infra*. The law is far better tailored to discriminating against open-shop speech than it is to the government's purported interest—underscoring the likelihood that the law is intended to discriminate in favor of union-favored speech and against open-shop speech. *Ridley*, 390 F.3d at 87 ("where the government states that it rejects something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive").

Finally, courts have repeatedly held that facially neutral laws may effect unconstitutional viewpoint discrimination where they are motivated by an intent to discriminate against a given viewpoint. *See, e.g.*, *Cornelius*, 473 U.S. at 812 (remanding for further factual development to determine whether a neutral exclusion of some groups from a non-public forum "was impermissibly motivated by a desire to suppress a particular point of view"); *Ridley*, 390 F.3d at 87 ("statements by government officials on the reasons for an action" can indicate impermissible viewpoint discrimination). While courts may refuse to consider the legislative intent in cases where the substantive claims do not rely on motive, motive *is* relevant in cases alleging impermissible discrimination. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (motive relevant to equal protection claim); *Bonham v. Dist. of Columbia Library Admin.*, 989 F.2d 1242, 1244 (D.C. Cir. 1993) (when analyzing purpose prong of *Lemon* Establishment Clause test, court could look to "testimony of parties who participated in the enactment . . . of the challenged law."); *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 909 F. Supp. 1187, 1198 (S.D. Ind. 1995) (motive relevant to claim of viewpoint discrimination).

Statements by SB 954's sponsors—and even by the Attorney General himself during the course of this litigation—demonstrate that the law was intended to cut off funding for ABC-CCC's speech, which the government dislikes. *See, e.g.*, Interpipe

ER 499, ER 149-151. As the Attorney General acknowledges in his opposing brief, the Senate Rules Committee recognized that a motivating factor in passing SB 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.*" Br. of Becerra at 34 n.7. In other words, the government was not simply concerned about employees' money being allocated without their consent; it was concerned about it being allocated to speech that the government considers "unfair."

Looking at the SB 954's effect, the ill fit between the government's purported ends and the statute's means, and the government's own statements, ABC-CCC was likely to prevail on that claim, and the district court was wrong to deny the motion for preliminary injunction. But even if this Court disagrees that there is enough evidence at this time to show proxy, ABC-CCC has made a plausible allegation that the law effects viewpoint discrimination and it was entitled to discovery to prove its claim.

III

SB 954 FAILS STRICT SCRUTINY

The government does not even attempt to argue that SB 954 satisfies strict scrutiny. Nor could it, because the law is not narrowly tailored to serving their stated interest of ensuring employee consent. As the government concedes, CBAs do not

actually ensure consent, because they are not based on unanimity.[9] Br. of Becerra at 38. Thus, even if employees do not want their wages to go in an industry advancement fund, so long as a majority of the union's members approves, their consent is irrelevant. Worse, some employees are not allowed to vote on CBAs, *see* Opening Br. of ABC-CCC at 12, and even when they can, they may only vote straight up and down; they can't vote down particular policies. And not only does SB 954 fail to secure consent, it prevents prevailing wage contributions in the event of actual consent. Even if an employer like Interpipe obtained consent from its employees to contribute to ABC-CCC, ABC-CCC could not actually receive those contributions unless they were authorized by a CBA.

But even if CBAs did ensure consent, SB 954 allows employers to make several other allocations against employees' will—*e.g.*, contributions to pension funds, vacation time, travel, training programs, and other purposes. *See* SB 954; Cal. Labor Code § 1773.1(a)(1)-(7). The law is therefore both under- and over-inclusive. It doesn't ensure actual consent on an individual basis, it permits many allocations without majoritarian consent, and it doesn't allow prevailing wage contributions even if an employer receives genuine and unanimous consent. This is sufficient evidence to "cast doubt on" the "genuineness" of the government's

[9] Indeed, Project Labor Agreements are negotiated before bidding, and thus do not require employee consent at all.

purported consent rationale, which points to viewpoint discrimination. *See Cornelius*, 473 U.S. at 812.

SB 954 does not ensure that prevailing wage contributions are consensual. Rather, it ensures that prevailing wage contributions do not support speech that unions dislike. If the government were truly concerned about employee consent, it could have ensured consent through employee checkoffs or other mechanisms designed to ensure individualized approval. Instead, it has chosen a policy that discriminates based on viewpoint, and the law therefore fails strict scrutiny. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978) (over- and under-inclusiveness indicated that true purpose of the law was to silence certain speakers, and it therefore failed strict scrutiny).

IV

SB 954 FAILS EVEN UNDER A GOVERNMENT SUBSIDY ANALYSIS

A. SB 954 Is Not a Speech Subsidy

SB 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.[10] Instead, as the government

[10] The Attorney General argues that ABC-CCC forfeited this argument because it did not make it below; however ABC-CCC argued both on the motion for preliminary injunction and against the motion to dismiss that SB 954 was a direct burden on ABC-CCC's speech, and not a government subsidy. *See* Interpipe ER 133, 176, 392.

itself argues, it controls the allocation of workers'—*i.e.*, *private*—funds. *See, e.g.*, Br. of Baker and Su at 29 ("SB 954 protects *workers* from being compelled to subsidize industry advancement funds with *their* wages.") (emphasis added); Br. of Beccerra at 30 ("SB 954 legally regulates conduct by protecting workers from having *their* wages reduced.) (emphasis added).

The government argues that because the employees work on public projects, the allocation of their wages is really the allocation of the government's money. But the government cannot have it both ways. At the time the money is allocated to industry advancement funds, it is allocated by employers as part of their compensation to employees. That money no more belongs to the government than a public school teacher's paycheck—once paid to the teacher—belongs to the government. Even *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009), 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 employees' money came from the government. Rather, the law was a subsidy because it required the state to "incur[] costs to set up and maintain the payroll deduction program." *Id.* at 375; *see also id.* at 359 ("publicly administered payroll deduction" system constituted government "support" of speech). Here, there is no such government outlay. The law is entirely a restriction on private funding of speech. *See Dep't of Texas, Veterans of Foreign Wars of U.S.*, 760 F.3d at 434 (limitation on the way

non-profit organizations could spend funds raised from bingo games did not involve government subsidy).

B. Even If SB 954 Were a Subsidy, It Would Still Fail First Amendment Scrutiny

Even if SB 954 were a subsidy of speech, it would still fail First Amendment scrutiny, because once the state chooses to offer subsidies, it may not discriminate against recipients based on viewpoint. *Regan*, 461 U.S. at 548; *Ysursa*, 555 U.S. at 359 (government may neutrally withhold subsidies so long as not "aim[ed] at the suppression of dangerous ideas") (citation omitted). The government tries to characterize *Regan* and *Ysursa* as permitting the discrimination effected here. Br. of Becerra at 41-42; Br. of Baker and Su at 34. But while those cases hold that the government may choose not to subsidize an entire category of speech, like political speech, *Ysursa*, 555 U.S. at 359, or may choose to subsidize one category of speakers, it may not discriminate among speakers of the same type based on viewpoint. *Regan*, 461 U.S. at 548 ("We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect."). Thus, while the law upheld in *Regan* limited its subsidy to veterans organizations, the decision contains no suggestion that the law could have constitutionally discriminated *among* veterans organizations, much less based on these groups' viewpoints.

But that is exactly what the government has done here. For years, the Department of Industrial Relations (DIR) recognized ABC-CCC as an industry advancement fund similarly situated to other industry advancement funds authorized to receive prevailing wage contributions. ER 162. Now it prohibits ABC-CCC from receiving those contributions. Both the intent and effect are to discriminate based on viewpoint. This type of discrimination against speech, even if a government subsidy of speech, is what the Supreme Court said in *Ysursa* and *Regan* that it would not countenance.

V

ABC-CCC ALLEGED AN EQUAL PROTECTION CLAIM AND WAS LIKELY TO SUCCEED ON THE MERITS

ABC-CCC alleges that SB 954 treats it differently than similarly situated industry advancement funds based on its viewpoint, and that it therefore violates the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 102 (2003) (equal protection challenge to restriction on political contributions brought by recipient of those contributions). This causes ABC-CCC to suffer an injury in fact:[11] the loss of prevailing wage contributions. ER 164, 165. That injury is not speculative, because ABC-CCC's funding comes almost entirely from prevailing wage contributions, ER 62, 63, 164, 165, and it is

[11] Denial of equal treatment, alone, is an injury sufficient to confer Article III standing. *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015).

unlikely that employers will contribute to ABC-CCC in the absence of a prevailing wage credit in a highly competitive industry like public contracting. *Id.* ABC-CCC therefore has standing to bring an equal protection claim.

The Attorney General argues that ABC-CCC's equal protection claim must fail because it is dependent on the First Amendment claim. But this critique conflates the two related but nevertheless distinct claims. ABC-CCC's First Amendment claim is that SB 954 burdens ABC-CCC's ability to fund its speech based on its viewpoint. ABC-CCC's equal protection claim is that SB 954 treats ABC-CCC differently than other similarly situated industry advancement funds based on its viewpoint. It therefore has standing to bring both claims.

Appellees Baker and Su argue that ABC-CCC lacks standing to bring an equal protection claim because SB 954 does not distinguish between industry advancement funds, and instead only draws distinctions between "public works employers" and "employees who are party to collective bargaining agreements." Br. of Baker and Su at 38. But that's not true. SB 954 controls which types of contributions qualify as "prevailing wage" contributions. On its face, the statute distinguishes between *payments* made pursuant to a collective bargaining agreement and *payments* that are not. *See* SB 954. The effect is to disallow prevailing wage contributions to ABC-CCC while allowing those same payments to other, similarly situated, industry advancement funds. ABC-CCC has standing to bring an equal protection claim on

that basis. Public works employers and employees may have an equal protection claim of their own based on how the law affects them. But ABC-CCC has a claim that the law operates to impermissibly disadvantage industry advancement funds like itself.

Finally, Appellees Baker and Su argue that the law does not discriminate against ABC-CCC because it may very well serve to prohibit *pro*-union industry advancement funds from receiving prevailing wage credits.[12] Br. of Baker and Su at 39. But discrimination—viewpoint or otherwise—does not cease being discrimination merely because the law happens to burden some speakers whose viewpoints align with the government's perspective. There will never be a perfect fit between a law and its intended target unless the government is explicit about that intention. And yet courts have repeatedly found that "neutral" laws may serve as a proxy for viewpoint discrimination. Poll taxes and literacy tests, for example, were widely recognized as tools for preventing racial minorities from having access to the ballot box. *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966). The fact that

[12] Appellees Baker and Su also argue that the law does not discriminate against open-shop funds like ABC-CCC, and instead "leaves it up to the parties negotiating a collective bargaining agreement to determine" which industry advancement funds receive prevailing wage contributions. Br. of Baker and Su at 39. What Appellees leave out is the fact that CBAs are negotiated between a union and a unionized employer or, in the case of Project Labor Agreements, between a union and the government project owner. Under such circumstances, CBAs will not authorize payments to industry advancement funds like ABC-CCC.

both would also prohibit poor, illiterate white males from voting does not mean that the laws were not racially discriminatory.

Here, the requirement of a CBA acts as a proxy for viewpoint. It may be true that some pro-union associations will also lose the ability to garner prevailing contributions through a CBA—we do not know because the case was dismissed before discovery commenced. But even if it were true, the effect, intention, and ill fit between the means and ends indicate that the law is a proxy for viewpoint.

CONCLUSION

For the foregoing reasons, ABC-CCC respectfully requests that this Court reverse the judgment of dismissal, vacate the denial of the preliminary injunction, and remand for further proceedings.

DATED: August 25, 2017.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Interpipe Contracting, Inc. and Associated Builders and Contractors of California Cooperation Committee, Inc. v. Xavier Becerra, in his official capacity as Attorney General of the State of California, et al., No. 17-55263

CERTIFICATE OF COMPLIANCE

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DATED: August 25, 2017.

s/ Anastasia P. Boden
ANASTASIA P. BODEN

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I hereby certify that on August 25, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

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