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

PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Associated Builders and Contractors, 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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FRAP 35(b) STATEMENT

Appellant Associated Builders and Contractors, California Cooperation Committee (ABC-CCC) respectfully requests rehearing en banc for the following reasons:

The Panel's opinion presents issues of exceptional importance. It drastically expands the definition of "government speech subsidy" such that the government's mere choice to restrict some communications, but not others, constitutes a "subsidy" of speech. Because speech subsidies traditionally receive less scrutiny than speech burdens, the Panel's opinion subjects a host of protected expression to a less rigorous standard than is constitutionally required.

Moreover, the Panel's opinion eliminates the ability of plaintiffs to claim that a facially "neutral" law is, in fact, viewpoint discriminatory—in conflict with Supreme Court and Ninth Circuit precedent. The Supreme Court, and courts across the country, have allowed plaintiffs to pursue First Amendment claims on the theory that a facially neutral law effectuates covert viewpoint discrimination. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004); *Southworth v. Bd. of Regents of Univ. of Wisconsin Sys.*, 307 F.3d 566, 593 (7th Cir. 2002); *cf. First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017). Here, the Panel affirmed dismissal and held that Appellant could not state a claim of viewpoint discrimination

because the law was neutral on its face—even though ABC-CCC alleged that the challenged law's supposedly neutral criteria acted as a proxy for viewpoint, the law was over- and under-inclusive with regard to its supposed purpose, and the government's own statements indicated that the law was aimed at suppressing disfavored speech. Because the government will "rarely flatly admit when it is engaged in viewpoint discrimination," *Ridley*, 390 F.3d at 87, plaintiffs must be allowed to obtain discovery once, as here, they plausibly allege that a neutral law is a façade for viewpoint discrimination. Rehearing is necessary to restore this important cause of action.

INTRODUCTION

Appellant ABC-CCC is a non-profit advocacy organization that challenges a California scheme that channels money towards union-approved advocacy, and union-approved advocacy only. Complaint, ER-160. In California, public contractors must pay employees the "prevailing wage," a predetermined rate set by the Department of Industrial Relations. Cal. Lab. Code § 1770. In addition to paying employees cash, contractors can satisfy this requirement by contributing to an employee's healthcare plan or pension, by allotting vacation time, or by supporting apprenticeship, worker protection, or other programs. Prior to SB 954, employers could also contribute to any "industry advancement fund" (that is, an organization that advocates for the industry) and receive a corresponding credit to their prevailing

wage obligation. *See* ER-173. SB 954 modified the law such that prevailing wage contributions may now be made only to industry advancement funds that are beneficiaries of a union-negotiated collective bargaining agreement (CBA). *Id*.

This gives unions immense influence—if not outright veto power—over which advocacy groups may receive prevailing wage contributions. Complaint, ER-167. It therefore discriminates against funds based on whether they advocate for or against union policies. ABC-CCC maintains what is called an "open-shop" or "merit-based" viewpoint and it often advocates in ways that unions do not like. ER-165. For example, it was formed for the very purpose of advocating against the use of project labor agreements in public contracting—which unions favor. ER-164. Project labor agreements require union and non-union contractors to abide by the terms of a union-negotiated CBA prior to bidding on any public project. ABC-CCC believes that project labor agreements drive up the cost of public projects and funds studies, mailers, and lobbying efforts to discourage their use. So long as ABC-CCC continues lobbying against union-favored policies, it will remain unpopular with unions and, for all practical purposes, ineligible to receive prevailing wage contributions. ER-165.

ABC-CCC brought suit on the theory that SB 954's 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 speakers.[1] ABC-CCC alleged that this viewpoint discrimination violates the First and Fourteenth Amendments. ER-166, 167. ABC-CCC supported its claim by noting that the law has a poor fit to the government's stated purpose: ensuring employees have consent over how their wages are allocated. For example, CBAs do little to ensure that individuals consent over wage allocations; some CBAs do not even require an employee vote.[2] Even when they do, voters have to vote straight up and down and approval is based on mere majority rule. SB 954 is also wildly over-inclusive; it prohibits prevailing wage contributions outside of the context of a CBA even if an employer obtains actual, individual consent. Not surprisingly, the law is perfectly tailored to the Legislature's (and unions') preference that employers negotiate the terms of employment not on an individual basis, but rather through majoritarian determination of employees as a class—in a word, through unionization.

While industry advancement funds may not have a free-floating right to be eligible for prevailing wage contributions, they have a First and Fourteenth Amendment right to be on equal footing when the government chooses to permit

[1] SB 954 may also discriminate against employers based on whether they are unionized, but that doesn't change the fact that, on its face, the law treats funds differently based on whether they receive prevailing wage contributions pursuant to a CBA.

[2] This is the type of CBA (a Project Labor Agreement) that ABC-CCC advocates against.

such contributions. ER-166, 167. If the state allows the credit for 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. *Id.*

The district court dismissed and held that ABC-CCC had not pled a cognizable viewpoint discrimination claim. ER-001. The Panel affirmed, holding that SB 954 was a government subsidy of speech that was neutral on its face. Panel Op. at 38. Because of the statute's facial neutrality, it declined to permit Appellant's discrimination-by-proxy claim to move forward. That decision threatens to undermine important First Amendment protections.

First, it vastly expands the definition of government speech subsidy. The Panel held that SB 954 did not burden disfavored speech but instead merely subsidized speech, even though the money at issue is not the government's. Panel Op. at 36. It reasoned that because the law was a state-authorized entitlement to donate private money to advocacy, it subsidized speech. This holding subjects many speech regulations to the less protective government speech subsidy standard. The Panel should have conducted its analysis under either the traditional viewpoint discrimination inquiry or an equal protection analysis.

Second, the decision eliminates the ability of plaintiffs to claim that a "neutral" law acts as a proxy for viewpoint discrimination. Whether the Panel

regarded SB 954 as a government subsidy or a restriction on speech, it should have allowed ABC-CCC's viewpoint discrimination claim to move forward. Covert discrimination claims have been accepted by the Supreme Court and Ninth Circuit, and are vital to preventing the government from censoring speakers it does not like. If courts cannot peer behind the government's stated purpose after a plaintiff makes a plausible claim of pretext, the government can get away with what is blatantly unconstitutional by conjuring a neutral façade.

Because this case involves important questions concerning the government's ability to commit perhaps one of the most dangerous constitutional infractions—stifling disfavored viewpoints—Appellant respectfully requests that the Court grant rehearing en banc.

REASONS FOR GRANTING THE PETITION

I

THE PANEL'S OPINION PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE

A. The Panel Drastically Expanded the Definition of Government Speech Subsidy

On its face, SB 954 limits the ability of advocacy organizations to receive prevailing wage contributions based on whether they are party to a CBA, *i.e.*, based on their viewpoint. It therefore acts directly on those speakers, and should have been subject to either First Amendment or equal protection scrutiny. Nevertheless, the

Panel held that SB 954 "takes the form of a state-authorized entitlement" allowing employers to direct money to certain organizations. Panel Op. at 46. It therefore regarded the law as a government subsidy of speech.

This twists the meaning of government subsidy. An economic regulation that controls the way that private employers allocate private funds to private speakers does not "subsidize" speech. If it were otherwise, every campaign finance law regulating financial contributions would in fact be a state subsidy. Where laws neither use government funds to financially subsidize speech, nor require any government mechanism to facilitate speech, there is no government subsidy.

In government subsidy cases, there is at least some affirmative facilitation of speech by the government other than mere legalization. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the government gave up its own revenue through a tax credit to certain speakers. *Id.* at 544 (equating tax-deductible donations to "public funds," since the donor could reduce his or her taxable income and thus, any obligation to the government, by the amount of the donation). In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), a public university directly funded the activities of student groups. In *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009), the Court held that a state law that regulated public employees' ability to donate their wages was a government subsidy because it required the state to "incur[] costs to set up and maintain the payroll deduction

program." *Id.* at 375. Here, there is no government outlay of any kind apart from mere legalization. The law is entirely a regulation of the ways that private parties fund private speech. *See Dep't of Texas, Veterans of Foreign Wars of the U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 434 (5th Cir. 2014) (legislative authority to gather revenue from bingo games did not involve government subsidy of private revenue).

Construing laws that merely choose (or choose not) to permit speech as "government speech subsidies" would subject a host of laws to the lower speech subsidy standard, as demonstrated by the case. Ultimately, the Panel's holding that SB 954 was a government speech subsidy 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 the statute is speaker-based alone would have been good enough to subject the law to strict scrutiny. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563 (2011). In order to give speech the full protection required by the First Amendment, this Court should correct the Panel's decision.

II

THE PANEL'S REFUSAL TO LOOK BEHIND THE STATUTE'S PURPORTED NEUTRALITY CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT

A. Covert Viewpoint Discrimination Is a Viable First Amendment Claim

Regardless of whether the Panel considered SB 954 a speech subsidy or restriction, it should have permitted ABC-CCC's viewpoint discrimination-by-proxy claim to move forward. Because the government is unlikely to openly admit when it's engaging in viewpoint discrimination, the Supreme Court has permitted plaintiffs to claim that an allegedly viewpoint-neutral law is, in effect, viewpoint-discriminatory. *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*, 473 U.S. at 812 (facial neutrality "cannot save an exclusion that is in fact based on the desire to suppress a particular point of view"); c*f. R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992) (holding law unconstitutional because it constituted viewpoint discrimination "[i]n its practical operation"); *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1983) (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").

This important cause of action permits plaintiffs to uncover subtle, but no less unconstitutional laws, and prevents the government from evading the First Amendment by fabricating a neutral pretense.

The Supreme Court has repeatedly held that factors such as over- and under-inclusiveness, selective enforcement, and legislative intent can indicate covert viewpoint discrimination. *See, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint"); *see id.* at 2379 (inferring viewpoint discrimination from the fact that "the State require[d] primarily [one type of] pregnancy center[]" to promote its message, as well as the "history of the Act's passage and its underinclusive application") (Kennedy, J., concurring); *Cornelius*, 473 U.S. at 811 (remanding for determination of state's motivation after allegations of unequal enforcement); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978) (over- and under-inclusiveness indicated that law's true purpose was to silence certain speakers).

The Ninth Circuit has also entertained claims brought under a covert viewpoint discrimination theory. *See, e.g.*, *First Resort, Inc.*, 860 F.3d 1263 (evaluating whether law that discriminated against non-abortion pregnancy centers effectuated covert discrimination); *Children of the Rosary v. City of Phoenix*, 154

F.3d 972, 980 (9th Cir. 1998) (rejecting First Amendment challenge after concluding that there was no evidence that facially neutral law was a "façade" or that it discriminated against viewpoint "in practice"); *Starkey v. Cty. of San Diego*, 346 Fed. Appx. 146, 148 (9th Cir. 2009) (plaintiff likely to succeed on viewpoint discrimination claim where "record flatly contradict[ed]" the government's "pretextual" justification for burden on speech).

One of the ways in which the government may effectuate covert viewpoint discrimination is by applying a law based on seemingly neutral criteria that are really just proxies for viewpoint. Several circuits have allowed plaintiffs to proceed on a discrimination-by-proxy theory. These courts typically look at the law's practical effect, the fit between the means and the stated ends, and legislative intent. *See, e.g.*, *Southworth*, 307 F.3d at 593 (striking down "neutral" university policy that allotted funding to student groups based on how long they existed and their funding from years prior because it gave historically popular viewpoints an advantage); *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998) (facially neutral fee waiver policy for applicants likely to "generate large favorable publicity" discriminated in favor of "respectable, popular politicians and respected, well-established political groups"); *cf. Ridley*, 390 F.3d at 87 ("loose" to "nonexistent" fit between the government's stated means and ends and "statements by government officials" suggested that public advertisement policy was based on viewpoint).

This is exactly the type of claim that ABC-CCC brought. ABC-CCC argued that the requirement that an industry advancement fund be designated in a CBA acts as a proxy for union-favored speech. Complaint, ER-167. On its face, that claim is plausible. As a practical matter, a union will never negotiate or approve a CBA that authorizes a prevailing wage contribution to a fund that opposes unionization or the use of CBAs in public projects.[3] At the time of filing, ABC-CCC anticipated it would lose over 90% of its funding as a result of the law. ER-063. Documents show that in reality, it lost 99% of its funding. Doc. 49-2.

In support of its viewpoint discrimination claim, ABC-CCC argued that the law has a poor fit to its supposed purpose because it is both over- and under-inclusive. SB 954 is over-inclusive because it does not allow prevailing wage contributions outside of the CBA arrangement even if the employer gets *actual* consent. The law 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, Project Labor Agreements (a special type of CBA) are negotiated prior to bidding—and therefore do not require employee consent at all. When employees are entitled

[3] The fact that industry advancement funds like ABC-CCC are eligible for *non*-prevailing wage contributions is inapposite; eligibility for prevailing wage contributions gives union-supported advocacy organizations a huge fundraising advantage. Public contracting is highly competitive, and employers will only contribute to industry advancement funds if they receive a prevailing wage credit—as evidenced by the fact that ABC-CCC has lost 99% of its funding since SB 954 went into effect. Doc. 49-2.

to vote, they must vote straight up and down; they do not have the ability to approve every term, or to veto specific terms. And CBAs are often ratified on a majority rule basis. SB 954 merely 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 SB 954 acts as a proxy for viewpoint.

The government's own statements throughout litigation also belie that SB 954 is aimed at consent. In his opposing brief, the Attorney General acknowledged 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, Doc. 28 at 34 n.7 (emphasis added). In other words, the government was not simply concerned about employers allocating 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 to union-approved speech without employees' consent. SB 954 is therefore better tailored to ensuring that prevailing wage contributions are channeled toward union-approved speech than it is to ensuring that employees have consent over the allocation of their wages.

Given these allegations, ABC-CCC was entitled to gather evidence to prove that the purportedly neutral law was a façade for viewpoint discrimination.

B. The Panel's Opinion Eliminates Proxy Claims

The Panel dismissed ABC-CCC's covert viewpoint discrimination claim because the law was neutral on its face. *See, e.g.*, Op. at 39, 42 (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). That reasoning eliminates plaintiffs' ability to plead covert viewpoint discrimination claims, in conflict with Supreme Court and Ninth Circuit precedent.

The Panel first held that a "facially neutral statute restricting expression for a legitimate end is not discriminatory simply because it *affects* some groups more than others." *Id.* at 39. But the Panel was incorrect to state that the law was facially neutral. On its face, the law treats CBA and non-CBA approved industry advancement funds differently. ABC-CCC therefore did not argue that the law was discriminatory merely because it disproportionately affected open-shop viewpoints; it argued that the 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.

Nevertheless, even if SB 954 only had a disproportionate effect on open-shop viewpoints, that allegation demonstrates a credible claim of covert discrimination sufficient to survive a motion to dismiss. The Panel used the example of a statute prohibiting outdoor fires to reason that neutral laws are legitimate even though they may "affect[] anti-government protesters more than pro-government ones." While it's possible that such a statute may ultimately survive judicial scrutiny, ABC-CCC's argument is that a plaintiff could plausibly *allege* that a neutral law effectuates viewpoint discrimination based on its effect. For example, if it were true that 99% of outdoor fires were started as anti-government flag burning protests, that might raise serious doubts about the purportedly viewpoint-neutral purpose of the statute.

The Panel also dismissed ABC-CCC's argument that SB 954's over-inclusiveness indicated viewpoint discrimination. ABC-CCC argued that SB 54 is over-inclusive because it does not permit prevailing wage contributions to go to funds outside of a CBA even if the employer receives actual consent from each employee. The Panel responded that such over-inclusiveness was justified because nonunionized employers might leverage their bargaining power to coerce consent—thereby rendering employee consent illusory.[4] Panel Op. at 42. The panel therefore

[4] Notably, the prospect of "illusory" consent is no greater under a non-unionized employer than a unionized one. After all, union members often disagree with the policies that unions pursue. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018).

justified the over-inclusiveness and deemed it irrelevant to the analysis rather than allowing the viewpoint discrimination claim to even proceed to discovery.

Moreover, the Panel held that though SB 954 was overinclusive if the goal was achieving individual consent, it was a reasonable method of furthering "collective consent." Panel Op. at 46. But that conclusion only affirms ABC-CCC's claim that the law is viewpoint discriminatory. The only way to achieve "collective consent" under SB 954 is through unionization, and any policy which favors collective consent therefore favors unions. Furthering "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.[5]

The Panel similarly disregarded ABC-CCC's claims of under-inclusiveness. ABC-CCC alleged that the law was under-inclusive both because collective bargaining does not ensure consent on an individual basis (indeed, some CBAs do not require employee consent at all) and because SB 954 does not require consent

[5] 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, seeing as those are also made without actual employee consent.

for other allotments of employee wages—including contributions to pensions, healthcare, or apprenticeship, worker protection, or training programs. According to the Panel, even though SB 954 might not "address all aspects" of its goal, it at least addressed the "most pressing concerns," and under-inclusiveness therefore does not indicate viewpoint discrimination. *Id.* at 43-44. Moreover, while SB 954 does not ensure consent over other allocations, the Panel reasoned that those allocations "directly benefit employees"[6] and therefore do not necessitate consent in the same way. *Id.* If courts can justify under-inclusiveness like this on a motion to dismiss, there is effectively no way to plead covert viewpoint discrimination.

Under a covert discrimination theory, allegations of and over- and under-inclusiveness are reasonable indicators of viewpoint discrimination. *See, e.g.*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). For example, one can imagine a law that says that nonprofits may not obtain donations through bitcoin because bitcoin is difficult to trace and prone to moneylaundering. However, an organization might allege that the restriction was designed to curb donations to those organizations that most often use bitcoin, all of whom share a certain viewpoint. It might also allege that the law is over- and under-inclusive, because it prohibits

[6] This conclusion is directly at odds with the government's own arguments. The government consistently argued that contributions to organizations designated in a CBA do directly benefit employees. It only claimed that contributions to *open-shop organizations*—which advocate in ways that the government does not like—do not benefit employees.

bitcoin even if the organization records the donor's information, and because it permits donations using other types of crypto-currency that present similar concerns. Although that law might ultimately survive strict scrutiny, the plaintiff's allegations raise a question about viewpoint discrimination.

By disregarding ABC-CCC's plausible allegations about SB 954's likely effect on viewpoint, the law's over- and under-inclusiveness, and the government's own statements throughout litigation, the Panel essentially foreclosed covert discrimination claims. If one cannot plead that a statute's natural effect and poor fit to the stated end indicate covert viewpoint discrimination, one cannot plead covert viewpoint discrimination at all. Such a holding would permit the government to disadvantage speech it doesn't like, so long as it can come up with a loose fitting neutral rationale. That essentially invites censorship.

CONCLUSION

Appellant respectfully requests that the Court grant the petition.

DATED: August 27, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 17-55248 (Consolidated with 17-55263)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

[✓] Contains 4, 091 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

[ ] Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

DATED: August 27, 2018.

s/ Anastasia P. Boden
ANASTASIA P. BODEN

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, 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

s/ Anastasia P. Boden
ANASTASIA P. BODEN