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 COMMITEEE, 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 COMMITEEE, 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 OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant ABC-CCC states that it is not a publicly held corporation, does not issue stocks, and does not have parent corporations.

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STATEMENT OF SUBJECT MATTER JURISDICTION

Appellant ABC-CCC brought suit in the district court pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of SB 954. Excerpts of Record (ER)-160. This appeal arises from the district court's final judgment dismissing the Complaint, denying the motion for preliminary injunction, and granting the motion for judgment on the pleadings. ER-1. The district court entered its judgment on January 31, 2017, ER-1, and ABC-CCC filed a timely Notice of Appeal on February 24, 2017. ER-27. The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). The statutory basis for this Court's appellate jurisdiction is 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The U.S. Constitution forbids states from favoring some speakers or viewpoints over others. California requires public contractors to pay employees the "prevailing wage" through a combination of cash wages and other benefits, including making donations to advocacy organizations. SB 954 limited the availability of those donations to organizations selected by a union in a collective bargaining agreement. ABC-CCC used to receive prevailing wage contributions, but no longer can because its open-shop viewpoint makes it unpopular with unions.

The questions presented on appeal are:

1) Did the district court err in dismissing ABC-CCC's First Amendment claim and granting Defendants' motion for judgment on the pleadings on the theory that the discriminatory policy is a government subsidy exempt from the viewpoint neutrality requirement?
2) Did the district court err in denying ABC-CCC a preliminary injunction for the same reason?
3) Did the district court err by denying ABC-CCC's standing to bring its Equal Protection claim on the theory that SB 954 discriminates against the contractors who contribute, not the recipients who use the funds for speech?

STATUTORY PROVISIONS

SB 954; Cal. Labor Code §§ 1770, *et seq*.

INTRODUCTION AND STATEMENT OF THE CASE

In California, contractors for public projects of over $1,000 must pay their employees the "prevailing wage," a pre-determined per diem rate set by the Department of Industrial Relations. Cal. Lab. Code § 1770. This suit challenges the constitutionality of SB 954, which changed how employers can allocate funds under California's prevailing wage requirement. ER-160.

In addition to paying cash, contractors can satisfy the prevailing wage requirement by distributing funds in various ways, including by contributing to an employee's health, welfare, or pension; allotting vacation time; supporting

apprenticeship or training programs; or by donating to worker protection programs. Cal. Lab. Code § 1773.1. Prior to SB 954, employers could also contribute to any "industry advancement" fund, and receive a corresponding credit to their prevailing wage obligation. *See* ER-173. Effective January 1, 2017, SB 954 modified the law such that prevailing wage contributions may only be made to industry advancement funds pursuant to a collective bargaining agreement (CBA) to which the contractor is a party. *Id*.

This threatens to shut down Appellant ABC-CCC, an industry advancement fund that, before SB 954, was entitled to receive prevailing wage contributions. ABC-CCC was formed in 2004 as a §501(c)(6) tax-exempt association to act as a counterpart to industry advancement funds operated by employers that are signatories to collective bargaining agreements. ER-68. That is, it advocates for a system wherein employees are free from coercion to join a union or to adhere to collective bargaining. ER-55, 56, 57. To that end, ABC-CCC underwrites academic studies regarding labor issues, publishes materials regarding California's prevailing wage law, presents testimony to legislative and other governmental bodies, hosts seminars for contractors, and files amicus briefs on precedential issues of importance to the construction industry. ER-57, 58.

Prevailing wage contributions are vital to ABC-CCC's existence. ER-63. Public contracting is a highly competitive industry, and as a result, contributions to ABC-CCC are made largely through the availability of prevailing wage credits. *Id.* Now that SB 954 has eliminated contractors' ability to make prevailing wage contributions to open-shop aligned funds like ABC-CCC, the organization's survival has been thrown into jeopardy. ER-63 (stating that ABC-CCC's funds would decline by 90% due to SB 954). Open-shop public contractors like co-Appellant Interpipe Contracting are prohibited from making prevailing wage contributions to ABC-CCC. And given that ABC-CCC opposes collective bargaining, it is improbable that it will receive prevailing wage contributions pursuant to a CBA. Deprived of its historical source of funding, ABC-CCC will be forced to stop its open-shop advocacy. ER-63. Industry advancement funds with a closed-shop viewpoint, by contrast, may continue to receive prevailing wage contributions, and therefore are not similarly threatened.

Confronted with this discrimination, ABC-CCC and Interpipe Contracting, a public contractor, filed suit pursuant to Section 1983 seeking declaratory and permanent injunctive relief. ER-160. ABC-CCC alleged that, because SB 954 allows prevailing wage contributions to go to union-backed industry advancement funds, but not those that speak against union interests, the law discriminates against speakers based on their viewpoint in violation of the First and Fourteenth

Amendments. ER-161. Interpipe alleged that SB 954 is preempted by the National Labor Relations Act. ER-160. The parties filed a preliminary injunction motion asking the court to immediately enjoin enforcement of the law. The district court denied the motion on the basis that ABC-CCC was not likely to succeed on the merits and dismissed the Complaint for failure to state a claim and lack of standing. ER-3. ABC-CCC and Interpipe filed separate appeals, which were consolidated.

STANDARD OF REVIEW

Orders granting motions to dismiss are subject to *de novo* review. *Ellis v. City of San Diego*, 176 F.3d 1183, 1188 (9th Cir. 1999). A Court reviewing a motion to dismiss must accept a plaintiff's allegations as true, construe them in the light most favorable to plaintiff, and reverse "unless the plaintiff['s] complaint fails to 'state a claim to relief that is plausible on its face.'" *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Generally, a district court's decision whether to grant preliminary injunctive relief is reviewed for abuse of discretion. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009). But where, as here, the decision is based solely on conclusions of law, it is reviewed *de novo*. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121 (9th Cir. 2005).

SUMMARY OF THE ARGUMENT

SB 954 limits prevailing wage contributions to union-backed speech, which is viewpoint discrimination. Formerly, industry advancement funds of all perspectives could receive prevailing wage contributions. After SB 954, only industry advancement funds that are beneficiaries of a CBA can receive those contributions. In effect, the CBA acts as a proxy for viewpoint. Only union-backed funds receive prevailing wage contributions through a CBA. Open-shop organizations, which act as a counterpart to union-backed funds and were formed for the very purpose of arguing that government agencies should not adopt CBAs, do not receive contributions through CBAs, and therefore can no longer receive prevailing wage contributions. SB 954 therefore burdens the ability of organizations like ABC-CCC to fund its speech, while leaving in place the ability of funds with a closed-shop perspective to receive the same contributions.

By discriminating against industry advancement funds based on their identity as open-shop organizations and their pro-open shop perspective, SB 954 commits perhaps the most dangerous type of First Amendment violation: speaker- and viewpoint-based discrimination. *Moss v. U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009) (laws that single out particular speakers "suppress[] a particular view about a subject" and are subject to strict scrutiny). In its Complaint, ABC-CCC alleged that SB 954 cannot satisfy strict First Amendment scrutiny because it is not related to

any compelling state interest, and instead serves only to disadvantage pro-open shop speech. ER-166, 167.

The district court dismissed ABC-CCC's First Amendment claim on the basis that the ability to make private contributions is merely a government subsidy of speech that the state can withhold from whichever speakers it prefers. ER-21. Moreover, it held that ABC-CCC's claims that the law was speaker-based were "tenuous." ER-22. But SB 954 is not a government subsidy; it does not involve the allocation of government funds, or require the government to forego revenue for the benefit of a private party. *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). Instead, it limits the way private speakers may raise money to fund their speech activities. The law is therefore a speaker- and viewpoint-based burden on speech subject to strict scrutiny, which it cannot meet. *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1121 (D. Ariz. 2011).

Even if SB 954 is a government subsidy, ABC-CCC still pled a claim under the First Amendment, because when the state chooses to fund private speech, it cannot discriminate against speakers based on their perspective. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995). SB 954 limits the ability to receive prevailing wage donations to beneficiaries of CBAs. This necessarily discriminates against associations that oppose union interests, and therefore do not

receive donations pursuant to such agreements. The district court therefore erred in dismissing ABC-CCC's First Amendment claim and denying its motion for preliminary injunction.[1]

ABC-CCC also adequately pled an Equal Protection violation, and it has standing to bring that claim. Before SB 954, donations to any advocacy organization received a prevailing wage credit. SB 954 withdraws the prevailing wage credit for donations to ABC-CCC, but leaves the credit in place for organizations with a different viewpoint. The law therefore discriminates against similarly situated parties on the basis of a fundamental right. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 582 (1983). ABC-CCC is injured by that discrimination because it will lose its funding. The remedy sought would redress that injury by barring enforcement of the discriminatory law and allowing ABC-CCC to maintain prevailing wage contributions. Appellant therefore has standing to bring its Equal Protection claim, and the district court erred by dismissing it. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

[1] The district court granted the motion for judgment on the pleadings on the same reasoning that it granted the motion to dismiss. ER-7. Thus, for the same reasons Appellant urges the Court to reverse the dismissal, Appellant urges the Court to reverse the judgment on the pleadings.

ARGUMENT

I
ABC-CCC ADEQUATELY PLED A FIRST AMENDMENT VIOLATION, AND ITS CLAIM WAS LIKELY TO SUCCEED ON THE MERITS

A. SB 954 Is an Unconstitutional Speaker- and Viewpoint-Based Restriction on Speech

ABC-CCC adequately pled a First Amendment violation, and the district court erred in dismissing its claim. Prior to SB 954, donations to all industry advancement associations qualified toward a public contractor's obligation to pay the prevailing wage. ER-173. Post-SB 954, only those contributions made pursuant to a CBA, *i.e.* contributions made to organizations with a closed-shop viewpoint, qualify toward a contractor's obligation to pay the prevailing wage. *Id*. ABC-CCC alleged that the requirement that prevailing wage contributions be made pursuant to a CBA acts as a proxy for union-backed speech. ER-167. Because the law permits union-backed advocacy organizations to receive prevailing wage contributions, and denies advocacy organizations with an open-shop viewpoint the same ability to fund their speech, the law is a speaker- and viewpoint-based restriction on speech, subject to strict scrutiny. *See United Food & Commercial Workers Local 99*, 817 F. Supp. 2d at 1124 (laws that burden only "less favored or more controversial views" discriminate on the basis of viewpoint).

In *United Food & Commercial Workers Local 99*, the plaintiff challenged a law that discriminated against certain organizations' ability to obtain payroll

deductions[2] to fund their advocacy activities. 817 F. Supp. 2d at 1121. Generally, if a recipient of a payroll deduction used the funds for political purposes, it was required to disclose to employers the percentage of its general fund used for those purposes. *Id.* If the recipient exceeded that figure, it was subject to a minimum civil fine of $10,000. *Id.* at 1122. Employers were required to re-certify annually that each employee consented to the deduction for political purposes. *Id.* However, the law exempted deductions donated to certain organizations, as well as contributions made by any "public safety employee, including a peace officer, firefighter, corrections officer, probation officer or surveillance officer." *Id.* Consequently, no public safety union was required to comply with the statute in order to obtain a payroll deduction and use it for political advocacy. A non-exempt organization challenged the law as an unconstitutional restriction on its ability to fund its speech.

The district court held that because the law disadvantaged certain organizations' ability to fund their political activity, but not others, the law was a speaker-based and viewpoint restriction on speech. *Id.* at 1124. It forced selected organizations to make disclosures and to obtain annual re-authorization of the employees' consent to contribute, on pain of civil fine, while other organizations were exempt based solely on their identity. The effect was to discriminate against

[2] Payroll deductions are funds that an employer withholds from an employee's paycheck and transfers directly to another recipient. *Id.*

those organizations "wishing to express less favored or more controversial views." *Id.* Such a discriminatory law was subject to strict scrutiny, which the government could not satisfy.

As in *United Workers*, ABC-CCC alleges that SB 954 violates the First Amendment because it burdens some organizations' ability to obtain private funding for their speech, but not others. ER-167. It further alleges that the law imposes burdens based on the recipient's status and viewpoint. *Id*. ABC-CCC therefore adequately alleged that SB 954 was a status- and viewpoint-based restriction on speech subject to strict scrutiny, and the district court erred in dismissing ABC-CCC's First Amendment cause of action.

Because ABC-CCC is likely to prevail on the merits of that claim, the district court also erred in denying the motion for preliminary injunction. SB 954 cannot satisfy strict scrutiny because it is not narrowly tailored to any compelling state interest. If, as the district court held, SB 954 was intended to ensure that employees consent to how their wages are allocated, the law is over-inclusive, because it does not allow an employer to take a prevailing wage credit *even if it obtains an employee's consent* to contribute to an industry advancement fund. Instead, SB 954 permits a credit only if the employer makes a contribution pursuant to a "collective bargaining agreement."

The law is also under-inclusive, because it leaves in place several prevailing wage credits for contributions that *do not* require employee consent—like contributions to pension funds, vacation time, travel, and other purposes. *See* SB 954. An employee might reasonably prefer, for example, to forego vacation days in order to increase pension fund allocations. Nevertheless, SB 954 allows employers to make that call, and receive a corresponding credit, without employee consent. Such over- and under-inclusiveness fail the strict scrutiny required by the First Amendment. *See United Food & Commercial Workers Local 99*, 817 F. Supp. 2d at 1124 ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.") (citation omitted); *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).

Moreover, it is specious to argue that a collective bargaining agreement ensures employee consent. It is unlikely that elected representatives are always able to negotiate a CBA that satisfies each individual employee. Though unions may allow members to vote on the CBA, they do not necessarily require unanimous member consent. A union does not even have to give every member the right to vote on a CBA in the first place. *See Sergeant v. Inlandboatmen's Union of the Pac.*, 346 F.3d 1196, 1203 (9th Cir. 2003) (upholding union rule prohibiting members in

"casual" positions from voting on CBA). And even if a given employee favors the CBA as a whole, he or she may not agree to every provision; employees do not have a line-item veto. An employee may oppose a contribution to a given industry advancement association, but may nevertheless conclude that—overall—a less than ideal CBA is better than no CBA at all.

The pretense of consent is all the more absurd given the existence of project labor agreements (PLAs), a special type of labor agreement allowed only for public construction projects. PLAs are negotiated by labor unions prior to bidding, and require the successful bidder for the project (unionized or not) to agree to abide by the terms of a collective bargaining agreement. *See Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002). Government entities may approve project labor agreements even without any worker vote or approval. *Id.* Given that PLAs will impose collective bargaining agreements on workers—which will include terms regarding the allocation of their wages—without the workers' approval, the argument that collective bargaining agreements ensure employee consent fails.

As the legislative history cited by the Attorney General below shows, SB 954's true purpose is to facilitate union-supported advocacy and discourage open-shop advocacy. *See* ER-149-151. SB 954 was passed on the theory that money given to industry advancement funds in the absence of a CBA is "often used to

support activities that are contrary to the interests of workers,[3] such as efforts to weaken health and safety standards or to reduce wages on public works and apprenticeship training standards." *Id.* SB 954 therefore sought to limit the prevailing wage credit to contributions made pursuant to a CBA because the state likes what union-approved industry advancement funds have to say on matters of public policy. But the state cannot disadvantage speech merely because it disagrees with the content, or deems it contrary to the public interest. *Rosenberger*, 515 U.S. at 828-29 ("[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.").

If the state is concerned with employees having a say over the allocation of their wages, or with the types of political advocacy the credits may fund, it could eliminate the prevailing wage credit for *all* contributions to industry advancement associations—regardless of their identity—and allow employees to decide how prevailing wage credits should be allocated. Instead, the state has chosen to eliminate only a certain type of credit that discriminates against disfavored speech. This discriminatory burden on ABC-CCC's speech fails strict scrutiny.

[3] Of course, ABC-CCC believes it advocates in the interest of workers by demonstrating, for example, the costs of project labor agreements and advocating against their use. ER-176 (report on PLAs sponsored by ABC-CCC).

B. SB 954 Is Not a Government Subsidy of Speech

The district court dismissed ABC-CCC's First Amendment claim on the basis that SB 954 is a state subsidy of private speech. ER-21. Under that theory, the state can subsidize or not subsidize whatever speakers it chooses, and its decision to withhold a subsidy from ABC-CCC was therefore constitutional. ER-22. But the law is not a government subsidy; it restricts the way *private parties* obtain *private funding* for their speech, at no cost to the government. Worse, it discriminates against disfavored parties' ability to obtain that funding. A restriction on the ability to "amass[] the resources necessary for effective . . . advocacy" is a restriction on First Amendment rights, subject to strict scrutiny. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (laws that restrict private contributions to "magnify the advantages" of one speaker, and that put others "to significant disadvantage," violate the First Amendment).

A government subsidy, by contrast, 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.*, 760 F.3d at 434 (government subsidy of speech occurs when there is a "direct or indirect receipt of funds from the public fisc"). Not one of the cases relied on by the district court supports the proposition that SB 954 is a subsidy.

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). *Rosenberger*, 515 U.S. 819, involved a public university that directly funded the activities of student groups. And *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009), involved a state that facilitated a payroll deduction at its own expense. *Id.* at 357 (noting that the state "incur[ed] costs to set up and maintain the payroll deduction program").

Here, by contrast, the challenged statute limits the ways in which speakers can obtain *private* funding for their speech, at no cost to the government. Indeed, the law is a *reverse* subsidy; it results in contractors using private funds to support government-approved objectives.

Dep't of Texas, Veterans of Foreign Wars of U.S., 760 F.3d at 436, is instructive. There, the government argued that a limitation on the way non-profit 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.* It

would be different if the state expended its own resources to conduct bingo games, and then distributed the money to the 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. ER-25. Whether prevailing wage contributions are considered the employers' or workers' money, SB 954 restricts private funding of speech, and is not a government subsidy.

C. Even If SB 954 Were a State Subsidy of Speech, It Would Still Be Unconstitutional Because it Discriminates Against Disfavored Speakers

Even if SB 954 were a government subsidy of speech, ABC-CCC still pled a cognizable First Amendment claim. Although the government has no obligation to subsidize speech, when it does, it may not discriminate amongst speakers based on their viewpoint. *Rosenberger*, 515 U.S. at 829.

In *Rosenberger*, the Supreme Court struck down a rule that required a university to withhold a subsidy from student groups that promoted a religious belief. The Court explicitly rejected the argument that, because the government is not required to subsidize speech, it can discriminate amongst speakers when it

chooses to subsidize them. *Id.* at 834-35. Once the university chose to "expend funds" to encourage private speech, it could not "silence the expression of selected viewpoints." *Rosenberger*, 515 U.S. at 835.

In *Regan*, 461 U.S. 540, Congress had refused to treat any contributions to organizations engaged in lobbying as tax deductible. However, it allowed *all* contributions to veterans' associations to qualify as tax deductible, regardless of whether the organization lobbied. A non-veterans organization challenged the law on the theory that denying it the same lobbying tax deduction given to veterans' organization discriminated against its speech. The Court upheld the law because it acted to subsidize *all* of the activities of *all* veterans' organizations, regardless of whether they lobbied, and without regard to what they said. *Id.* at 548.

Unlike in *Regan*, it is not the case here that the state is neutrally subsidizing all of the activities of one type of organization, regardless of whether it engages in advocacy, to the exclusion of all others. Instead, the state is discriminating among organizations of the same type based on those organizations' viewpoints. In *Regan*, Congress was discriminating among apples and oranges, which the Court found constitutional because it had nothing to do with viewpoint. Here, the state is discriminating among apples, and it is doing so based on their status and viewpoint. Even the State has acknowledged that, other than for viewpoint, groups like ABC-CCC are similarly situated to CBA-supported groups. Prior to SB954, ABC-CCC

was authorized by the Department of Industrial Relations to receive prevailing wage contributions. That only could have been legal if, in the view of the state, ABC-CCC worked for "purposes similar to" those served by "[i]ndustry advancement" contributions "required under a collective bargaining agreement." *See* former Cal. Lab. Code § 1773.1(a)(9).

Importantly, in *Regan* there was "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." 461 U.S. at 548. The Court warned that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to "aim[] at the suppression of dangerous ideas." *Id.* (citation omitted). That is exactly what the state has done here: it has withdrawn the ability of ABC-CCC to fund its speech through prevailing wage payments because it does not like what ABC-CCC says. The legislative history confirms that SB 954 was "aimed at the suppression of [open-shop] ideas." *Id.*

In *Ysursa*, 555 U.S. 353, the Supreme Court upheld a state's refusal to subsidize speech precisely because that refusal was neutral. There, the government declined to allow any public sector employees to contribute to a political action committee through payroll deductions. The law neutrally applied "to all organizations, to any deduction regarding political issues, . . . regardless of viewpoint or message, . . . to all employers," and made no exemptions. *Id.* at 361 n.3. The Court held that the law did not "suppress political speech but simply

decline[d] to promote it," across the board, "through public employer checkoffs for political activities." *Id.* at 361. That is unlike the case here, where the state has not neutrally withdrawn the "subsidy" for all industry advancement funds' speech, but has instead chosen to treat donations differently based on the identity and viewpoint of the recipients.

The argument that government can constitutionally subsidize one party to the exclusion of any similarly situated party proves too much. Nobody would contend, for example, that the government can withhold a voting subsidy based on the way an organization votes, or withhold a speech subsidy on the basis of one's race. Once the state chooses to subsidize private advocacy in the construction industry, it must do so evenhandedly, without regard to viewpoint.

The district court disagreed with the argument that SB 954 discriminates against certain speech, and held instead that 1) the law was "facially neutral" and 2) ABC-CCC's claim that it would be disfavored as a result of the law was "tenuous." ER-22. But because ABC-CCC's allegations were plausible, they should have been taken as true at the motion to dismiss stage. *Zucco Partners, LLC*, 552 F.3d at 989 (quoting *Twombly*, 550 U.S. at 570).

On its face, prevailing wage funds may only be given to organizations pursuant to a collective bargaining agreement. Given that open-shop organizations oppose unionization and collective bargaining agreements, it is certainly "plausible"

that the purpose and effect of the law is to bolster funding to union-backed speakers to the exclusion of open-shop speakers. A closed-shop viewpoint is so associated with the existence of the CBA to raise serious concerns about the legislature's intended effect of the law. Plausible allegations of pretext must be able to survive motions to dismiss for the First Amendment to have any meaning.

Let's say, for example, the State of Wisconsin wanted to subsidize fans of the Green Bay Packers and discriminate against fans of the Minnesota Vikings. The state could enact a law that said that everyone who wears green on Sundays will be given a $100 tax deduction. On its face, the green shirt requirement is viewpoint neutral. But the presence of a green shirt on Sundays in Wisconsin might be so associated with a pro-Packer viewpoint that a plaintiff could plausibly allege that the true intent was to discriminate in favor of Packer fans. Allowing dismissal merely because the law is viewpoint neutral on its face, when the plaintiffs have made a plausible allegation of pretext, would permit the legislature to evade First Amendment scrutiny. *See Spencer v. U.S. Postal Serv.*, 613 F. Supp. 990, 993 (S.D. Ohio 1985) (facially viewpoint neutral state subsidy was discriminatory because distinction between organizations went "to the heart of the reason why Charter was founded," and thus its viewpoint).

ABC-CCC's allegation that it will be prejudiced in its ability to receive funding, was also plausible. In a highly competitive industry, the prevailing wage

credit acts as an incentive to donate to industry advancement funds. ER-63. Now that the credit is eliminated, so too is the incentive. *Id.* Open-shop organizations are therefore prejudiced in their ability to raise funding, and the natural result will be that contributions decline. This argument was supported by allegations in the Complaint, ER-164, 165, and numerous declarations in connection with ABC-CCC's preliminary injunction motion, including a declaration from ABC-CCC's Executive Director John Loudon, who stated that the fund's contributions would decline by an estimated 90%. *See, e.g.*, ER-30, 37, 40, 63, 94-103. The district court itself found that ABC-CCC had standing on the basis that it would "incur financial damage" and its "speech rights would be chilled" as a result of SB 954. ER-10, 11. The Complaint's allegations of harm were certainly "plausible," and should have been taken as true.[4]

In sum, when the government chooses to subsidize private speech, it cannot withhold the subsidy from some speakers because it does not like what they have to say. ABC-CCC alleged that this is exactly what SB 954 has done, and for that reason, it adequately pled a First Amendment claim and was likely to succeed on the merits of that claim. The district court erred by holding otherwise.

[4] If the Court believes the Complaint is deficient, but the averments in the declarations, if true, would be sufficient, ABC-CCC should be allowed to amend the Complaint.

II
ABC-CCC HAS STANDING TO BRING AN EQUAL PROTECTION CLAIM

When the government makes a legislative classification on the basis of a fundamental right, that law is subject to strict scrutiny. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) ("equal protection analysis requires strict scrutiny" when a discriminatory law "interferes with the exercise of a fundamental right"); *Minneapolis Star & Tribune Co.*, 460 U.S. at 582 (law that singled out press for special tax burdened fundamental right of free speech and was subject to strict scrutiny). By permitting some industry advancement funds to obtain prevailing wage payments, but not others, SB 954 discriminates against funds like ABC-CCC. Moreover, SB 954 discriminates on the basis of ABC-CCC's speech, which is a fundamental right. *See Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 470 (2007) (issue advocacy is protected by the First Amendment). The law is therefore subject to strict scrutiny under the Equal Protection Clause. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (strict scrutiny applies when legislative classification restricts First Amendment rights). For the reasons stated above, Defendants cannot meet such a demanding standard.

The district court dismissed ABC-CCC's equal protection claim on the basis that SB 954 discriminates against employers not subject to CBAs, and ABC-CCC is not such an employer. This essentially criticizes ABC-CCC for bringing a claim that

it did not raise. SB 954 might discriminate against employers, who have the ability to bring their own equal protection claims. But for reasons explained, the law also discriminates against ABC-CCC by burdening its ability to fund its speech. *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); *Randall*, 548 U.S. at 248 (candidates for political office challenged limitation on people's ability to make financial donations). ABC-CCC is injured by that discrimination because it will lose funding. The remedy ABC-CCC seeks would redress its injury by barring enforcement of the discriminatory law and allowing ABC-CCC to maintain funding. It therefore has standing to bring an equal protection claim, and the district court erred in dismissing it. *See Lujan*, 504 U.S. at 560 ("[A] plaintiff has standing if he has suffered a concrete and particularized injury, fairly traceable to the defendant's conduct, which the court can remedy.").

CONCLUSION

For the reasons stated, ABC-CCC respectfully requests that the Court reverse the district court's dismissal and grant of the motion for judgment on the pleadings,

and remand for further consideration of Appellant's motion for preliminary injunction.

DATED: June 2, 2017.

Respectfully submitted,

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By s/ Anastasia P. Boden
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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

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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DATED: June 2, 2017.

s/ Anastasia P. Boden
ANASTASIA P. BODEN

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 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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ANASTASIA P. BODEN

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9th Circuit Case Number: 17-55248 (Consolidated with 17-55263)

I, Anastasia P. Boden, certify that this brief is identical to the version submitted electronically on June 2, 2017.

DATED: June 5, 2017.

s/ Anastasia P. Boden
ANASTASIA P. BODEN