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June 19, 2020

VIA ELECTRONIC FILING

Ms. Molly Dwyer, Clerk
Office of the Clerk
Ninth Circuit Court of Appeals
95 Seventh Street
P.O. Box 193939
San Francisco, CA 94119

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Re: *NLRB v. International Association of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*
Case No. 17-73210
Citation to Supplemental Authority Pursuant to FRAP 28(j)
***Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer, No. 18-15840 (June 10, 2020)* Petition for Panel Rehearing and Hearing en banc pending**

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Dear Ms. Dwyer:

The Court’s opinion in *Pacific Coast* is directly opposing to the panel decision which is pending before this Court.

This Court held “that vocational training is speech protected by the First Amendment.” Slip Op. page 12. The Court held that because the Private Postsecondary Education Act regulates both the subject matter of speech and distinguishes between speakers it is governed by First Amendment strict scrutiny. *Id.* at 15-16. Because the statute “*favours* particular kinds of speech and particular speakers through an extensive set of exemptions” *Id.* at 17, it is subject to strict scrutiny. *Sorrell v. IMS Health, Inc.*, 564 US 552 (2011).

The Court held that the PPEA imposed barriers to the vocational training of farriers which are not imposed on the training of other vocations which disfavored the speech activity of teaching horseshoeing. This was accomplished by exempting other training programs from the same barriers.

The Court remanded the case to determine whether the commercial speech doctrine might apply reducing the level of scrutiny, an issue which does not affect union speech in this case.

Regulation of labor speech cannot satisfy strict scrutiny because it regulates the content of speech and excepts from regulation *all* speech by any other person except an agent of a labor organization. As *Pacific Horseshoeing* notes, this “picks winners and losers when it comes to which institutions [are subject to the statute].” *Id.* at 16.

• Admitted in Hawaii
◆ Also admitted in Nevada
▼ Also admitted in Illinois
▶ Also admitted in New York and Alaska
* Also admitted in Florida
◆ Also admitted in Minnesota

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The decision in *Pacific Coast* is irreconcilable with the panel decision in this case. *Pacific Coast* relies heavily upon *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) and other cases which the panel in this case held did not “warrant divergence from the Supreme Court’s analysis in [*IBEW Local 501 v. NLRB*, 341 U.S. 694 (1951)]”. See Slip Op. p. 9. *Pacific Coast* rejects this narrow approach to the First Amendment reach of *Reed* and other cases.

There is no way to reconcile the Opinions even by retreating to the argument that the speech issue was resolved in a 1951 case which did not apply strict or even intermediate scrutiny.

Sincerely,

A handwritten signature in blue ink that reads "David A. Rosenfeld". The signature is written in a cursive, slightly slanted style.

David A. Rosenfeld

DAR:lda

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on June 19, 2020, I electronically filed the foregoing 28(j) Letter with the United States Court of Appeals for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on June 19, 2020.

/s/ Sally Mendez
Sally Mendez