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June 30, 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)
IMDB.com v. *Becerra*, No. 18-15463, 2020 WL 3396306 (9th Cir. June 19, 2020)
Petition for Panel Rehearing and Hearing en banc pending

OF COUNSEL

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Dear Ms. Dwyer:

Again this Court has decided a case that is directly opposing to the panel’s decision which is pending Petition for Rehearing and Hearing en banc.

In this new case, the Court invalidated a California statute because it was content based regulation on speech and furthermore targeted particular speakers. *See* slip op. at 14-15. For that reason, strict scrutiny applied. The Court relied upon *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011).

In the case pending before this Court, a secondary boycott law targets speech solely based on the speaker, its content and the hearer.

The restriction of this activity is less justifiable because it applies only to one type of entity and one viewpoint. It targets speech encouraging workers to exercise a right to leave work, a right guaranteed by the Constitution and state law, which makes employment at will. Furthermore, the National Labor Relations Act does not prohibit or regulate workers and their choice to work or not work. It regulates unions and employers.

The decision also addresses whether the statute prohibits “speech that itself proposes an illegal transaction.” Slip op. at 19-20. Because the speech itself was not proposing any illegal conduct, even though the listener might engage in such conduct, it was subject to First Amendment protection. But, as noted, workers have every right to leave a job, so the union was transmitting perfectly protected information. The secondary boycott statute prohibits the

• 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

transmission of information which encourages only a lawful action on the part of the workers.

This Court particularly noted the “the statute is underinclusive because it limits its restrictions to those who both [meet two tests, one as speaker, the other as listener].” Slip op. at 27. Here, the secondary boycott statute is analogous: it is underinclusive because it limits its speech restrictions to labor organizations and only when addressed to employees.

There is no way to reconcile the Opinions even by retreating to the argument that the speech issue was addressed in dicta 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

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**CERTIFICATE OF COMPLIANCE PURSUANT TO F.R.A.P. 15(d) and
27(d)(2)(A))**

I hereby certify pursuant to Federal Rule of Appellate Procedure 15(d) and 27(d)(2)(A) that this **CITATION TO SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j)** complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 343 words. This **CITATION TO SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j)** with the typeface requirements of Federal Rule of Appellate Procedure and the tpestyle requirements of Federal Rule of Appellate Procedure because it has been prepared with Microsoft Word 2010 in in Times New Roman font.

Dated: June 30, 2020

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: */s/ David A. Rosenfeld*
David A. Rosenfeld

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 30, 2020, I electronically filed the foregoing **CITATION TO SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j)** 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 30, 2020.

/s/ Katrina Shaw
Katrina Shaw