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July 16, 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)
Barr v. American Association of Political Consultants,
No. 19-631 ____ U.S. ____ (July 6, 2020)
Petition for Panel Rehearing and Rehearing En Banc Pending

OF COUNSEL

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Dear Clerk:

The Panel declined to apply *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), on the grounds that the sign ordinance was directed at the general public while the communications regulated in this case “were addressed to neutral employees within the highly regulated contours of labor negotiations.”

On July 6, 2020, the Supreme Court eliminated any uncertainty whether the statements made by the Local 439 Business Agent to employees are subject to strict scrutiny under the First Amendment.

The Court in *Barr* rejected the Panel’s view that it made a difference who was speaking about what subject. The Court in *Barr* rejected the Panel’s view that it makes a difference what subject matter is being regulated. The Court in *Barr* rejected all the arguments the government made in an effort to save that exception at issue.

Here, the secondary boycott law as applied is content based. It is speaker based. It is viewpoint based. It is listener based. *Barr* ends the question.

The Panel suggested that the failure of the Court to mention *IBEW v. NLRB*, 341 U.S. 694 (1951), in *Reed* suggests the Court was implicitly approving the failure to apply strict scrutiny 64 years earlier. Slip op. at 7-8. *Barr* also relies upon *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), which did not mention *IBEW* either. Although *Barr* also

• 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

doesn't mention *IBEW*, it is impossible to trust that the Court did not mean what it said, that strict scrutiny applies to all content regulation, including labor speech.

As we have pointed out previously, the Union agent asked employees to leave work. There was no coercion or conduct. None left work. The right of employees to leave work is not limited by the National Labor Relations Act; what is limited is the communication of the idea to employees and only when that communication comes from a Union.

This Court should grant the Rehearing or the Rehearing En Banc and determine that in this case the regulation of speech was content based and cannot survive First Amendment 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/kts
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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 340 words. This **CITATION TO SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j)** with the typeface requirements of Federal Rule of Appellate Procedure and the typestyle requirements of Federal Rule of Appellate Procedure because it has been prepared with Microsoft Word 2010 in in Times New Roman font.

Dated: July 16, 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 July 16, 2020, I electronically filed the foregoing **CITATION TO SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(J)** with the United States Court of Appeals, 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 July 16, 2020.

/s/ Katrina Shaw
Katrina Shaw