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August 11, 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*,
140 S. Ct. 2335 (July 6, 2020) and other cases
Petition for Panel Rehearing and Rehearing En Banc Pending**

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Dear Ms. Dwyer:

On July 31, the Board responded to our recent Rule 28(j) letters. The Board is reduced to the argument that the strict scrutiny doctrine of the First Amendment does not apply to the area of labor law. The Board argues that *Barr v. American Association of Political Consultants*, 140 S. Ct. 2335 (2020), and the other cases cited “involve different areas of law” and should be disregarded. The Board cites no case where the Supreme Court or this Court has held that the First Amendment does not apply to any area of the law.

Carefully read, *IBEW Local 501 v. NLRB*, 341 U.S. 694 (1951), was a ruling on picketing, not speech. We recognize that courts have taken dicta in that case and relied on it to hold that the Court was commenting on speech and not just picketing. However, *Barr* and the other cases cited to this Court make it clear that strict scrutiny does apply to speech, and it is not necessary to reach the question of whether strict scrutiny applies to picketing. And if peaceful picketing were at issue, strict scrutiny would apply.

Agostini v. Felton, 521 U.S. 203 (1977), is no bar. The Board’s recurrent argument that the First Amendment does not apply to labor law is a concession that *Barr* and the other cases have applied strict scrutiny to all areas of law. The fact that the Supreme Court has not specifically mentioned *IBEW* in First Amendment cases in no way suggests that the First Amendment does not apply to labor speech. Indeed, this Court has made it clear that it does apply. See *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2005) (citing Supreme Court cases applying the First Amendment). See also *Bethany College*, 369 N.L.R.B. No. 98 (June 10, 2020) (applying broadly the First Amendment in the free exercise of religion context).

• 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
◆ Admitted in Nevada and Washington

August 11, 2020

Page 2

The proof of our argument is this Court's application of the First Amendment to the same phrase in the immigration context. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), pending on remand to this Court.

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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August 11, 2020

Page 3

**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 441 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: August 11, 2020

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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

August 11, 2020

Page 4

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 August 11, 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 August 11, 2020.

/s/ Laureen D. Arnold
Laureen D. Arnold

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