No. 19-70334

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,
and
PREFERRED BUILDING SERVICES, INC.,
Intervenor.

On Petition for Review of an Order of the National Labor Relations Board

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, NATIONAL RETAIL FEDERATION, AND RETAIL INDUSTRY LEADERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF INTERVENOR PREFERRED BUILDING SERVICES, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* the Chamber of Commerce of the United States of America, the Coalition for a Democratic Workplace, Associated Builders and Contractors, the National Retail Federation, and the Retail Industry Leaders Association, each certify that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that all current parties have consented to the filing of this brief in support of the Intervenor, Preferred Building Services, Inc. In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici Curiae* state that this brief was prepared in collaboration with its counsel of record. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except the *Amici Curiae*, their counsel and/or their members contributed money to fund the preparation or submission of this brief.

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Coalition for a Democratic Workplace ("CDW") is a business association comprised of nearly 500 organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry.[1] CDW members are joined by their mutual concern over labor law issues and developments that threaten entrepreneurs, other employers, employees, and economic growth.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 21,000 members. ABC's membership represents all specialties within the U.S. construction industry and is

[1] A full list of CDW's members is available at https://myprivateballot.com/about/.

comprised primarily of firms that perform work in the industrial and commercial sectors.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF regularly advocates for the interests of these retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government.

The Retail Industry Leaders Association ("RILA") is a trade association of retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, more than 42 million American jobs and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

The *Amici Curiae* have a mutual interest in the important protection afforded to neutral parties by "secondary boycott" provisions in the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151 *et seq.*, which make it unlawful for a union to enmesh neutral employers, including their employees, the public, and other

persons, in labor disputes in which the parties have no involvement except for their business dealings with another employer that is the subject of the union's dispute.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 70 years, federal labor law has involved the careful balancing of competing interests. Among these goals is the protection of collective bargaining, including the potential use of certain economic weapons by unions and employers. At the same time, though, the overriding policy objective of the NLRA is to "minimize industrial strife" and to "eliminate . . . substantial obstructions to the free flow of commerce." *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959); *see* 29 U.S.C. § 151.

This case involves unlawful "secondary" picketing that plainly violates NLRA Section 8(b)(4)(B), consistent with black-letter principles established in decades of case law decided by the National Labor Relations Board, the Supreme Court, and this Court. Nevertheless, the Petitioner[2] and certain *amici*[3] attempt to recast the unlawful picketing as "speech" that should be cloaked with First Amendment protection.

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[2] *See* Opening Brief of Petitioner Service Employees International Union Local 87, filed Aug. 19, 2019, at 2-3, 41-46 (hereinafter "SEIU Brief" or "SEIU Br.").

[3] *See* Brief of *Amici Curiae* Labor Law Professors [Charlotte Garden and Catherine L. Fisk] In Support Of Petitioner, filed Aug. 26, 2019, at 4-7, 21-27 (hereinafter "Garden-Fisk Brief" or "Garden-Fisk Br.").

For two reasons, this Court should find that these First Amendment arguments are without merit.

First, the First Amendment arguments raised by the SEIU and the Garden-Fisk Brief rest on an incorrect premise that "serious constitutional questions" and a First Amendment "conflict" arise from Section 8(b)(4)(B)'s prohibition against unlawful secondary picketing. SEIU Br. at 20-21; Garden-Fisk Br. at 17-18. The simple answer is that the First Amendment does not protect unlawful picketing and related conduct, including speech, that violates Section 8(b)(4)(B). *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 941 F.3d 902, 905-06 (9th Cir. 2019) (hereinafter *Iron Workers*) (rejecting argument that a Section 8(b)(4)(B) violation was unconstitutional because it "punished expressive activity protected by the First Amendment"); *see also IBEW v. NLRB*, 341 U.S. 694, 705 (1951) (NLRA's prohibition against secondary boycotts "carries no unconstitutional abridgment of free speech"); *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 952 (D.C. Cir. 1999) (the "First Amendment is not at all implicated" even when addressing pure speech that violates Section 8(b)(4)(B)); *NLRB v. Local Union No. 3, IBEW*, 477 F.2d 260, 266 (2d Cir. 1973) (same). Indeed, this Court's rejection of the First Amendment challenge in *Iron Workers* constitutes the law of this Circuit, which forecloses—as a matter of law—the First Amendment challenge presented by

the SEIU and other *amici*. *Miranda v. Selig*, 860 F.3d 1237, 1243 (9th Cir. 2017); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993).

Because the NLRB's finding in this case involved a union's secondary *picketing*, the absence of any bona fide First Amendment concerns is especially clear. Section 8(b)(4)(B) only prohibits a union from picketing or taking other actions to "threaten, coerce, or restrain" a *neutral* party (with whom the union has no direct dispute) where the union's "object" is to penalize the neutral party for doing business with the *primary* employer (*i.e.*, the employer that is directly involved in the union dispute). *Iron Workers*, 941 F.3d at 905 (holding that "a union may not exert pressure on employees of a neutral employer to strike against that secondary employer for the purpose of increasing the union's leverage in its dispute against the primary employer"). Congress enacted Section 8(b)(4)(B) to address, in a narrow fashion, "*isolated evils* which experience has established flow from [secondary] picketing." *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 63 (1964) (hereinafter *Tree Fruits*) (emphasis added) (quoting *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 284 (1960)).

In the "sensitive area" of labor relations, *Drivers*, 362 U.S. at 284, the NLRA provides that, when a union engages in secondary picketing in violation of Section 8(b)(4)(B), the union's *conduct* is unlawful, and it is equally clear that such conduct is unprotected by the First Amendment. *See Int'l Longshoremen's Ass'n v. Allied*

Int'l, Inc., 456 U.S. 212, 226 (1982) ("conduct designed not to communicate but to coerce merits still less consideration under the First Amendment"); *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"); 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR–MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1437 (1959) (hereinafter "LMRDA Hist.") (statement of Sen. Kennedy) (noting that secondary boycott prohibition permits "all publicity short of having ambulatory picketing in front of a secondary site").

Second, contrary to the impression conveyed by the SEIU and certain *amici*, the structure and application of Section 8(b)(4)(B)—as adopted by Congress and as applied by the NLRB and the courts—incorporate numerous additional safeguards to avoid any conflict with the First Amendment. Section 8(b)(4)(B) contains a "publicity proviso" that affirmatively protects "publicity, *other than* picketing" that has "the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." 29 U.S.C. § 158(b)(4)(B) (emphasis

added).[4] Not only does Section 8(b)(4)(B) on its face reaffirm the limited scope of its prohibition, the Supreme Court over the years has construed Section 8(b)(4)(B) in a manner that has erred on the side of protecting speech under the First Amendment. *See, e.g.*, *Drivers*, 362 U.S. at 284 (holding that "restrain or coerce" under Section 8(b)(4)(B) does not include recognitional picketing); *Tree Fruits*, 377 U.S. at 63 (finding that certain types of consumer-directed picketing at neutral retail stores does not violate Section 8(b)(4)(B)). The Court expansively interpreted the publicity proviso in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, further narrowing the restrictions imposed by Section 8(b)(4)(B), to avoid "serious questions . . . under the First Amendment." 485 U.S. 568, 575 (1988).

Here as well, it is important to note that the Supreme Court in *DeBartolo* emphasized that "*picketing* is *qualitatively* '*different* from other modes of communication.'" *Id.* at 580 (emphasis added) (citations omitted). Likewise, former President John F. Kennedy, when serving in the U.S. Senate, chaired the Conference

[4] The publicity proviso contains a further qualification that the publicity "not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." 29 U.S.C. § 158(b)(4)(B).

Committee when Section 8(b)(4)(B) was amended in 1959,[5] and then-Senator Kennedy stressed that Section 8(b)(4)(B) broadly permitted all kinds of communication and speech *except for secondary picketing*. To this effect, he stated that a "union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity *short of having ambulatory picketing in front of a secondary site*." LMRDA Hist., *supra*, at 1437 (statement of Sen. Kennedy) (emphasis added).

These factors support the NLRB's holding here that the SEIU's secondary picketing constituted unlawful coercion in violation of Section 8(b)(4)(B). This Court should reject arguments that the Board's conclusion runs afoul of First Amendment concerns.

ARGUMENT

I. The First Amendment Does Not Protect Unlawful Secondary Picketing That Violates Section 8(b)(4).

For more than 70 years, our federal labor laws have maintained a complex balancing of competing interests. The NLRA protects collective bargaining in order to "minimize industrial strife" and to "eliminate . . . substantial obstructions to the free flow of commerce." *Oliver*, 358 U.S. at 295; *see* 29 U.S.C. § 151. But Congress

[5] Section 8(b)(4)(B) was amended as part of the Labor-Management Reporting and Disclosure Act ("LMRDA," also known as the "Landrum-Griffin Act"), Pub. L. No. 86-257, 73 Stat. 519 (1959).

understood that collective bargaining involved the potential resort of economic weapons—including strikes, lockouts and other types of conflict—with potentially significant adverse consequences for employers, employees, unions and the public. As the Supreme Court stated in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960), parties in collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Id.* at 487-89.

The NLRA—enacted in 1935 as the "Wagner Act"—originally only regulated employer conduct.[6] In 1947, however, Congress amended the NLRA as part of the Labor Management Relations Act ("LMRA") (also known as the "Taft-Hartley Act") which added prohibitions against *union* unfair labor practices.[7] These prohibitions, especially the proscription of certain "secondary boycotts," were strengthened as part of additional amendments that were enacted as part of the Labor-Management Reporting and Disclosure Act ("LMRDA") (also known as the "Landrum-Griffin Act").[8]

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[6] Pub. L. No. 74-198, 49 Stat. 449 (1935).

[7] Pub. L. No. 80-101, 61 Stat. 136 (1947).

[8] Pub. L. No. 86-257, 73 Stat. 519 (1959).

The illegality of a "secondary boycott" arises from the attenuated nature of the relationship that exists between the "secondary" employer—which has no direct dispute with the union—and the "primary" employer as to which the union has some type of dispute involving employee representation or wages, hours or working conditions. As aptly summarized by this Court, "a union may not exert pressure on employees of a neutral employer to strike against [the] secondary employer for the purpose of increasing the union's leverage in its dispute against the primary employer." *Iron Workers*, 941 F.3d at 905. To this effect, Section 8(b)(4)(B) of the National Labor Relations Act prohibits labor organizations from engaging in conduct designed to "threaten, coerce, or restrain" a secondary employer from handling products or doing business with the primary employer. 29 U.S.C. § 158(b)(4)(B). Accordingly, the Act's prohibition addresses the "isolated evils which experience has established flow from [secondary] picketing." *Tree Fruits*, 377 U.S. at 63 (quoting *Drivers*, 362 U.S. at 284).

Congress adopted the Act's prohibition against secondary boycotts based on extensive evidence that "secondary" picketing and other forms of coercion had a debilitating impact on the economy, in addition to imposing harsh burdens on neutral parties that lacked any involvement in the underlying labor dispute. Illustrative are the following comments during the LMRA's consideration in the House:

> *Secondary boycotts engaged in by labor unions to force a third party, not a party to a primary labor dispute, to force that party to cease*

> *using the products of the employer engaged in the primary dispute is an activity which should be made illegal. Secondary boycotts have had the effect of throwing a great many innocent people out of work.* As a result of these secondary boycotts many of our citizens have been deprived of the deliveries of milk, bread, meat, fruits, vegetables, and other essentials of life.
>
> A member of the Associated Farmers of California, who testified before our committee, cited many examples how boycotts have cost the Nation a loss of millions of dollars in food stuffs. For instance, the lettuce strike at Salinas in 1936 caused a loss of 2,000 cars of lettuce which would have been distributed over the United States. As recently as last fall 20,000 gallons of "hot milk" were dumped one morning in front of the city hall of Los Angeles. The term "hot milk" is that milk which is barred from the market and sale by the teamsters' union or any other union involved. They embargo the "hot milk" and invoke a secondary boycott against the delivery of any milk which they feel should be milked by union milkers, or hauled by union teamsters, or distributed by union drivers.
>
> Close to $1,000,000 was lost in a simliar asparagus strike. Seven hundred and fifty thousand dollars worth of asparagus was dumped in one pile in San Joaquin County, Calif. alone. The farmers of California were forced to dump 76 carloads of lemons because they could not get them unloaded and delivered to the markets. In many instances where secondary boycotts have occurred, union trucks have refused to haul products of honest hard-working American farmers. If the farmers or dairymen try to haul for themselves, their trucks are destroyed and their lives threatened.

1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 583 (hereinafter "LMRA Hist.") (statement of Rep. Landis) (emphasis added); *see also* H. Rep. No. 245, 80th Cong. 1st Sess. 24, *reprinted in* 1 LMRA Hist., at 315 ("Illegal boycotts take many forms. . . . Sometimes they are direct restraints of trade, designed to compel people against whom they are engaged in to place their business with

some other than those they are dealing with at the time, or *vice versa*. The effects of boycotts upon business, and particular upon small commercial enterprises in metropolitan centers, such as New York, Philadelphia, and Pittsburgh, have often been disastrous.").[9]

[9] A recurring theme in the legislative history underlying the Act's secondary boycott provisions, was Congress' intention to exempt secondary boycotts from the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, which had previously broadly protected all types of labor disputes from judicial interference. As explained by Senator Taft, who was the LMRA's principal sponsor in the Senate, the secondary boycott prohibition "makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees . . . . Under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, *no matter how unlawful it may have been at common law*. All this provision of the bill does is to *reverse the effect of the law as to secondary boycotts*." 2 LMRA Hist., at 1106 (emphasis added).

It is also important that "common law" uniformly considered secondary boycotts to be illegal, even though the courts otherwise retreated from their earlier broader prohibition of collective bargaining. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2471 n.7 (2018); *see also* Note, *Legality of Trade Unions at Common Law*, 25 Harv. L. Rev. 465, 466 (1912) ("The earliest cases in America followed the English law in holding unions to be criminal conspiracies."). Thus, even in the late 1800s, the courts consistently held that secondary boycotts directed against neutral third parties were unlawful conspiracies. *See, e.g.*, *Moores & Co. v. Bricklayers' Union*, 10 Ohio Dec. Reprint 665 (Ohio Super. 1889) (Taft, J.); *State v. Stewart*, 9 A. 559 (Vt. 1887); *State v. Glidden*, 8 A. 890 (Conn. 1887). This "widespread and time-tested consensus"—dating back well over a century—provides additional powerful evidence that secondary boycotts have never been deemed protected by the First Amendment. *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality) (upholding content-based speech restriction); *id.* at 214–16 (Scalia, J., concurring in judgment) (relying on tradition dating to the "late 19th century"); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) ("A governmental practice [regulating speech] that has become general throughout the

In this case, the SEIU had a primary dispute with two employers: Preferred Building Services, Inc. ("Preferred") and Ortiz Janitorial Services ("OJS"). *Preferred Building Servs., Inc.*, 366 NLRB No. 159, slip op. at 1-2 (2018). Employees supported by the SEIU repeatedly engaged in picketing, marching, and chanting at a location where multiple neutral parties were engaged in business, including Harvest Properties ("Harvest") and KGO Radio ("KGO"); and the SEIU directly appealed to Harvest and KGO to intercede in the dispute with Preferred and OJS. *Id.*, slip op. at 2-3. There is ample evidence that the Union's object was to have Preferred and Ortiz replaced by a unionized contractor, which is what ultimately occurred. *Id.*

In these circumstances, the NLRB properly concluded that this conduct was prohibited by Section 8(b)(4)(B) and that the Board's finding does not impinge on First Amendment concerns. Especially as applied here, Section 8(b)(4)(B) focuses on the coercive *non*-speech component of secondary picketing, and there is a compelling government interest in prohibiting such conduct—*i.e.*, picketing as a form of coercion directed at neutral parties (with whom the union has no direct dispute) with the object of forcing them to cease doing business with the primary employer (which, unlike the neutral parties, has a direct dispute with the union).

United States, and particularly one that has the validation of long, accepted usage [dating to the late 19th century], bears a strong presumption of constitutionality.").

A. Unlawful Coercion and Related Non-Speech Conduct is Unprotected by the First Amendment.

As noted above, Section 8(b)(4)(B), on its face, prohibits certain *conduct*, which involves efforts to "threaten, coerce, or restrain" any person with the "object" of "forcing or requiring" the person "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(B).

Even when non-picketing union conduct violates Section 8(b)(4)(B), this Court and numerous other courts have concluded that that such conduct is unprotected by the First Amendment. Indeed, in *Iron Workers*, this Court applied and reaffirmed the validity of the 1951 Supreme Court decision in *IBEW v. NLRB*, where the Court concluded that the First Amendment's protection "does not extend to '*speech or picketing* in furtherance of unfair labor practices such as are defined in § 8(b)(4).'" 941 F.3d at 905-06 (emphasis in original) (quoting 341 U.S. at 704). This Court also stated there was no reason to depart from rulings of the D.C. Circuit and Second Circuit, which concluded that—even in the context of "pure speech"—"the 'First Amendment is not at all implicated' when activities prohibited by Section 8(b)(4)(i) are proscribed." 941 F.3d at 905 (quoting *Warshawsky*, 182 F.3d at 952); *see also Local Union No. 3*, 477 F.2d at 266 (same). As noted previously, this Court's rejection of the First Amendment challenge in *Iron Workers* constitutes the

law of this Circuit, which forecloses as a matter of law the First Amendment challenge presented by the SEIU and other *amici*. *Miranda*, 860 F.3d at 1243; *Baker*, 6 F.3d at 637.

The First Amendment arguments in this case are even more attenuated because, as noted above, the NLRB's Section 8(b)(4)(B) finding focused on the coercive, *non*-speech component of unlawful secondary picketing. *See DeBartolo*, 485 U.S. at 576 (confirming that, unlike handbilling, picketing involves both speech and non-speech elements). In such situations, it is especially clear that government regulation does *not* warrant strict scrutiny for purposes of the First Amendment scrutiny. *See Iron Workers*, 941 F.3d at 905-06 (rejecting invitation to apply strict scrutiny when evaluating claim that Section 8(b)(4)(i)(B) violation based on non-picketing conduct violates the First Amendment); *see also O'Brien*, 391 U.S. at 376 ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). The result is that Section 8(b)(4)(b) does not offend the First Amendment, which is especially clear when the offending conduct involves secondary picketing. *Longshoremen's*, 456 U.S. at 226 ("It would seem even clearer that *conduct* designed not to communicate but to coerce merits still less consideration under the First Amendment") (emphasis added).

This conclusion is reinforced by the courts' repeated acknowledgments that picketing is qualitatively different from speech. The Supreme Court has recognized that "while picketing is a mode of communication, it is inseparably something more and different." *Hughes v. Superior Court*, 339 U.S. 460, 464 (1950). Indeed, "the very purpose of a picket line is to exert influences . . . different from other modes of communication." *Id.* at 465. In this way, "picketing is a mixture of conduct and communication"; and, what is more, "it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment." *NLRB v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 619 (1980) (hereinafter *Safeco*) (Stevens, J., concurring). "[R]ather than a reasoned response to an idea," unlawful secondary picketing "calls for an automatic response to a signal"—the picket line—that deters through coercion instead of speech. *Id.*

This Court has also acknowledged the coercive, non-speech element inherent in unlawful secondary picketing under Section 8(b)(4). *See, e.g., NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 433*, 891 F.3d 1182, 1187 (9th Cir. 2018) (holding that "a plain reading of § 8(b)(4)(ii)(B) reflects that the statute regulates conduct rather than content" and that "[t]he First Amendment does not afford unbridled protection to [such action]"). Such activity can thus be regulated precisely because it involves more than speech. *Miller v.*

United Food & Commercial Workers Union, Local 498, 708 F.2d 467, 471 (9th Cir. 1983) ("[Picketing] is subject to regulation since [it] involves elements of conduct as well as the communication of ideas.").

As a result, it makes no constitutional difference that the statute targets only certain labor-related threats, and thus applies only to certain types of content. "[S]ince words can in some circumstances violate laws directed not against speech but against conduct," a statute can validly prohibit "a particular content-based subcategory of" speech if it is "directed at conduct rather than speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992). Thus, for example, Title VII can validly target certain content-based classes of discriminatory fighting words because the statute prohibits conduct, not speech. *Id.* What's more, even if the secondary-boycott ban were a content-based speech restriction (which it is not), the ban would *still* be constitutional because Congress may prohibit a particular content-based subclass of unprotected threats if "the disruption that fear engenders . . . ha[s] special force" for the targeted class of threats. *Id.* at 388; *see also Virginia v. Black*, 538 U.S. 343, 362 (2003). Since secondary boycotts uniquely have a debilitating impact on commerce,[10] the First Amendment does not prohibit Congress from prohibiting whatever speech might be associated with this type of unlawful conduct.

[10] *See* pages 10-12, *supra*.

In short, especially as applied here, Section 8(b)(4)(B) targets the non-speech coercive *conduct* that lies at the core of unlawful secondary picketing, and which "calls for an automatic response to a signal, rather than a reasoned response to an idea." *Safeco*, 447 U.S. at 619 (Stevens, J., concurring). For this reason alone, the Board's ruling does not implicate First Amendment concerns.

B. Substantial Governmental Concerns Warrant the Role Played by Section 8(b)(4)(B)'s Prohibition of Secondary Picketing.

Beyond the non-speech element of an unlawful secondary boycott, incidental burdens on economic speech do not receive the level of protection Petitioner seeks—especially in the face of other governmental concerns. There is a "strong governmental interest in certain forms of economic regulation," including, among other things, restricting unfair labor practices. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 912 (1982). And this interest can prevail even if it results in "an incidental effect on First Amendment freedoms." *See id.*; *see also FTC v. Superior Trial Lawyers Ass'n*, 493 U.S. 411, 428 n.12 (1990).

This Court has similarly held that "the government's strong interest in regulating the economic relationship between labor and management [allows Congress to] constitutionally enact measures which impact [] the speech element of picketing." *Miller*, 708 F.2d at 471. Such a rule is in line with the Supreme Court's direction that "[t]he Constitution . . . accords a lesser protection to commercial

speech than to other constitutionally guaranteed expression." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980).

It is for these reasons that the Supreme Court refuses to apply *Claiborne Hardware* in the labor-picketing context. The Court has distinguished restrictions on unfair labor practices from traditional, core First Amendment subjects—such as political speech—finding that the government has a "strong" interest in regulating such economic activity. *Claiborne Hardware*, 458 U.S. at 912. "While [the government has] broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity." *Id.* at 913. And so even though the First Amendment protected political picketing in *Claiborne Hardware*, the Court expressly declined to extend its holding to economically motivated picketing, such as is regulated by § 8(b)(4). *Id.* at 915. This was reaffirmed in *Longshoremen's* just six months later. 456 U.S. at 223 n.20.

This rule conforms with the traditional understanding of the First Amendment's effect on union activities. Section 8(b)(4) represents "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Claiborne Hardware*, 458 U.S. at 912 (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring in part)); *see also Iron Workers*, 941 F.3d at 906 (rejecting union's claim that recent content-based

jurisprudence applies to § 8(b)(4)(B) because, unlike "a municipal ordinance regulating signs directed toward the general public," § 8(b)(4)(B) governs "the highly regulated contours of labor negotiations"); *Builders Local 433*, 891 F.3d at 1187 (holding "restrictions on speech addressed by [recent content-based First Amendment cases] are not implicated by compliance with § 8(b)(4)(ii)(B)"); *NLRB v. Teamsters Union Local 70*, 668 Fed. Appx. 283, 284 (9th Cir. 2016) (holding recent content-based First Amendment jurisprudence "has not disturbed" § 8(b)(4)'s regulation of unlawful secondary picketing).

Enforcing the government's "strong interest" in regulating unfair labor practices furthers Congress's goal of protecting neutral employers from disputes that do not involve them. Through Congress's "delicate balancing," it has "prohibit[ed] the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen [industrial strife]: the coercion of neutral employers." *Longshoremen's*, 456 U.S. at 223 n.20 (quoting *Carpenters v. NLRB*, 357 U.S. 93, 100 (1958)).

In this way, the prohibition on unlawful secondary picketing prevents a third-party business from being conscripted into the union's cause based on fear of retaliation or economic loss. Were such prohibitions unconstitutional, third parties could be coerced into siding with unions in a labor dispute. Or they would become a means for the union to "communicate" the union's message.

Section 8(b)(4) also serves other goals commonly pursued by forms of regulation that fall outside of the First Amendment's protections. For example, the rule helps to prevent confusion on the part of bystanders or customers, who might otherwise think the neutral third party being picketed was responsible for the allegedly wrongful actions precipitating the picket line. Because such confusion could lead to unfair labeling of the third-party businesses, preventing unions from lumping the primary and secondary businesses together is in keeping with long-standing restrictions against untruthful speech and deceptive advertising. Just as the government "may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there," *R.A.V.*, 505 U.S at 388–89, Congress may prohibit secondary picketing because of its unique risk of public confusion, and the serious harm to commerce that such confusion entails.

At most, then, the prohibition on unlawful secondary boycotts prevents only a narrow type of economically focused speech that has the potential to harm commerce in a way inconsistent with the goals and purposes of the First Amendment. It should thus be unsurprising that the Supreme Court has "consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment." *Longshoremen's*, 456 U.S. at 226.

II. Section 8(b)(4)(B) Provides Ample Protection For Speech That Is Protected By The First Amendment.

The First Amendment challenges to Section 8(b)(4)(B) are meritless for another reason: contrary to the impression created by the SEIU and certain *amici*, the structure and application of Section 8(b)(4)(B), as adopted by Congress and as applied by the NLRB and the courts, incorporate numerous safeguards to protect First Amendment activity.

As noted above, Section 8(b)(4)(B) contains a "publicity proviso" that affirmatively protects "publicity, *other than* picketing" that has "the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." 29 U.S.C. § 158(b)(4)(B) (emphasis added).[11] Therefore, Section 8(b)(4)(B) on its face reaffirms the limited scope of its prohibition.

What is more, the Supreme Court has construed Section 8(b)(4)(B) in a manner that has erred on the side of protecting speech under the First Amendment. In *NLRB v. Drivers*, the Supreme Court held that "restrain or coerce" under Section 8(b)(4)(B) does not include recognitional picketing. 362 U.S. at 284. In *Tree Fruits*,

[11] In relevant part, Section 8(b)(4)(B)'s "publicity proviso" states: "[N]othing contained in such paragraph shall be construed to prohibit *publicity, other than picketing*, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." *Id.* (emphasis added).

the Supreme Court held that that certain types of consumer-directed picketing at neutral retail stores does not violate Section 8(b)(4)(B). 377 U.S. at 63.[12] And in *DeBartolo*, the Supreme Court expansively interpreted the publicity proviso, which further narrowed the restrictions imposed by Section 8(b)(4)(B), to avoid "serious questions . . . under the First Amendment." 485 U.S. at 575. The Court distinguished handbilling from unlawful secondary picketing, holding that handbilling was not coercive because it "depend[s] entirely on the persuasive force of the idea." *Id.* at 580 (internal quotations omitted). Going further, the Court recognized that "newspaper, radio, and television appeals" also constituted lawful activity. *Id.* at 583.

Throughout its analysis, the Supreme Court in *DeBartolo* punctuated its analysis with indications that "*picketing* is *qualitatively* '*different* from other modes of communication.'" *Id.* at 580 (emphasis added; citations omitted). To the same effect, as noted above, this precise distinction was also made by former President John F. Kennedy, who (while serving in the Senate) chaired the Conference

[12] The Court held that peaceful picketing that followed the struck product, and did not endanger the secondary's business, was permissible under § 8(b)(4) because it did not carry the coercive, non-speech element prohibited by the statute. *Tree Fruits*, 377 U.S. at 71. The Court later clarified that the targeted picketing in *Tree Fruits* of one item was different in kind from secondary boycotts aimed at getting customers to forego the neutral business altogether. *Safeco*, 447 U.S. at 614.

Committee when Section 8(b)(4)(B) was most recently amended in 1959.[13] Then-Senator Kennedy stressed that Section 8(b)(4)(B) broadly permitted all kinds of communication and speech *except for secondary picketing*. He stated that a "union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity *short of having ambulatory picketing in front of a secondary site*." LMRDA Hist., *supra*, at 1437 (statement of Sen. Kennedy) (emphasis added).

In short, the Board's conclusion here focused on secondary picketing that constituted coercion or restraint that violated Section 8(b)(4)(B) because the picketing had an "object" of "forcing or requiring neutral parties to "cease doing business" with primary employers (*i.e.*, Preferred and OJS). Under this Court's rulings and long-established precedent—including numerous Supreme Court decisions—the Board's conclusion does not implicate First Amendment concerns. Indeed, such arguments are especially meritless given that the ruling only addresses picketing. Section 8(b)(4)(B)'s narrow proscription, as enacted and as applied, provides substantial accommodations for protected speech, including the ability of unions to freely engage in innumerable types of communication and noncoercive conduct *other than* picketing. *Longshoremen's*, 456 U.S. at 227 ("There are many

[13] *See* note 5 *supra*.

ways in which a union and its individual members may express their opposition . . . without infringing upon the rights of others.").

CONCLUSION

For these reasons, Section 8(b)(4)(B) and its application against unlawful secondary picketing in this case do not infringe on First Amendment rights, and the petition for review should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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On December 2, 2019, the foregoing Brief of the Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, Associated Builders and Contractors, National Retail Federation, and Retail Industry Leaders Association, as *Amici Curiae* in Support of Intervenor Preferred Building Services, Inc., was filed electronically with the Clerk of the United States Court of Appeals for the Ninth Circuit. All parties were served via the Appellate Electronic Filing system, and so a certificate of service is not required. Circuit Rule 25-5(f).

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