UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150 A/W INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and LIPPERT COMPONENTS, INC.	Case 25-CC-228342

BRIEF OF THE RETAIL INDUSTRY LEADERS ASSOCIATION, NATIONAL RETAIL FEDERATION, AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS AS AMICI CURIAE

PHILIP A. MISCIMARRA
JONATHAN C. FRITTS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
(202) 739-3000

SAMUEL D. BLOCK
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive, Fifth Floor
Chicago, IL 60601
(312) 324-1000

Counsel to the Retail Industry Leaders Association, National Retail Federation and International Council of Shopping Centers as Amici Curiae

Dated: December 28, 2020

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INTERESTS OF THE AMICI CURIAE

The impact of unlawful union secondary boycotts, targeting neutral parties that have no direct involvement in the underlying dispute, falls most heavily on retail stores, shopping centers, retail distribution and fulfillment centers and related businesses, adversely affecting millions of American consumers and their communities. Retail employers respect the rights and responsibilities afforded by the National Labor Relations Act ("NLRA" or "Act"). However, with the exception of handbilling and pure "publicity," the Act prohibits all secondary activities that "threaten, coerce, or restrain" neutral parties. The Board should give these terms their natural meaning, which renders unlawful all types of secondary picketing, patrolling, bannering, inflatable rats and other displays that target shopping centers, retail stores, their employees and associates, consumers and other neutral parties.

This brief is submitted by the Retail Industry Leaders Association ("RILA"), the National Retail Federation ("NRF") and the International Council of Shopping Centers ("ICSC") (collectively the "Amici"), which are the leading organizations representing the U.S. retail industry. The retail industry creates more employment than any other sector in the U.S. economy, providing one in every four jobs in the United States, encompassing 42 million working Americans and contributing $2.6 trillion annually to the U.S. Gross Domestic Product. In 2019, the retail real estate industry contributed $400 billion in state and local taxes supporting schools, public safety resources and infrastructure.

The Retail Industry Leaders Association's 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 National Retail Federation is the world's largest retail trade association, representing all aspects of the retail industry. NRF members includes discount and department stores, home

goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. The NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including the legislative, executive, and judicial branches of government.

The International Council of Shopping Centers, founded in 1957, is the preeminent membership network serving retail and real estate professionals including property owners, developers, construction company owners, brokers and, importantly, shopping center tenants such as retailers, restaurants, gyms, health centers and other service providers. ICSC represents nearly 45,000 members who play an essential role in the economy of every city, town and village across the United States. Pre-COVID-19, an estimated $6.7 trillion of consumer activity produced by the retail, food & beverage, entertainment and consumer service industries occurred within America's shopping centers.

SUMMARY OF ARGUMENT AND RESPONSES TO THE BOARD'S QUESTIONS

1. Should the Board Adhere To, Modify, or Overrule *Eliason & Knuth* and *Brandon Regional Medical Center*?

The Board should overrule *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 811-821 (2010) and *Sheet Metal Workers Local 15 (Brandon Medical Center),* 356 NLRB 1290 (2011) for the reasons explained in Argument Part B (pages 8-22 of this brief).

2. What Standard Should Govern Whether Conduct Constitutes Proscribed Picketing Under Section 8(b)(4)?

Section 8(b)(4)(B) prohibits *all* actions that "threaten, coerce, or restrain" neutral parties and *not* just picketing (see point 3 below). However, the Board should endorse the decades of NLRB and court cases establishing that secondary picketing *always* constitutes unlawful threats, coercion and restraint within the meaning of Section 8(b)(4)(B). In this context, picketing should be defined as (a) patrolling by one or more employees or union agents with or without signs, and (b) the posting or carrying of a sign or signs by one or more employees or union agents with or

without patrolling, when these actions are directed against one or more neutral parties in connection with a labor dispute. *See* Argument Part B (pages 8-22 of this brief).

3. What Standard Should Govern Whether Nonpicketing Conduct Is Otherwise Unlawfully Coercive Under Section 8(b)(4)?

Unlike handbilling that was declared lawful in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988), the Board should find that the use of banners, inflatable rats, and similar displays (in addition to picketing, as defined in point 2 above) constitute "coercion" and "restraint" in violation of Section 8(b)(4)(B) when they are directed against one or more neutral parties in connection with a labor dispute; and any threat to engage in such activities should be deemed a "threat" in violation of Section 8(b)(4)(B). The Board should also find that unlawful threats, coercion and restraint include the examples identified in cases cited by Members Schaumber and Hayes in their *Eliason & Knuth* dissent, quoted in part on pages 13-14 of this brief. *See* Argument Part B (pages 8-22 below).

4. Why Would Finding a Section 8(b)(4) Violation In This Case Not Infringe on the First Amendment?

The conduct at issue in this case clearly violates Section 8(b)(4)(B), and raises no First Amendment concerns for the reasons explained in Argument Part B, subpart 3 (pages 20-22 of this brief).

ARGUMENT

A. The Retail Industry and Consumers Are Most Adversely Affected by Unlawful Secondary Bannering, Inflatable Rats and Other Displays

The retail industry, as indicated above, creates more employment than any other sector in the U.S. economy, providing one in every four jobs in the United States, encompassing 42 million employees. In several respects, however, these figures dramatically understate the impact of retail employers, shopping centers, and related businesses, and the importance of protecting retail employers and shopping centers from the "unmitigated evils" associated with

unlawful secondary activities that violate Section 8(b)(4)(B). *United Brotherhood of Carpenters (Wadsworth Building Co.),* 81 NLRB 802, 812 (1949), *enforced*, 184 F.2d 60 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951).

First, the operation of retail stores and shopping centers involves much more than selling to consumers: the industry involves direct and indirect relationships with all kinds of businesses, including building, construction, maintenance and cleaning, logistics and freight transportation, health care, finance, real estate and technology.[1]

Second, an exceptionally large number of cases dealing with secondary picketing and other forms of unlawful threats, coercion and restraint have involved retail locations, shopping centers, and similar locations. *See, e.g., Edward J. DeBartolo Corp. v. NLRB*, 463 U. S. 147 (1983); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988); *Overstreet v. United Brotherhood of Carpenters Local 1506*, 409 F.3d 1199, 1202 (9th Cir. 2005); *Pye v. Teamsters Local 122,* 61 F.3d 1013, 1024 (1st Cir. 1995).

Third, retail stores, shopping centers and related businesses are not only often the focus of secondary picketing and other threats, coercion and restraint, the resulting negative consequences are magnified by the fact that retail stores tend to be located in extremely close proximity to large numbers of other "neutral" businesses. Every retail operation also requires extensive support involving an expansive array of separate business relationships –

[1] A May 2020 study by PricewaterhouseCoopers, "The Economic Impact of the U.S. Retail Industry" (hereinafter "PwC Study") indicates that direct, indirect and induced employment resulting from the retail industry in 2018 was responsible for more than 51 million jobs, and direct retail-related employment involved the following industries (classified by NAICS code): Retail trade (including food services and drinking places); Health care and social assistanc; Professional, scientific, and technical services; Manufacturing; Administrative and support and waste management and remediation services; Other services (except government and government enterprises); Construction; Finance and insurance; Real estate and rental and leasing; Transportation and warehousing; Wholesale trade; Educational services; Arts, entertainment, and recreation; Agriculture, forestry, fishing, and related activities; Information; Management of companies and enterprises; Mining, quarrying, and oil and gas extraction; and Utilities. *Id.* Tables E-2 and E-6 (available at https://cdn.nrf.com/sites/default/files/2020-06/RS-118304%20NRF%20Retail%20Impact%20Report%20.pdf).

encompassing innumerable manufacturers, distributors, freight transportation businesses, construction companies, cleaning and housekeeping services, security firms, and property managers. This greatly increases the risk that retail employers will be exposed to unlawful secondary pressure (based on a union's dispute with any one of these other entities). The same relationships expand geometrically the cascading effects of any dispute on additional neutral businesses, including their employees, customers, suppliers and vendors. Also, *small businesses* constitute the overwhelming majority of retail firms that are exceptionally vulnerable to the damage resulting from illegal secondary boycotts: a recent study shows that *90.8 percent* of retail firms in the United States had *fewer than 10 employees*, and *98.5 percent* of retail firms had *fewer than 50 employees.*[2]

As a final matter, unlawful secondary picketing and bannering, by their nature, target "brick-and-mortar" retail stores and shopping centers. Even before the COVID-19 pandemic, it was well-documented that conventional retailers and physical shopping locations faced immense obstacles and intense competition, and numerous well-established retail businesses have declared bankruptcy in recent years.[3] The COVID-19 pandemic has magnified these challenges, with

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[2] PwC Study, *supra* note 1, Table 7 (showing the "Percent of U.S. Retail Firms, Employment, and labor Income by Firm Size, 2018"). Only *1.5 percent* of retail firms have 50 or more employees. *Id.*

[3] *See, e.g.*, R. Lal, J. Alvarez, and D. Greenberg, *Retail Revolution: Will Your Brick and Mortar Store Survive* (2014); D. Howland et al., *The running list of 2019 bankruptcy victims*, Retail Dive (Oct. 23, 2019) (available at https://www.retaildive.com/news/the-running-list-of-2019-bankruptcy-victims/545774/); M. Bain, *2019 saw a dramatic spike in US retailers closing stores*, Quartz (Dec. 19, 2019) (available at https://qz.com/1771909/2019-saw-a-dramatic-spike-in-us-retailers-closing-stores/); R. McClay, *2018: The Year of Retail Bankruptcies*, Investopedia (June 25, 2019) (available at https://www.investopedia.com/news/year-retail-bankruptcies-looms-m/). *See also* L. Thomas, *The 10 biggest retail bankruptcies of 2020*, CNBC (Dec. 26, 2020) (available at https://www.cnbc.com/2020/12/26/the-10-biggest-retail-bankruptcies-of-2020.html); J. Valinski, *The 30 retailers and restaurant chains that filed for bankruptcy in 2020*, CNN (Dec. 13, 2020) (available at https://www.cnn.com/2020/12/12/business/retailers-restaurants-bankrupt-2020/index.html); L. Getlen, *Retail Bankrtuptcies in 2020: How the Fallout Will Play Out*, Commercial Observer (Dec. 15, 2020) (available at https://commercialobserver.com/2020/12/retail-bankruptcies-2020-retailers-covid/); A. Urbanski, *It's a record! 11,000 closed stores and 40 retailer bankruptcies in 2020*, Chain Store Age (Dec. 8, 2020) (available at https://chainstoreage.com/its-record-11000-closed-stores-and-40-retailer-bankruptcies-2020); D. Geske, *Biggest Retail Bankruptcies Of 2020: A Complete List Of Bankrupt Retailers*, International Business Times (Dec. 25, 2020) (available at https://www.ibtimes.com/biggest-retail-bankruptcies-2020-complete-list-bankrupt-retailers-3094871); M. Lisicky, *In Memoriam - A Look At 6 Department Stores That Closed Their Doors In 2020*, Forbes (Dec. 27, 2020) (available at https://www.forbes.com/sites/michaellisicky/2021/12/27/in-memoriama-look-at-6-department-stores-that-closed-their-doors-in-2020/?sh=5b0043d82bd5).

estimates that 25,000 retail stores will close by the end of 2020, and more than 100,000 stores will close in the next five years.[4]

The Board has long recognized that retail establishments face unique challenges, prompting the Board to adopt "different rules" for retail businesses. In *Restaurant Horikawa*,[5] a group of 30 demonstrators picketed and distributed handbills in front of a restaurant, and then "marched through the reception area where 13 customers were waiting to be seated."[6] They confronted the owner, and upon entering and leaving, chanted "Horikawa" along with "additional words in Japanese" and left after spending 10 to 15 minutes in the store.[7] The demonstrators included a single employee – whose employment was terminated – which the Board upheld with the following explanation:

> The Board has traditionally acknowledged *the necessity for applying different rules to retail enterprises* from those to manufacturing plants with respect to the right of employees to engage in union activity on their employer's premises. Specifically, the Board has recognized that the nature of retail establishments, including restaurants, *requires that an atmosphere be maintained in which customers' needs can be effectively attended to and that, consequently, a broad proscription of union activity in areas where customers are present is not unlawful*.[8]

The Board's further explanation is instructive in the instant case:

> *Not all concerted activity is protected. Merely because such activity is conducted in furtherance of a labor dispute does not mean that in each and every instance it will enjoy the Act's protection*. For example, it will not be protected if conducted in an

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[4] Allen J. Lynch, *The Next Chapter for Brick-and-Mortar Retail*, Am. Bankr. Inst. L. J. (Sept. 2020). See also D. Lee Yohn, *The Pandemic Is Rewriting the Rules of Retail*, Harvard Bus. Rev. (July 6, 2020) (available at https://hbr.org/2020/07/the-pandemic-is-rewriting-the-rules-of-retail); J. Conca, *The Coronavirus Accelerates Online's Destruction Of Brick & Mortar Shopping*, FORBES (Aug. 21, 2020) (available at https://www.forbes.com/sites/jamesconca/2020/08/21/the-coronavirus-accelerates-onlines-destruction-of-brick--mortar-shopping/); E. Hawker, *Has Coronavirus Brought Brick-And-Mortar Retail To An End*?, BUSINESSBECAUSE (July 27, 2020) (available at https://www.businessbecause.com/news/insights/7119/the-end-of-brick-and-mortar-retail).

[5] 260 NLRB 197, 198 (1982). *Restaurant Horikawa* involved a primary (not secondary) dispute, and the Board addressed whether the employee's participation in the demonstration was protected under the Act, which the Board answered in the negative. However, the case reflects the Board's awareness of unique circumstances in the retail industry that are instructive when the Board determines what constitutes threats, restraint, and coercion against neutral retail businesses under NLRA Section 8(b)(4)(B).

[6] *Id.* at 197.

[7] *Id.*

[8] *Id.* at 198 (footnote omitted; emphasis added).

> unlawful or violent manner or as a partial strike or slowdown. Further, *where and when it occurs can have a direct bearing on whether it is found to be protected*. . . .
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> [T]he demonstrators seriously disrupted Respondent's business. Clearly, *their conduct interfered with Respondent's ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion*; and it is likely that such conduct infringed on the customers' dining enjoyment. Such an invasion of an employer's premises might be hard to find warranted even in an industrial setting." *In a restaurant or other retail establishment it is wholly unwarranted and cannot be justified regardless of purpose or origin*.[9]

See also Davison Paxon Co. v. NLRB, 462 F.2d 364, 370 (5th Cir. 1972) ("The possibility of offending customers and, as a result, losing customers is an immediate and pressing concern to retail and service establishments and must be considered by the Board"); *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at 11 (2015) (Member Miscimarra, dissenting) ("Conventional retail stores . . . literally exist for the sole purpose of providing a positive in-store experience for customers" and "on-premises conduct that disrupts such an environment, especially in the presence of customers, . . . prevent[s] the store from being used for the sole reason it exists, which is to provide customers a positive, carefully cultivated in-store experience").

The above discussion makes several things clear: (i) retail employers, shopping centers and related businesses – and their employees, customers, and surrounding communities – have a vital interest in being protected against secondary union picketing, bannering, inflatable rats and other types of threats, coercion and restraint resulting from disputes in which they have no involvement; (ii) when evaluating what types of employee conduct are protected or unprotected under the Act, the Board recognizes that the industry's unique characteristics make retail businesses – especially brick-and-mortar locations – especially vulnerable to demonstrations and disruptions that prevent retail consumers from having "an atmosphere free of interruption and unwanted intrusion";[10] and (iii) the Board should apply the same standard when evaluating

[9] *Id.* (footnote omitted; emphasis added).

[10] *Restaurant Horikawa*, 260 NLRB at 198.

oversized banners, inflatable rats and similar protests that target neutral employers, which warrants a conclusion that these types of secondary demonstrations and displays – like secondary picketing – unlawfully "threaten, coerce, and restrain" employers in violation of Section 8(b)(4)(B) of the Act. The latter issues are addressed more fully below.

B. Banners, Inflatable Rats and Other Displays Directed Against Neutral Employers Violate Section 8(b)(4)(B) of the National Labor Relations Act

1. The NLRA Prohibits a Broad Range of Secondary Activities Directed Against Neutral Employers

When evaluating whether any type of conduct is "protected" or "prohibited" under the NLRA, the Board should be informed by three things: (a) the statute's policies and objectives, (b) the text of the statute, and (c) the statute's other provisions, especially those that use the same words or phrases. All three considerations make it clear that the Act prohibits a broad assortment of secondary activities by unions against "neutral" or "secondary" employers (including retail stores and shopping centers) that have no dispute with unions apart from having dealings with a different party (the "primary" employer) whose actions give rise to the union protests.

First, the NLRA's policies and objectives certainly do not encompass blanket protection for all union-sponsored activities that disrupt commerce. To the contrary, the Act's overriding objective – while balancing the protection afforded to employees, employers and unions – is to "*minimize* industrial strife" and to "*eliminate* the causes of certain substantial obstructions to the free flow of commerce." *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 295 (1959) (emphasis added); 29 U.S.C. § 151. Congress understood that collective bargaining involves the potential resort to economic weapons, including strikes and lockouts, with potentially significant adverse consequences for employers, employees, unions and the public.[11] Yet, the goal of the Act is to

[11] 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

avoid interruptions to commerce. This is reflected in the Act's preamble, incorporating language that Congress added 12 years after the statute's adoption,[12] which states:

> [C]ertain practices by some labor organizations, their officers, and members *have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce* through strikes and other forms of industrial unrest or through concerted activities *which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.*[13]

Second, the text of the NLRA unequivocally prohibits union-sponsored "secondary" activities that expand primary disputes by targeting "neutral" parties that have no direct involvement in the labor dispute. Section 8(b)(4)(B) prohibits unions from engaging in a range of actions – specifically, the statute makes it unlawful for unions to "threaten, coerce, or restrain" neutral employers – where the "object" is to force or require the neutral employer "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer" to "to cease doing business with any other person."[14] The illegality of a secondary boycott arises from the attenuated nature of the relationship that exists between the neutral party and the "primary" employer whose actions or employment practices give rise to the dispute. As the court stated in *NLRB v. Iron Workers Local 229*, 941 F.3d 902, 905 (9th Cir.

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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 488-89.

[12] The NLRA was enacted in 1935 as the "Wagner Act," which originally only imposed constraints on employer conduct. Pub. L. No. 74-198, 49 Stat. 449 (1935). In 1947, 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. Pub. L. No. 80-101, 61 Stat. 136 (1947). These prohibitions, especially the proscriptions against "secondary boycotts," were strengthened as part of additional amendments adopted in 1959 as part of the Labor-Management Reporting and Disclosure Act ("LMRDA"), which is also known as the "Landrum-Griffin Act." Pub. L. No. 86-257, 73 Stat. 519 (1959).

[13] NLRA Section 1, 29 U.S.C. § 151 (emphasis added).

[14] Section 8(b)(4) also contains what has been called the "publicity proviso," which states "for the purposes of this paragraph (4) only, nothing 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, as long as such publicity does 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."

2019) (hereinafter *"Iron Workers"*), "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." *See also Carpenters (Wadsworth Building)*, 81 NLRB 802, 812 (1949), *enforced*, 184 F.2d 60 (10th Cir. 1950) (Congress thought that secondary boycotts "were unmitigated evils and burdensome to commerce").

Third, the NLRA's other provisions – in conjunction with Section 8(b)(4)(B) – demonstrate that Congress intended that the Act's secondary boycott prohibition encompasses *much more* than "picketing." Statutory language must be construed as a whole and particular words or phrases are to be understood in relation to associated works and phrases.[15] The prohibition in Section 8(b)(4)(B) is not limited to "picketing." Rather, Section 8(b)(4)(B) expressly renders unlawful all secondary activities that "*threaten*, *coerce*, or *restrain*" neutral parties.[16] By comparison, a different NLRA provision – Section 8(b)(7)(C) – contains a prohibition that applies *only* to "picketing."[17] The broader language in Section 8(b)(4)(B) demonstrates that Congress intended that the statute's secondary boycott prohibition would encompass *all* kinds of coercion and restraint, as well as threats to engage in such secondary activities.

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[15] 2A Norman J. Singer, *Statutes and Statutory Construction (Sutherland Statutory Construction)* Sec. 47.16 (5th ed. 1992). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945) (Supreme Court, describing protected employee rights under the NLRA, states "these rights are no unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee").

[16] *Id.* (emphasis added). This brief uses the phrase "secondary" actions to mean all actions that have the secondary "object" prohibited in Section 8(b)(4)(B) – *i.e.*, the "object" of forcing or requiring any 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."

[17] Section 8(b)(7)(C) addresses recognitional "picketing" with a structure similar to Section 8(b)(4)(B), except Section 8(b)(7)(C) deals specifically with "picketing." Thus, Section 8(b)(7)(C) makes it unlawful for a union "to picket or cause to be picketed, or threaten to picket or cause to be picketed" any employer where the union's "object" is forcing or requiring the employer to "recognize or bargain with" the union as the "representative of his employees," where the union has failed to file a representation petition within a reasonable period not to exceed 30 days "from the commencement of such picketing."

Equally significant is the fact that *other* NLRA provisions use the words "coerce" and "restrain" to describe an expansive range of actions. For example, NLRA Section 8(a)(1) states it is unlawful for employers "to interfere with, *restrain, or coerce* employees in the exercise of the rights guaranteed in section 7," and Sections 8(b)(1)(A) and (B) state it is unlawful for unions "to *restrain or coerce* . . . employees in the exercise of the rights guaranteed in section 7 . . . or an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The meaning of "restrain" and "coerce" in these provisions is unquestionably wide-ranging: these terms encompass unlawful overly broad work rules and policies even if there is no proof of unlawful motivation or actual interference,[18] taking photographs of employees engaged in NLRA-protected activity,[19] restricting access to property (in an overly broad or discriminatory manner),[20] employer or union threats of adverse treatment,[21] and breaches of a union's duty of fair representation or hiring hall procedures,[22] among other things. Indeed, the words "coercion and restraint" as used in Section 8(a)(1) are interpreted so broadly as to encompass *all* employer violations of *any other* NLRA provision, which means *every* violation of NLRA Sections 8(a)(2), 8(a)(3), 8(a)(4) or 8(a)(5) are also considered to be unlawful "coercion" and "restraint" in violation of Section 8(a)(1).[23]

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[18] *See, e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Boeing Co*., 365 NLRB No. 154 (2017); *Cooper Thermometer Co*., 154 NLRB 502, 503 n.1 (1965).

[19] *See, e.g., Randell Warehouse of Arizona, Inc*., 347 NLRB 591 (2006).

[20] *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956).

[21] *See, e.g., Mike Yurosek & Sons, Inc*.,292 NLRB 1074 (1989); *Armco, Eastern Steel Div v. NLRB*, 832 F.2d 357 (6th Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988).

[22] *See, e.g., Carpenters Local 608 (Harte)*, 279 NLRB 747 (1986), *enforced*, 811 F.2d 149 (2d Cir. 1987), *cert. denied*, 484 U.S. 817 (1987); *Theatrical Stage Employees Local 7 (Universal City Studios)*, 254 NLRB 1139, (1981); *Interstate Bakeries, Inc*., 357 NLRB 15 (2011).

[23] Thus, violations of sections 8(a)(2), 8(a)(4), and 8(a)(5) are treated as *per se* violations of section 8(a)(1) as well. As the Board noted in 1939 (four years after the original Wagner Act's adoption), "a violation by an employer of any of the four subdivisions of Section 8, other than subdivision one, is also a violation of subdivision one." 3 NLRB Ann. Rep. 52 (1939).

In addition to making it unlawful for employers to "coerce" or "restrain" employees in the exercise of their Section 7 rights, Section 8(a)(1) also makes it unlawful for an employer to "interfere with" those rights. However, most if not all Board cases finding a Section 8(a)(1) violation indicate that the disputed actions constitute unlawful "restraint" and "coercion" as well as "interference." In any event, the Board has obviously interpreted "coercion"

The Supreme Court had repeatedly recognized the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Given that "coercion" and "restraint" are given such broad meanings when describing the Act's other types of employer and union violations, encompassing a wide variety of actions, the inescapable conclusion is that Congress intended "coerce" and "restraint" to be interpreted equally broadly when determining what unlawful "secondary" activities that violate Section 8(b)(4)(B). Moreover, as the court held in *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1267 (D.C. Cir. 1980), the phrase "threaten, coerce, or restrain" in Section 8(b)(4)(B) does not create an "empirical requirement" that must be proven. Rather, Section 8(b)(4) "is concerned with the nature of the pressure the union imposes on the secondary and the reasonably foreseeable effects of that pressure." *Id.* (citation omitted).

2. Banners, Inflatable Rats and Other Coercive Displays Against Neutral Employers Are Coercive Like Secondary Picketing (and Worse) Under Section 8(b)(4)(B)

As indicated above, picketing against neutrals is a classic example of unlawful activity that can violate Section 8(b)(4)(B), but the statute renders unlawful *all* secondary activities which "threaten, coerce or restrain" neutral parties, and these cases have often included retailers, shopping centers, distribution centers, and consumers. *See* subpart 1 above. Accordingly, in the 70 years that have elapsed since the Act's secondary boycott provisions were adopted, the Board

and "restraint" extremely broadly in Section 8(a)(1) cases (involving employer violations) *and* in Section 8(b)(1)(A) and (B) cases (involving union violations).

and the courts have held that numerous types of union-sponsored protests and conduct violate Section 8(b)(4)(B).

For example, in *Pye v. Teamsters Local 122*,[24] a union was involved in a dispute with a wholesale beer distributor (Busch), and to impose pressure on that employer, the union organized "group shopping trips" to three retail businesses upon which union members "descended, in droves and in concert . . . and engaged in multiple rounds of penny-ante purchasing, buying small, inexpensive items . . . and paying for them (more often than not) with bills of large denomination," which also resulted in "overcrowded parking lots, congested aisles, long checkout lines, and an exodus of regular customers."[25] The First Circuit upheld the issuance of a Section 10(l) injunction against this conduct based on Section 8(b)(4)(B), stating the actions could be reasonably regarded as potentially "coercive" because the "*character of the conduct . . . tends by its very nature to disrupt normal commercial activity* and, thus, *to place economic pressure on a retail establishment to appease the Union* by, say, cutting back on dealings with the primary employer."[26]

The range of actions that the Board and the courts have considered to be coercive secondary activity was aptly described by former Board Members Peter Schaumber and Brian Hayes in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*,[27] as follows:

> The prohibition against coercive secondary activity sweeps more broadly and has been held to encompass patrolling without signs,[28] placing picket signs in a snowbank and then watching them from a parked car,[29] visibly posting union agents near signs affixed to poles and trees in front of an employer's premises,[30] posting banners on a fence or stake

[24] 61 F.3d 1013 (1st Cir. 1995).

[25] *Id.* at 1017.

[26] *Id.* at 1021 (emphasis added).

[27] 355 NLRB 797, 811-821 (2010) (Members Schaumber and Hayes, dissenting) (hereinafter "*Eliason & Knuth*").

[28] *Service Employees Local 399 (Burns Detective Agency)*, 136 NLRB 431, 436-437 (1962).

[29] *Woodward Motors*, 135 NLRB 851 (1962), *enforced*, 314 F.2d 53 (2d Cir. 1963).

[30] *NLRB v. United Furniture Workers,* 337 F.2d 936, 940 (2d. Cir. 1964) (court indicates that "a picket may simply stand rather than walk" while remanding the case for the Board to evaluate whether the conduct involved "the extent of confrontation necessary to constitute picketing" where union agents sat in their cars after affixing the

> in the back of a truck with union agents standing nearby[31] and . . . simply posting agents without signs at the entrance to a neutral's facility.[32] Further, "movement . . . [is] not a sine qua non of picketing," nor is the "carrying of placards" a necessary element.[33] Instead, the essential elements of picketing are: (1) the posting of union agents reasonably identifiable as such; and (2) placement of the union agents within the immediate vicinity of the employer's premises.[34]

See also Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), *enforced*, 402 F.2d 452 (10th Cir. 1968) ("the Board and the courts have held that patrolling, in the common parlance of movement, and the carrying of placards, are not a sine qua non of picketing") (citations omitted).

In the decades that have elapsed since Congress enacted the Act's secondary boycott prohibitions, the law has evolved into two main principles: (1) the Act prohibits a wide range of secondary activities that "threaten, coerce, or restrain" neutral parties, encompassing picketing, patrolling and other activities and protests; and (2) the Act does *not* prohibit secondary handbilling, consistent with Section 8(b)(4)'s "publicity proviso" and the Supreme Court's indication that handbilling, if restricted, could run afoul of the free speech guarantees afforded by the First Amendment.[35] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr.*

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signs to poles and trees, and it was not clear they were visible to employees and customer or were clearly identifiable as union representatives).

[31] *UMW Local 1329 (Alpine Construction)*, 276 NLRB 415, 431 (1985), *remanded on other grounds,* 812 F.2d 741 (D.C. Cir. 1987).

[32] *UMW District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001).

[33] *Lawrence Typographical Union 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968), *enforced*, 402 F.2d 452 (10th Cir. 1968) (indicating it would "exalt form over substance" to define picketing only when a union patrols with placards).

[34] *Eliason & Knuth*, 355 NLRB at 815 (footnotes renumbered), citing *Teamsters Local 182 (Woodward Motors),* 135 NLRB 851 n.1, 857 (1962), *enforced*, 314 F.2d 53, 57-58 (2d Cir. 1963) (stating that "picket in the labor sense means to walk or stand in front of a place of employment as a picket" and describing a "picket" as "a person posted by a labor organization at an approach to the place of work") (quotations omitted).

[35] Although Section 8(b)(4)(B) has been found to broadly prohibit secondary picketing, the Supreme Court in *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits Labor Relations Committee, Inc.)*, 377 U.S. 58 (1964), created a narrow exception – based in part on First Amendment considerations – that permits consumer-directed picketing that clearly identifies a particular product that is the subject of the dispute (*i.e.*, without advocating a total boycott of the neutral's business). However, the Supreme Court subsequently held this exception – which permits consumer-directed "struck product" picketing – does not apply when: (i) the neutral employer is completely dependent on the primary employer's product, *NLRB v. Retail Store Employees Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607 (1980); (ii) the stuck product is merged, integrated or otherwise inseparable from the neutral's business, *Kroger Co. v. NLRB*, 647 F.2d 634 (6th Cir. 1980); *K & K Construction Co. v. NLRB*, 592 F2d 1228 (3d Cir. 1979); A*merican Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969); and (iii) where picket signs fail to

Trades Council, 485 U.S. 568 (1988). As to this latter point, the Supreme Court unequivocally distinguished picketing from handbilling, stating that "*picketing is qualitatively different* from other modes of communication," and defining picketing as "a *mixture of conduct* and communication," where the "conduct" element "often provides *the most persuasive deterrent to third persons about to enter a business establishment*."[36] *See also Hughes v. Superior Court*, 339 U.S. 460, 465 (1950) ("the very purpose of a picket line is to exert influences, and it produces consequences, *different from other modes of communication*.") (emphasis added).

In *Eliason and Knuth* and other bannering cases,[37] the Board majority disregarded the Act's plain language by misinterpreting Section 8(b)(4)(B) as creating a binary distinction between picketing, on the one hand, and handbilling, on the other. This oversimplification ignores the breadth of the statutory phrase "threaten, coerce, or restrain." Even more indefensible was the Board majority's conclusion that, even though secondary picketing unquestionably constitutes "threats, coercion and restraint" in violation of Section 8(b)(4)(B), much larger banners and much more prominent displays are lawful under Section 8(b)(4)(B). This conclusion should be reconsidered and rejected by the Board for several reasons.

First, the banners and similar displays at issue in *Eliason & Knuth*, like the banners and inflatable rats at issue in the instant case, are enormous in size, which means they are *viewed by a greater number of people* and are observed *from a greater distance*. Therefore, banners,

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clearly identify the particular struck product. *Furniture Workers Local 140 (U.S. Mattress Corp.)*, 167 NLRB 271 (1967), *enforced*, 390 F.2d 495 (2d Cir.), *cert. denied*, 392 U.S. 905 (1968).

[36] *DeBartolo*, 485 U.S. at 580, *quoting Babbitt v. Farm Workers*, 442 U.S. 289, 311 n.17 (1979); *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950); *NLRB v. Retail Store Employees Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (emphasis added; internal quotation marks omitted).

[37] References to "bannering cases" in this brief include *Eliason & Knuth*, supra note 27, and *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB 1330 (2010); *Southwest Regional Council of Carpenters (Richie's Installations, Inc.)*, 355 NLRB 1445 (2010); and *Southwest Regional Council of Carpenters (New Star Gen. Contr. Inc.)*, 356 NLRB 613 (2011). Such references are also intended to include *Sheet Metal Workers Local 15 (Brandon Medical Center),* 356 NLRB 1290 (2011), where the Board majority extended *Eliason & Knuth* to find that a 16-feet tall and 12-feet wide inflatable rat, positioned on a flatbed trailer in front of a hospital, did not threaten, coerce or restrain parties in violation of Section 8(b)(4)(B). Each of these cases were decided by a majority of Board members with dissenting opinions by Members Schaumber and/or Hayes.

inflatable rats and similar displays produce more onerous consequences than picketing, in terms of threats, coercion and restraint. In *Eliason & Knuth*, the banners were "3 or 4 feet high and from 15 to 20 feet long," and required up to 5 people to hold them.[38] The banners identified the neutral company by name using words like "Shame," "Labor Dispute" and "Immigrant Labor Abuse," without indicating the union's dispute was actually with someone else.[39] In the instant case, the display included "an inflatable rat approximately 12 feet in height with red eyes, fangs and claws," accompanied by two union representatives, with banners that were 3-3/4 feet high and 8 feet long, one of which stated "SHAME ON LIPPERT COMPONENTS, INC., FOR HARBORING RAT CONTRACTORS."[40] To borrow the Supreme Court's words from *DeBartolo*, these oversized banners, inflatable rats and displays are "qualitatively different" from handbilling: they are a "mixture of conduct and communication," and the "conduct" element – by design – it intended to be "the most persuasive deterrent to third persons about to enter a business establishment."[41] Indeed, in *DeBartolo*, the Supreme Court described conventional picketing as a "deterrent" attempting to prevent neutral parties from "entering a business establishment." The massive size and scale of banners, inflatable rats and other displays demonstrates their intended purpose, which is to be seen *hundreds of feet away*, with the objective of pressuring consumers and the

[38] Conventional secondary picketing has been declared unlawful under § 8(b)(4)(B) based on picketing by as few as one person. *See, e.g., IBEW v. NLRB*, 341 U.S. 694, 696-67 (1951) (1 picket). *See also Iron Workers Local 433 (Aram Kazazian Constr., Inc.)*, 293 NLRB 621 (1989) (2 pickets); *Laborers' Eastern Region Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251,1253 (2006) ("no minimum number of persons is necessary to create a picket line"). *Cf. United Bhd. of Carpenters (Wadsworth Bldg. Co.)*, 81 NLRB 802, 812 (1949), *enforced*, 184 F.2d 60 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951): "It was the *objective* of the unions' secondary activities, as legislative history shows, and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress" (emphasis in original).

[39] *Eliason & Knuth*, 355 NLRB at 798 (3 or 4 people holding banners). In other cases, the banners have been 4 feet by 18 feet long, framed on the top and sides, with base legs which allowed them to stand by themselves, accompanied by multiple union members or employees. *See, e.g.*, *Marriott Warner*, 355 NLRB at 1333 (ALJ opinion). Up to 5 people were holding or standing by the banners in *New Star Gen. Contractors Inc.*, 356 NLRB at 624 (ALJ opinion). *See also Richie's Installations, Inc.*, 355 NLRB at 1447-49 (ALJ opinion).

[40] *International Union of Operating Engineers Local 150 (Lippert Components, Inc.)*, Case 25-CC-228342, slip op. at 3 (ALJ opinion July 15, 2019) (hereinafter "Lippert ALJ opinion"). The inflatable rat in *Brandon Medical Center),* 356 NLRB 1290 (2011) was 16-feet tall and 12-feet wide and was positioned on a flatbed trailer. *Id.*

[41] *DeBartolo*, 485 U.S. at 580 (citations omitted).

public *not to go anywhere close* to the general vicinity where the targeted neutral business is located.

Second, the Board majority decisions in *Eliason & Knuth* and *Brandon Medical Center* defy logic and common sense by finding that massive banners and oversized inflatable rats are equivalent to 8½ by 11-inch handbills, and are less threatening and coercive than relatively small conventional picket signs. As Member Hayes stated in *Brandon Medical Center*:

> Moving from giant banners in *Eliason* to rat colossi mounted on trailers in this case, *my colleagues have quite literally expanded the physical mass that unions may erect to confront and deter customers from entering a neutral employer's premises* in order to coerce that employer to cease doing business with the primary employer target of a labor dispute. *Clearly, these means of protest owe more to intimidation than persuasion*.[42]

Third, an additional feature that makes banners, inflatable rats and other displays more coercive than picketing – and qualitatively different from handbilling and speech – is the near-complete absence of detail in any "message" being communicated. As the Board indicated in *Capital Medical Center*, "[h]andbilling, by its nature, requires the intended recipient to take the handbill and *read it in order for the message to be communicated*."[43] The converse is true when evaluating oversized banners and large inflatable rats. By their nature, these activities are *not* intended to convey anything other than the most rudimentary types of information; they are intended to create a spectacle so that consumers, customers and the public *remain at a distance*. This was recognized by Justice Stevens in *NLRB v. Retail Store Employees Local 1001 (Safeco Title Insurance Co.)*,[44] where he stated that handbills "depend entirely on the persuasive force of the idea," which contrasts with picketing which "calls for *an automatic response to a signal*,

[42] *Brandon Medical Center*, 356 NLRB at 1297 (Member Hayes, dissenting) (emphasis added).
[43] *Capital Medical Center*, 364 NLRB No. 69, slip op. at 5 n.14 (2016) (emphasis added).
[44] 447 U.S. 607, 618 (1980) (Stevens, J., concurring).

rather than a reasoned response to an idea."[45] To the same effect, in *Bakery Drivers Local 802 v. Wohl*,[46] Justice Douglas observed:

> Picketing by an organized group is more than free speech . . . since *the very presence of a picket line may induce action of one kind or another*, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.[47]

Although the Supreme Court in *Safeco* and *Wohl* addressed the distinctive characteristics of picketing (the eliciting of an "automatic response" and inducing "action" based on its "very presence"), these same characteristics are shared by large banners, inflatable rats and similar displays: their purpose is to keep consumers and customers away.

Fourth, the Board in *Eliason & Knuth* and other bannering cases disregarded the most important thing these cases had in common with every other situation involving unlawful secondary threats, coercion and restraint: the union's object is to inflict injury on neutral parties which have no involvement in the underlying dispute (other than their business dealings with a different entity whose actions or employment practices have given rise to the controversy). Indeed, in only five cases – *Eliason & Knuth*, *Marriott Warner Center Woodland Hills, Richie's Installations, New Star General Contractors* and *Brandon Medical Center* – the union activity affected more than *two dozen* neutral companies, in addition to their employees, customers, vendors and the public.[48] The affected neutrals in these cases included a retail furniture store, restaurants, a hotel, medical centers and hospitals, a property management company, real estate developers, agents and brokers, a car dealership, spa, consulting company, newspaper publisher, mortgage lender, medical device manufacturer, public transit authority, a credit union, a pharmaceutical company, two universities, and a public courthouse.

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[45] *Id.* at 619 (Stevens, J., concurring).

[46] *Bakery Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942) (Douglas, J., concurring).

[47] *Id.* at 776-777 (Douglas, J., concurring) (emphasis added).

[48] *See* cases cited in note 37, *supra*.

Finally, the Board majority in *Eliason & Knuth* enunciated several other limiting and self-contradictory principles that are substantial departures from black-letter principles and numerous prior Board and court decisions. Thus, the Board majority in *Eliason & Knuth* stated that the "core conduct" rendering picketing coercive under Section 8(b)(4)(B) was the "combination" of carrying picket signs and "persistent patrolling of the picketers back and forth in front of an entrance to a work site,"[49] contrary to numerous cases where activities were considered to be unlawful picketing *without* back-and-forth patrolling.[50] Unable to ignore these cases, the Board majority conceded that "prior Board decisions have used broader language to define picketing" and that "there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation."[51]

The Board majority in *Eliason & Knuth* further stated that "[b]anners are not picket signs"[52] as if this is a self-evident proposition, when there are no clear distinguishing features between conventional picket signs and banners. Conventional picket signs and banners both contain fairly abbreviated messages in large letters; some picket signs consist only of the sign with no structure and are carried or worn by one or more persons, and various banners similarly consist only of the banner which is carried or held; other picket signs are affixed to a stick or other objects, and some banners likewise have some type of frame or base legs.[53]

Finally, the Board majority in *Eliason & Knuth* suggested that "nonpicketing" conduct could be unlawful "coercion" under Section 8(b)(4)(B) "only when the conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations,"[54]

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[49] *Eliason & Knuth*, 355 NLRB at 802.

[50] *See* notes 28-34, *supra*, and accompanying text.

[51] *Eliason & Knuth*, 355 NLRB at 803-804.

[52] *Eliason & Knuth*, 355 NLRB at 802.

[53] *See, e.g.*, *Marriott Warner*, 355 NLRB at 1333 (ALJ opinion).

[54] *Id.* at 805.

but the majority conceded "the General Counsel need not wait for harm to be inflicted."[55] Predicating any violation on proof of an actual "disruption" would disregard the plain language of Section 8(b)(4)(B), which renders unlawful activities which "*threaten*, coerce, or restrain" neutral parties with the "object" of forcing or requiring them to cease doing business with another person. *See Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1267 (D.C. Cir. 1980) (the phrase "threaten, coerce, or restrain" in Section 8(b)(4)(B) does not create an "empirical requirement" that must be proven).

3. The NLRA's Prohibition Against Secondary Bannering, Inflatable Rats and Other Displays Creates No Conflict With the First Amendment

The Board and the courts – over more than seven decades – have prohibited secondary picketing and other activities that "threaten, coerce, or restrain" neutral parties. Although the First Amendment confers important protection on speech and freedom of expression, the Supreme Court and other courts have uniformly upheld the right of Congress to restrict secondary picketing and other forms of secondary threats, coercion and restraint. As the Supreme Court stated in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982): "Secondary boycotts and picketing by labor unions may be prohibited, as part of 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."[56] The power to prohibit secondary boycotts flows from "the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association,"[57] which means speech is less protected in the "special context of labor disputes." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 n.17 (1976).

[55] *Id.* at 806 n.30.
[56] *Id.* at 912 (internal citations omitted).
[57] *Id.*

In *Eliason & Knuth*, after reaching the conclusion that secondary bannering did not violate Section 8(b)(4)(B), the Board majority – invoking "the constitutional concerns that animated the Supreme court's decision in *DeBartolo* and its precursors" – stated that finding bannering violative of the Act "would raise serious constitutional questions under the First Amendment."[58]

The Board should overrule this aspect of *Eliason & Knuth* (and related cases), which misconstrues the central aspect of the Supreme Court decision in *DeBartolo*.

As noted previously, the Supreme Court in *DeBartolo* held that First Amendment concerns made it appropriate to find that secondary *handbilling* did not threaten, coerce, or restrain neutral parties in violation of Section 8(b)(4)(B). However, the Supreme Court differentiated handbilling, on the one hand, from picketing, on the other, stating that "*picketing is qualitatively different*" and is "a *mixture of conduct* and communication," where the "conduct" element "often provides *the most persuasive deterrent to third persons about to enter a business establishment*."[59] *See also Hughes,* 339 U.S. at 464 ("while picketing is a mode of communication, it is inseparably something more and different").

The Board in *Eliason & Knuth* similarly disregarded the fact that *DeBartolo* itself affords substantial First Amendment protection by holding that secondary union *handbilling* does not rise to the level of threats, coercion or restraint under Section 8(b)(4)(B). At all times, a union that wishes to advocate a boycott of neutral employers may do so in the form of handbilling. This makes it even more clear that Section 8(b)(4)(B) does not impose a ban on union speech generally in relation to secondary parties; it only prohibits picketing and other coercive activities

[58] 355 NLRB at 807.

[59] *DeBartolo*, 485 U.S. at 580, quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 311 n.17 (1979); *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950); *NLRB v. Retail Store Employees Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (emphasis added; internal quotation marks omitted).

– including bannering, inflatable rats and other displays – that are "a *mixture of conduct* and communication."[60]

CONCLUSION

For the reasons explained above, the Retail Industry Leaders Association, the National Retail Federation and the International Council of Shopping Centers contend that the Board should overrule *Eliason & Knuth*, *Brandon Regional Medical Center* and the other bannering cases described above, and find that the union-sponsored banners, the use and positioning of an inflatable rat, and related actions at issue in the instant case violate Section 8(b)(4)(B) of the Act.

Respectfully submittted,

PHILIP A. MISCIMARRA
JONATHAN C. FRITTS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
(202) 739-3000

SAMUEL D. BLOCK
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive, Fifth Floor
Chicago, IL 60601
(312) 324-1000

Counsel to the Retail Industry Leaders Association, National Retail Federation and International Council of Shopping Centers as Amici Curiae

Dated: December 28, 2020

[60] The Court of Appeals for the Eleventh Circuit in *Kentov v. Sheet Metal Workers Local 15*, 418 F.2d 1259, 1265 (11th Cir. 2005) found there was reasonable cause to believe that a union's mock funeral protest violated Section 8(b)(4)(B) and concluded that the protest was "the functional equivalent of picketing, and therefore, the First Amendment concerns in DeBartolo are not present in this case." In contrast, the D.C. Circuit in *NLRB v. Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 491 F.3d 429 (D.C. Cir. 2007) denied enforcement of a Board order finding that a union's mock funeral violated Section 8(b)(4)(B), and the court – applying the doctrine of "constitutional avoidance" – determined that the "mock funeral lies somewhere between the lawful handbilling in *DeBartolo* and unlawful picketing or patrolling," which prompted the court to ultimately conclude the activities "must be evaluated in a manner consistent with the First Amendment," and the court held the mock funeral did not constitute unlawful threats, coercion or restraint in violation of Section 8(b)(1)(B). In the instant case, the Board should be guided by the Eleventh Circuit's decision in *Kentov*, which – unlike the D.C. Circuit decision – appropriately focused on the "conduct" element of the union activities. In any event, even more so than the "mock funeral" at issue in the above cases, the use of oversize banners, inflatable rats and similar displays to pressure neutral parties clearly is the equivalent of picketing (or worse), which warrants a finding that they violate Section 8(b)(4)(B).

CERTIFICATE OF SERVICE

The undersigned counsel certifies this 28th day of December 2020 that a copy of the foregoing BRIEF OF THE RETAIL INDUSTRY LEADERS ASSOCIATION, NATIONAL RETAIL FEDERATION, AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS AS AMICI CURIAE was filed electronically and served on the following parties by email on December 28, 2020:

Charles R. Kiser
International Union of Operating Engineers Local 150
ckiser@local150.org

Brian West Easley
Elizabeth Bentley
Allyson Werntz
beasley@jonesday.com
ebentley@jonesday.com
awerntz@jonesday.com

Patricia Nachand, Regional Director
Joanne Mages, Regional Attorney
Michael T. Beck, Supervisory Attorney
Tiffany Limbach, Field Attorney
National Labor Relations Board Region 25
patricia.nachand@nlrb.gov
joanne.mages@nlrb.gov
michael.beck@nlrb.gov
tifanny.limbach@nlrb.gov

Laurie Monahan Duggan
National Labor Relations Board, Division of Advice
laurie.duggan@nlrb.gov

Philip A. Miscimarra