Case No. 25-CC-228342

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 150,

and

LIPPERT COMPONENTS, INC.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF INDIANA

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The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Indiana is a state affiliate of the national ACLU. The ACLU has appeared before courts in numerous cases to defend the expressive and associational rights of workers, including as counsel in *Farm Labor Organizing Committee v. Stein*, No. 1:17CV1037, 2018 WL 4518696 (M.D.N.C. Sept. 20, 2018) and as amicus in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council* (*DeBartolo II*), 485 U.S. 568 (1988).

The ACLU submits this amicus brief in response to the National Labor Relations Board's October 27, 2020 Notice and Invitation to File Briefs. Of the four questions presented, this brief focuses on the fourth: whether the Board could find that the conduct at issue in this case—displaying a twelve-foot inflatable rat and two large banners on public property—violates the National Labor Relations Act (NLRA) under any standard for defining what conduct Sections 8(b)(4)(i) and (ii)(B) of the NLRA proscribe, without violating the First Amendment.

INTRODUCTION

Scabby the Rat is a common sight at labor protests, and he communicates a clear message: workers' criticism of a business. Displays of Scabby on public property thus constitute speech on a matter of public concern, and enjoy the highest degree of First Amendment protection. The same is true of the labor banners at issue here, which discuss a business' health and safety violations and criticize another business' hiring practices.

The National Labor Relations Act ("NLRA") cannot constitutionally proscribe such expression. As the Supreme Court has made clear, the NLRA "ought not be construed to violate the Constitution if any other possible construction remains available," and so the Board must avoid instituting any standard that would allow such a result. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* (*DeBartolo II*), 485 U.S. 568, 575 (1988).

To avoid this conclusion—and notwithstanding the clear weight of authority holding otherwise—the Government argues that a union's display of Scabby and banners critical of businesses deserve, at most, diminished constitutional protection as commercial or "labor speech." *See* Brief of the General Counsel (Nov. 27, 2020) ("Gov. Br.") at 18. But the Supreme Court has rejected the idea that speech is commercial merely because it urges consumers not to do business with a company—to the contrary, speech about labor disputes, touching on working conditions and hiring practices, is often held to be speech on a matter of public concern. In addition, speech by labor unions and workers deserves the same protection as speech by other speakers.

Even more radically, the Government contends that this case need not implicate the First Amendment at all, because displays of Scabby encourage employees of a secondary employer to

withhold services from their employer, in violation of Section 8(b)(4)(i) of the NLRA, and coerce members of the public to boycott a business, in violation of Section 8(b)(4)(ii)(B). This, too, is wrong. Speech does not lose protection merely because it is persuasive, and courts have repeatedly rejected the claim that Scabby—a balloon—is coercive because of his "menacing" looks. *See* Gov. Br. at 11, 15.

Even if the speech at issue here were tantamount to picketing, it would still deserve protection under the First Amendment. Because picketing is a protected form of expressive conduct, the Government may restrict it to address harms caused by its noncommunicative elements, but not to suppress its communicative elements. Restrictions on labor picketing are appropriate only insofar as they are necessary to prevent economic coercion, physical obstruction, or threats of violence. It is dubious whether these justifications still apply to secondary labor picketing, given that unions are now largely powerless to discipline workers who decide to cross a picket line. In any event, the Board should reject the Government's attempt to expand Section 8(b)(4) to encompass all forms of labor protest that are "emotional and confrontational," since such a restriction would impose a blatant content-based restriction on protected expression.

For these reasons, the Board must construe the NLRA in such a way as to avoid this constitutional issue and ensure that displaying Scabby and banners on public property, without more, does not violate the NLRA.

I. The First Amendment protects a labor union's display of Scabby the Rat and banners on public property.

A. Scabby the Rat is protected symbolic expression.

The Supreme Court has "long recognized that [the First Amendment's] protection does not end at the spoken or written word," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), and that

symbolism in particular is an "effective way of communicating ideas." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 569 (1995) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1942)). "The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Barnette*, 319 U.S. at 632. For workers, labor unions, and the public, Scabby the Rat is such a shortcut.

While "a narrow, succinctly articulable message is not a condition of constitutional protection," *Hurley*, 515 U.S. at 569, Scabby's message is clear. He is "a familiar sight . . . when a dispute breaks out between a union and an employer," and he is "notable" for his "symbolic meaning." *Constr. & Gen. Laborers' Union No. 330 v. Town of Grand Chute* (*Grand Chute II*), 915 F.3d 1120, 1121 (7th Cir. 2019). He "has long been used as a symbol of efforts to protest unfair labor practices," *Tucker v. City of Fairfield*, 398 F.3d 457, 460 (6th Cir. 2005), of workers' "unhappiness with employers that do not pay union-scale wages," *Constr. & Gen. Laborers' Local Union No. 330 v. Town of Grand Chute* (*Grand Chute I*), 834 F.3d 745 (7th Cir. 2016); and of labor unions' "struggles with employers" more broadly, *id.* at 751 (Posner, J. concurring in part and dissenting in part).

Just as a union is protected in using the words "scab" or "rat" in the context of a labor dispute, so too is it protected in displaying an inflatable rat balloon named "Scabby." The Supreme Court has recognized that "epithets such as 'scab' . . . are commonplace in [labor] struggles" and that they carry "generally accepted definitions," including "one who refuses to join a union." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 278, 283 (1974). Similarly, the term "rat" is used "to aptly describe [a union's] strong (negative) views of [a

business'] employment practices." *Beverly Hills Foodland, Inc. v. United Food & Com. Workers Union, Local 655*, 840 F. Supp. 697, 705 (E.D. Mo. 1993), *aff'd*, 39 F.3d 191 (8th Cir. 1994). A union has a "license to use [such] intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Letter Carriers*, 418 U.S. at 278.

Indeed, federal and state courts around the country have consistently held that "there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment." *Tucker*, 398 F.3d at 462; *accord Grand Chute II*, 915 F.3d at 1123. *See also, e.g.*, *King v. Constr. & Gen. Bldg. Laborers' Local 79*, 393 F. Supp. 3d 181, 196–97 (E.D.N.Y. 2019); *Microtech Contracting Corp. v. Mason Tenders Dist. Council of Greater N.Y.*, 55 F. Supp. 3d 381, 384 (E.D.N.Y. 2014); *Int'l Union of Operating Eng'rs, Local 150 v. Village of Orland Park*, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001); *State v. DeAngelo*, 963 A.2d 1200, 1206 (N.J. 2009).

B. Displaying banners to criticize a business and publicize a labor dispute is protected speech.

A labor union displaying banners, as here, to inform the public that the Occupational Safety and Health Administration (OSHA) found safety violations against a company with which the union has a primary labor dispute and to "SHAME" a neutral company "FOR HARBORING RAT CONTRACTORS" is equally protected by the First Amendment. Gov. Br. at 12. Since 1940, the Supreme Court has recognized that "publicizing the facts of a labor dispute in a peaceful way," including specifically "by banner," must "be regarded as within that liberty of communication which is secured to every person by the [Constitution]." *Carlson v. California*, 310 U.S. 106, 113

(1940). Accordingly, courts have rejected attempts to prohibit peaceful bannering under the NLRA, "conclud[ing] that, under controlling Supreme Court precedent, the conduct of the union members in displaying the banner falls outside [its] scope." *Kohn v. Sw. Reg'l Council of Carpenters*, 289 F. Supp. 2d 1155, 1159 (C.D. Cal. 2003), *aff'd* 409 F.3d 1199 (citing *DeBartolo II*, 485 U.S. at 575); *see also Overstreet v. United Brotherhood of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1210–12 (9th Cir. 2005) (holding that "interpreting the [NLRA] to prohibit" peaceful "bannering activity would pose a 'significant risk' of sanctioning a violation of the First Amendment").

The combination of banners and "a large inflatable rat does not alter th[is] analysis." *Ameristar Casino E. Chi., LLC v. UNITE HERE! Local 1, No. 16-CV-*5379, 2018 WL 4052150, at *9 (N.D. Ill. Aug. 24, 2018). "[T]he First Amendment precludes the application of Section 8(b)(4) to [a union's] use of stationary banners and inflatable rats." *Ohr v. Int'l Union of Operating Eng'rs, Local 150*, No. 18 C 8414, 2020 WL 1639987, at *4 (N.D. Ill. Apr. 2, 2020).

II. There is no labor exception to this First Amendment analysis.

Notwithstanding the clear weight of this caselaw, the Government argues that a union can constitutionally be sanctioned under the NLRA for displaying Scabby and banners on public property, without more, because such expression is "entitled to lesser First Amendment protection" as "labor and/or commercial speech." Gov. Br. at 18. The Government is wrong on both counts.

The fact "[t]hat a labor union is the [speaker] and that a labor dispute was involved does not foreclose [First Amendment] analysis." *DeBartolo II*, 485 U.S. at 576. To the contrary, questions about the speech of workers and labor unions, like questions about the speech of any

other speaker, must "be answered consistent with developments in the Supreme Court's first amendment jurisprudence." *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007) (applying non-labor protest cases to case about labor protest). In other words, the fact that a labor union is speaking should not diminish the applicable First Amendment protection. Indeed, as shown by the caselaw discussed above, the First Amendment protects the display of a symbolic inflatable rat and of banners *by labor unions*.

The Government contends that these kinds of speech are commercial because they "argu[e] the merits of [a] business, as opposed to merely informing the public of its labor dispute." Gov. Br. at 20. But courts have rejected the claim that labor speech is "necessarily 'commercial speech . . . and thereby entitled to a lesser degree of constitutional protection.'" *Sheet Metal Workers*, 491 F.3d at 437 (quoting *DeBartolo II*, 485 U.S. at 576). In *DeBartolo II*, the Supreme Court rejected the idea that handbills that "truthfully revealed the existence of a labor dispute and urged potential customers of [a] mall . . . not to patronize the retailers . . . in the mall" constituted commercial speech. 485 U.S. at 575. Though the handbills urged a boycott of specific retailers because of a labor dispute—the equivalent of "arguing the merits of [a] business," *see* Gov. Br. at 20—the Court held that the handbills were more than commercial speech. *DeBartolo II*, 458 U.S. at 576.[1]

[1] Moreover, "commercial speech itself is protected by the First Amendment, and however [the expression at issue here is] to be classified," a construction of the NLRA that prohibits such expression "would require deciding serious constitutional issues." *DeBartolo II*, 485 U.S. at 576 (citation omitted). Thus, even if the Board views the speech at issue as commercial speech, it should nevertheless avoid the constitutional issue and construe the NLRA not to reach the union's expression.

The Supreme Court has recognized that such criticism and protest—including about a specific business—"is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern." *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940). Far from constituting "matters of mere local or private concern," "[t]he health of the present generation and of those as yet unborn may depend on [satisfactory hours and wages and working conditions], and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing." *Id.* at 103. As such, "free discussion concerning the conditions in industry and the causes of labor disputes [is] . . . indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Id.* at 103.[2]

Moreover, the Government's argument that speech criticizing a business is commercial because it boils down to discussion of the business' merits proves too much. It would turn any criticism of a business' labor, health, environmental, or other practices into commercial speech. As the Supreme Court observed in *Janus v. AFSCME*, "[t]o suggest that speech on such matters"—including "education, child welfare, healthcare, and minority rights, to name a few"—"is not of great public concern . . . is to deny reality." 138 S. Ct. 2448, 2475 (2018). *See also Boulton v. Swanson*, 795 F.3d 526, 532 (6th Cir. 2015) ("[S]peech addresses a matter of public concern when

[2] Indeed, while the Supreme Court analogized commercial speech to labor speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, a case the government relies upon for its commercial speech argument, the Court also analogized commercial speech to political speech and speech of general public interest. The Supreme Court drew these analogies to demonstrate that commercial speech, like other forms of constitutionally protected speech, may serve the goal of "enlighten[ing] public decisionmaking in a democracy." 425 U.S. 748, 762–63, 765 (1976). In other words, the Court provided these analogies to justify greater protection for commercial speech—not to diminish protection for "labor speech" or other forms of political speech.

it alleges corruption . . . failure to follow state law . . . or discrimination of some form.") (citations omitted); *Perry v. McGinnis*, 209 F.3d 597, 609 (6th Cir. 2000) (holding that speech about racially discriminatory treatment by an employer constitutes a matter of public concern even when it arose as a personal internal employment grievance).

Further, as all nine Justices in *Janus* agreed, there is no question that union speech on such matters directed at the "public square," or addressed to a public audience, supports a finding that it is indeed speech on a matter of public concern. 138 S. Ct. at 2476; *id.* at 2495 (Kagan, J., dissenting). As such, expression like that at issue here—which took place in public spaces and was directed to the public—constitutes not commercial or "labor speech," but rather speech on a matter of public concern and so "occupies the highest rung of the hierarchy of First Amendment values" and merits "special protection." *Id*. at 2476 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

III. The expression at issue is not unprotected conduct, nor can it be banned because of its persuasive power.

Advancing an even more radical position, the Government argues that "the First Amendment is not implicated in this case" at all because the union's display of banners and Scabby "is non-speech conduct with a significant confrontational element." Gov. Br. at 18. Much of the Government's support for this argument is conclusory—simply stating that Scabby and the banners would reasonably encourage employees of a secondary employer to withhold services from their own employer and would reasonably coerce a member of the public to boycott a business. Gov. Br. at 13, 15. Such "conclusory use of the term 'confrontational' . . . without more, does not transform otherwise protected use and display of an inflatable rat into unlawful labor conduct." R. & R., *All-City Metal, Inc. v. Sheet Metal Workers' Int'l Ass'n Local Union 28*, No.

18-CV-958-RRM-SJB, 2020 WL 1502049, at *7 (Feb. 18, 2020 E.D.N.Y.), *report and recommendation adopted*, Order Adopting R. & R., *All-City Metal*, 2020 WL 1466017 (E.D.N.Y. Mar. 25, 2020).

The Government also contends that "the iconic and menacing rat . . . create[s] an emotional and confrontational barrier" because it is "glaring in character and size and an unmistakable symbol of contempt"; that its "red eyes, fangs, and claws add[ ] to the display's coercive nature"; and that Scabby, combined with "signs meant to disgrace the neutral and the primary" would induce the public to stay away out of a "desire to avoid confrontation" and an appeal to "emotions," rather than "to reason." Gov. Br. at 11, 13, 15.

As an initial matter, the Government's putative distinction between emotional and rational persuasion finds no support in the caselaw. "[W]ords are often chosen as much for their emotive as their cognitive force." *Cohen v. California*, 403 U.S. 15, 26 (1971). "The protection of on-site speech extends to the 'emotive impact of speech on its audience,' including [a union's] invocation of 'shame' on the protested retailers and, by extension, on members of the public who patronize them." *Overstreet*, 409 F.3d at 1212 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.)).

The remainder of the Government's argument seems to be "that persuasive speech is prohibited speech." *Kohn*, 289 F. Supp. 2d at 1167. But the Supreme Court has made clear that influence on listeners that results from persuasion—even persuasion to action, and even persuasion to unlawful action—does not justify punishing or silencing the speaker. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

This is equally true in the labor context. Coercion under the NLRA, absent a threat, cannot "be defined so broadly as to crimp the free speech guarantee of the First Amendment." *Sheet Metal Workers*, 491 F.3d at 437 (holding that union enacting mock funeral in front of a hospital did not constitute coercion). The Supreme Court has characterized "the notion that *any* kind of handbilling, picketing, or other appeals" by workers is proscribable under the NLRA when they "ha[ve] some economic impact"—that is, when they are persuasive and effective—as "untenable." *DeBartolo II*, 485 U.S. at 579. "[P]eaceful and truthful discussion of matters of public interest [cannot be sanctioned] merely on a showing that others may thereby be persuaded to take action inconsistent with [a business'] interests." *Thornhill*, 310 U.S. at 104.

This is true both for Section 8(b)(4)(ii)(B), for which coercion, not "mere persuasion is necessary," *DeBartolo II*, 485 U.S. at 578, and for Section 8(b)(4)(i), which proscribes "induc[ing] or encourag[ing]" the employees of a secondary employer to stop work. 29 U.S.C. § 158(b)(4)(i)(B). "[A] message about a secondary employer does not violate § 8(b)(4)(i)(B) just because it might reach the eyes and ears of secondary employees and might cause them to think bad things about their employer." *King*, 393 F. Supp. 3d at 201. "To hold otherwise would be to prohibit the union from engaging in any speech that is harmful to plaintiff's image, a holding that would completely eviscerate the First Amendment rights of the union." *Id.* (cleaned up).[3]

[3] In addition, applying Section 8(b)(4)(i) here, where it is not clear that the union targeted secondary employees specifically, would also violate the First Amendment by "turn[ing] the specialized concept of 'signal picketing' into a category synonymous with *any* communication requesting support in a labor dispute." *Overstreet v. United Brotherhood of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1215 (9th Cir. 2005).

In addition, to the extent that this argument focuses on the content of the union's message—i.e., Scabby as a "symbol of contempt" and the banners' efforts "to disgrace the neutral and the primary," Gov. Br. at 11, 13—it "collides head-on with First Amendment principles that preclude prior restraints and content-based limitations on the display of signs, banners, and the like." *Kohn*, 289 F. Supp. 2d at 1167. To the extent that the Government's argument focuses on Scabby's frightful or disturbing appearance, it is worth noting that Scabby is a balloon. And "unsettling and even offensive speech," including at a labor protest, "is not without the protection of the First Amendment." *Sheet Metal Workers*, 491 F.3d at 439. Indeed, as the Supreme Court recognized in holding that the First Amendment protected a picket near a soldier's funeral that displayed signs like "Thank God for 9/11" and "God Hates Fags"—thereby adding "anguish . . . to [the family's] already incalculable grief"—speech in "a public place on a matter of public concern" "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder*, 562 U.S. at 449, 56, 58.

The government also argues that the expression at issue here is picketing, or tantamount to picketing. Gov. Br. at 13. As noted below, even if it *were* tantamount to picketing, it would still be protected by the First Amendment. Contrary to the government's argument, however, a union displaying Scabby and two banners on public property cannot be fairly characterized as picketing. The Supreme Court has held that labor picketing is "qualitatively 'different from other modes of communication,'" *DeBartolo II*, 485 U.S. at 580 (quoting *Babbitt v. United Farm Worker Nat'l Union*, 442 U.S. 289, 311 n.17 (1979)), in that it "is 'a mixture of conduct and communication[,]' and the conduct element 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'" *DeBartolo II*, 485 U.S. at 580 (quoting *NLRB v. Retail Store*

Emps. Union, Local 1001 (*Safeco*), 447 U.S. 607, 619 (1980) (Stevens, J., concurring)). In the Supreme Court's view, picketing "involves patrol of a particular locality," and the mere "presence of a picket line" induces certain actions—namely, refusing to cross that line. *Safeco*, 447 U.S. at 619 (Stevens, J., concurring) (marks and citation omitted). In contrast, the Court has made clear that "mere persuasion" that does not involve "intimidat[ion] by a line of picketers" is protected expression. *DeBartolo II*, 485 U.S. at 580.

Applying this precedent, courts have consistently rejected the argument that displaying Scabby, alone or in combination with handbills and banners, constitutes coercion, intimidation, or improper persuasion of secondary workers in violation of the NLRA. For example, one court held that the "regular display of inflatable rats and a cockroach on a public street, peaceful and limited handbilling, and a single, peaceful, stationary, hourlong rally" that did not involve violence or patrolling constituted "mere persuasion," not picketing. *King*, 393 F. Supp. 3d at 202. Another held that leafletting and displaying a "fifteen[-]f[oo]t[-]high," "repugnant and hideous" Scabby was not picketing, even where a business contract was terminated following the display and despite vague and conclusory assertions that the display was "coercive" and "would create disharmony and trouble for the worksite." R. & R. *All-City Metal*, 2020 WL 1502049, *at* *7.

Such conclusions are necessary because "the First Amendment strongly counsels against straining to construe as coercive a union's use of stationary banners and inflatable rats." *Ohr*, 2020 WL 1639987, at *4 (holding that use of stationary banners and Scabby is not coercive and is protected by the First Amendment).

IV. Even if the expressive conduct at issue here were tantamount to picketing, it would still be protected under the First Amendment.

As noted above, the expression at issue here is not picketing. But, even if it were, the Government's argument—that a balloon and banners are unprotected by the First Amendment because they are just as "emotional and confrontational" as picketing, which the Government describes as "inherently intimidating and coercive," Gov. Br. at 10–11—illustrates just how far it has strayed from first principles. As the Supreme Court has held numerous times since its landmark decision in *Thornhill*, "picketing plainly involves expressive conduct within the protection of the First Amendment." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99 (1972) (striking down a content-based ban on picketing) (collecting cases); *see also, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982) (holding that peaceful secondary picketing and boycotting by civil rights protesters was protected under the First Amendment); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (applying First Amendment scrutiny to a ban on targeted residential picketing); *Madsen v. Women's Health Ctr*., 512 U.S. 753, 774–75 (1994) (holding that the First Amendment applies to anti-abortion picketing); *Snyder*, 562 U.S. at 454–58 (holding that the First Amendment protected the Westboro Baptist Church's picketing of a soldier's funeral).

Like other forms of symbolic speech or expressive conduct, picketing may be restricted to prevent harms caused by its noncommunicative elements, but generally may not be restricted based on its message or its communicative impact. *See Mosley*, 408 U.S. at 99 (striking down an ordinance that prohibited *non-labor* picketing near schools, because the restriction targeted protected expression on the basis of its subject matter).[4] Although the Supreme Court "has]

[4] It is worth noting that, historically, many picketing cases arose in the context of laws prohibiting non-labor picketing, which legislatures at the time viewed as more dangerous or nefarious. *See,*

recognized that 'where "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,'" it has "limited the applicability of [this] relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression.'" *Johnson*, 491 U.S. at 407 (quoting *United States v. O'Brien*, 391 U.S. 367, 376, 377 (1968)).

Thus, laws aimed at preventing picketers from physically obstructing access to the protested enterprise or threatening violence against those who cross the picket line may constitute narrowly tailored restrictions prohibiting unprotected conduct, and even anti-picketing injunctions issued after such conduct has become endemic during a particular demonstration may be proper, but categorical restrictions on labor picketing writ large are not justifiable. *Cf. McCullen v. Coakley*, 573 U.S. 464, 490–91 (2014) (holding that a statute establishing buffer zones around abortion clinics failed intermediate First Amendment scrutiny, where the state failed to demonstrate that laws prohibiting obstruction, intimidation, and harassment were insufficient to ensure clinic access). "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter." *Mosley*, 408 U.S. at 100–01 (rejecting the City of Chicago's argument that an ordinance restricting non-labor picketing was justified because non-labor pickets are more prone to violence).

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e.g., *Carey v. Brown*, 447 U.S. 455 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972); *People Acting Through Comty. Effort v. Doorley*, 468 F.2d 1143 (1st Cir. 1972). As the courts recognized then, the First Amendment and the Equal Protection Clause prohibit content-based restrictions on picketing.

Instead of explicitly focusing on subject matter, statutory restrictions on labor picketing have traditionally been justified by reference to Justice Douglas's statement in *Bakery & Pastry Drivers Local 802 v. Wohl* that "[p]icketing 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." 315 U.S. 769, 819–20 (1942) (Douglas, J., concurring). Justice Stevens echoed these sentiments when he concluded that Section 8(b)(4)'s restriction on secondary labor picketing is constitutional, because it "affects only that aspect of the union's efforts to communicate its views that 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 in part and concurring in the judgment). And the Supreme Court formally adopted this rationale in *DeBartolo II*, 485 U.S. at 580.

Why has the Supreme Court viewed the noncommunicative aspects of labor picketing as uniquely coercive? It is not the threat of violence or harassment. "Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes." *Mosley*, 408 U.S. at 101. Nor is it the presence of emotional appeals to labor solidarity. Appeals to emotion and affinity are common to most public demonstrations. *See Hurley*, 515 U.S. at 569 (describing the banners in Boston's St. Patrick's Day Parade); *Claiborne*, 455 U.S. at 903 ("Pickets used to advertise the boycott were often small children."). Moreover, as already discussed, emotional appeals are fully protected by the First Amendment. *See Cohen*, 403 U.S. at 26. Some other factor, unique to the labor context, must explain the Court's differential treatment of labor picketing.

The most plausible explanation is that, when many of the seminal Supreme Court cases were decided, labor unions had the power to impose severe discipline against members who

crossed a picket line. As one court explained in 1962, "[t]he response to which Mr. Justice Douglas referred" in his *Wohl* concurrence was "characteristic of unionized employees to whom pickets have traditionally addressed their appeal. Such employees are subject to group discipline based on common interests and loyalties, habit, fear of social ostracism, *or the application of severe economic sanctions*. . . . In that context, picketing is more than 'pure' speech." *Fruit & Vegetable Packers & Warehousemen, Local 760 v. NLRB*, 308 F.2d 311, 316 (D.C. Cir. 1962) (emphasis added) (citation omitted), *vac'd*, 377 U.S. 58, 84 (1964). This also explains why, in certain contexts, "signal picketing" has been prohibited along with traditional picketing. "The entire concept of signal picketing . . . depends on union employees talking to *each other*, not to the public. In other words, 'signals,' in this context, are 'official directions or instructions to a union's own members,' implicitly backed up by sanctions." *Overstreet*, 409 F.3d at 1215 (citing *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 690–91 (1951)).

Although the coercive threat of union discipline may once have justified the NLRA's infringement on First Amendment freedoms, it is dubious whether it still does. Unions' power to discipline those who cross a picket line has diminished considerably in the decades since *Wohl* was decided. In 1947, the Taft-Hartley Act made it illegal for employers to require union membership as a condition of hiring. 29 U.S.C. § 158(a)(3). The Supreme Court later held that, although employees may be required to pay union dues as a condition of employment, they may not be fired for failing to abide by union rules or policies with which they disagree. *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742–43 (1963). Subsequent cases have established that unions can neither restrict the timing or circumstances under which members may resign, *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106–07 (1985), nor impose discipline on former members who

resigned in order to cross a picket line, *NLRB v. Granite State Joint Bd., Textile Workers Union, Local 1029*, 409 U.S. 213 (1972).

In short, a union member who wants to cross a picket line is free to resign their union membership at will and without fear of financial or professional repercussions. As numerous commentators have observed, the absence of a credible threat of union discipline for crossing a picket line has dramatically undermined the traditional "coercion" justification for the NLRA's restrictions on labor picketing. *See, e.g.*, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past As Prologue*, 118 Colum. L. Rev. 2057, 2058–59, 2080–81 (2018); Michael J. Hayes, *It's Now Persuasion, Not Coercion: Why Current Law on Labor Protest Violates Twenty-First Century First Amendment Law*, 47 Hofstra L. Rev. 563 (2018); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich. L. Rev. 169, 225–28 (2015).

It is time to reconsider whether the NLRA should be interpreted to avoid the obvious First Amendment problems posed by a broad, content-based restriction on labor picketing. As one commenter has suggested, "[p]eaceful picketing . . . should be treated no differently than any other kind of behavior used to communicate a message. It should be restrictable to the extent that its noncommunicative elements cause harm—for instance if it is too loud or blocks the entrance to a building—but not restrictable based on its message[.]" Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1319–20 (2005). Interpreting Section 8(b)(4)(ii)(B)'s restrictions on secondary labor picketing in support of a boycott to apply only to obstruction and threats, for example, would avoid the significant First Amendment problems posed by a content-based ban on protected expression. *Cf. NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental &*

Reinforcing Ironworkers Union, Local 433, 891 F.3d 1182, 1187 (9th Cir. 2018) (holding that Section 8(b)(4)(B)(ii) is not content discriminatory, because it applies only to "harassing and intimidating conduct").

But the Board need not reach those issues here. In this case, the Government seeks to expand Section 8(b)(4)'s reach to encompass other forms of expression and expressive conduct on the theory that they are tantamount to picketing. The Government invites the Board to conclude that any "emotional and confrontational" form of labor protest is tantamount to picketing and therefore unprotected by the First Amendment. Gov. Br. at 11. Far from resolving the conflict between Section 8(b)(4) and the First Amendment, such a ruling would predicate liability under Section 8(b)(4) even more squarely on the message and communicative impact of protected expression, in direct violation of the First Amendment's prohibition against content discrimination.

The Board should turn down the Government's invitation. "The National Labor Relations Act 'ought not be construed to violate the Constitution if any other possible construction remains available.'" *Sheet Metal Workers*, 491 F.3d at 437 (quoting *NLRB v. Catholic Bishop of Chi*., 440 U.S. at 500).

CONCLUSION

For the foregoing reasons, the Board should not construe the NLRA in any way that could proscribe displaying an inflatable Scabby balloon and banners on public property as picketing, or otherwise unlawful conduct, under Section 8(b)(4) of the NLRA.

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