No. 19-70334

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

PREFERRED BUILDING SERVICES,
Intervenor

On Petition for Review of a Decision of the National Labor Relations Board
Case No. 20-CA-149353

BRIEF OF AMICI CURIAE LABOR LAW PROFESSORS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE AND ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

STATEMENT OF AMICI CURIAE INTEREST AND AUTHORITY[1]

Amici are professors who study and teach labor law, including the provision of the National Labor Relations Act (NLRA) that is at issue in this case, and the application of First Amendment principles to labor picketing and protest. Amici have an interest in the correct application of existing law regarding two fundamental issues raised in this case: the First Amendment rights of workers and labor organizations; and the scope of the NLRA's prohibition on "secondary" picketing. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The workers in this case – janitors employed by a subcontractor to clean a commercial office building – were fired in retaliation for standing on the public sidewalk outside their workplace with picket signs and leaflets protesting sexual harassment, low wages, and violations of workers' compensation and sick leave laws. The National Labor Relations Board (NLRB or Board) ruled the workers had forfeited legal protection against retaliatory firings because their protests violated

[1] No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than amici or their counsel contributed money that was intended to fund preparing or submitting the brief.

§ 8(b)(4) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(4)(B). Section 8(b)(4) makes it an "unfair labor practice" for a union to engage in certain so-called "secondary" protest activity, which the Act defines as "to threaten coerce, or restrain any person" with "an object" of "forcing or requiring any person … to cease doing business with any other person." *Id.*

Without meaningful analysis, the Board assumed that because the speech in this case involved patrolling with signs (as well as distributing leaflets, making a video, and speaking to passersby and to employees of tenants), the "threaten, coerce, or restrain" element was met and the only issue was whether it had a prohibited secondary object. Then, reversing the Administrative Law Judge, *Preferred Bldg. Servs., Inc.,* 366 N.L.R.B. No. 159 at *18-19 (2018), the Board reasoned that the workers' efforts to appeal to the building manager and tenants rendered the objective of the speech illegal. *Id.* at *4-5. The petition for review should be granted and the Board's decision rejected.

First, § 8(b)(4) on its face regulates speech based on the speaker (it restricts only labor organizations) and on content and viewpoint (it restricts only speech that seeks to persuade someone to cease doing business with another, and not speech that encourages business dealings). Speaker and viewpoint discrimination are "presumptively unconstitutional," *Iancu v. Brunetti,* 139 S. Ct. 2294, 2299 (2019), and prohibited in a public forum. *Minnesota Voters Alliance v. Mansky,*

138 S. Ct. 1876, 1885 (2018). "Viewpoint discrimination … occurs when the government prohibits speech by particular speakers." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2744 (2019). If the workers had affiliated with a civil rights, religious, or political organization rather than a labor union, § 8(b)(4) would not apply, and the workers' collective action would have been protected by the NLRA. 29 U.S.C. § 157. Moreover, § 8(b)(4) also discriminates on the basis of viewpoint: had the janitors praised their employer's practices, they would have retained legal protection.

The Board's interpretation of § 8(b)(4) prohibits speech in a traditional public forum (a public sidewalk) on a matter of public concern (workplace sexual harassment and violation of state and local labor laws). Even content-neutral regulation of peaceful picketing on public sidewalks on matters of public concern must be "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (invalidating as overly broad a content neutral law restricting speech on public sidewalks within 35 feet of reproductive care facilities); *see also Snyder v. Phelps*, 562 U.S. 443 (2011) (holding First Amendment shields picketers from tort liability for foulmouthed, homophobic picketing because they raised "matters of public import"). Under current First Amendment law, § 8(b)(4) cannot constitutionally prohibit speech that does not coerce.

Second, the Board's reading of § 8(b)(4) to cover peaceful picketing aimed at protesting sexual harassment violates the Supreme Court's and this Circuit's admonition to read statutes restricting speech narrowly to avoid constitutional questions. The relevant legislative history suggests Congress did not intend to prohibit peaceful consumer-facing picketing and that a narrower reading of the statute to prohibit only coercion is possible. Thus, settled principles of constitutional avoidance suggest a second reason that the petition for review should be granted.

ARGUMENT

I. APPLYING § 8(b)(4) TO COVER THIS PICKETING VIOLATES THE FIRST AMENDMENT

A. Section 8(b)(4) Discriminates Against Speech Based on Speaker and Viewpoint

The workers in this case – janitors employed by a subcontractor working at a commercial office building – were fired for walking on the public sidewalk outside their workplace with signs and leaflets protesting their employer's sexual harassment, low wages, and violations of workers' compensation and sick leave laws. The NLRB ruled the workers had forfeited legal protection against retaliatory firings because their protests violated § 8(b)(4) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(4)(B). Section 8(b)(4) makes it an "unfair labor practice" for a union:

> (4) (i) to engage in, or to induce or encourage [a work stoppage or boycott]…; or
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,
>
> where in either case an object thereof is–
>
> …
>
> (B) forcing or requiring any person … to cease doing business with any other person …: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

Id. Because these workers did not strike or encourage a boycott, only subsection (ii) is at issue.

A § 8(b)(4)(ii)(B) violation, this Court explained, "has two elements. First, a labor organization must 'threaten, coerce, or restrain' a person engaged in commerce, such as a customer walking into one of the secondary businesses. Second, the labor organization must do so with 'an object' of 'forcing or requiring any person to … cease doing business with any other person." *Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1212 (9th Cir. 2005) (citation omitted).

The Board appeared to assume that because the speech in this case involved patrolling with signs (as well as distributing leaflets, making a video, and speaking to passersby and to employees of tenants), the "threaten, coerce, or restrain" element was met and the only issue was whether the speech had a prohibited secondary object. 366 N.L.R.B. No. 159, at *4-5. Accordingly, most of the Board's

analysis was devoted to the second element, whether the speech had a prohibited object (i.e., was "secondary" rather than "primary" activity). The Board found it did because the janitors worked for a subcontractor (Ortiz) but some of their communications asked for the support of building tenants in improving working conditions, and some mentioned the janitorial contractor (Preferred). *Id.* at 5.

The Board skipped an essential question: can peaceful sidewalk picketing be prohibited, based on speaker and content, absent any evidence of threats or coercion? Section 8(b)(4) on its face regulates speech based on the speaker: it restricts only a "labor organization or its agents." 29 U.S.C. §158(b)(4). Had these workers not been affiliated with a labor union, their speech would not have violated § 8(b)(4) and they would not have lost the NLRA's protection. *Center for United Labor Action*, 219 N.L.R.B. 873 (1975) (organization that does not bargain collectively but that supports employee "protest against alleged employer injustices" and seeks "to rally public opinion in favor of the employees' cause" is not a labor organization subject to §8(b)(4) prohibitions). Indeed, had the workers been engaged in a secondary protest to advance a civil rights claim, not only would their speech not be prohibited by § 8(b)(4), it would be *protected* by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding First Amendment protected civil rights groups' secondary picketing and boycott).

To prohibit workers affiliated with a union from engaging in speech that is constitutionally protected for workers affiliated with the NAACP is unacceptable under modern First Amendment law. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 349 (2010) ("the worth of speech does not depend upon the identity of its source, whether corporation, association, union, or individual"). And § 8(b)(4) also prohibits speech based on content and viewpoint: it restricts only speech that seeks to require someone to cease doing business with another, not speech that encourages business dealings. Had the workers stood on the sidewalk praising their employer rather than seeking better working conditions, their speech would not have been prohibited.

If the Board limited the application of §8(b)(4) to actual instances of coercion, the statute might be constitutionally applied. But the application of §8(b)(4) to peaceful appeals such as these is impermissible, especially in light of recent Supreme Court and Circuit decisions taking a more speech-protective approach to the First Amendment than courts used at the time §8(b)(4) was written.

B. Content Discrimination in Regulating Picketing Requires Strict Scrutiny and Viewpoint Discrimination is Prohibited

The Supreme Court has said in a string of recent decisions that *all* content-based regulations of speech are subject to strict scrutiny. As Justice Thomas wrote for the Court in *Reed v. Town of Gilbert*, the government "has no power to restrict

expression because of its message, its ideas, its subject matter, or its content. Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." 135 S. Ct. 2218, 2226 (2015) (striking down sign ordinance that treated political signs differently from temporary directional signs). The Court has invalidated content-based speech regulations that were intended to protect the public. In *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2019) (*NIFLA*), the Court struck down a compulsory disclosure law that intended to protect patients by ensuring they received information about where to obtain comprehensive family planning services, *id*. at 2369, 2375-76, because the law required speakers to "alter the content" of their message. *Id.* at 2371. Similarly, in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564 (2011) the Court struck down a law prohibiting the sale of information about pharmaceutical prescriptions because it was a content- and speaker-based restriction on speech.

This Court also recognizes that strict or "exacting" scrutiny applies to restrictions on labor speech, including picketing. "At least in the context of organized labor, the impingement of First Amendment rights must, at a minimum, satisfy 'exacting scrutiny'; i.e., it must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational

freedoms.'" *Mentele v. Inslee*, 916 F.3d 783, 790 (9th Cir. 2019) (quoting *Janus v. Am. Fed. State, Cnty, & Mun. Employees Council 31*, 138 S. Ct. 2448, 2465 (2018)), *petition for cert. filed*, May 24, 2019.

Moreover, the Supreme Court and this Circuit have held that viewpoint discrimination is "an 'egregious form of content discrimination' and is 'presumptively unconstitutional.'" *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)). "Viewpoint discrimination is the most noxious form of speech suppression," and "occurs when the government prohibits speech by particular speakers." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2744 (2019). In *Iancu*, the Court invalidated a Lanham Act provision that denied trademark registration to "immoral or scandalous matter." 15 U.S.C. § 1052(a); 139 S. Ct. at 2297. Similarly, in *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017), the Court struck down a trademark law that denied protection to marks that "disparage … or bring … into contempt or disrepute" any "persons, living or dead." 15 U.S.C. § 1502(a). Striking down statutes in effect since the 1940s, *Iancu* and *Matal* emphasized that "government may not discriminate against speech based on the ideas or opinions it conveys." 139 S. Ct. at 2299; *see also* 137 S. Ct. at 1765.

C. The NLRB's Interpretation of § 8(b)(4) Fails Strict Scrutiny

The Supreme Court has recently observed that "it is the rare case" in which the government can show "that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015). Viewpoint restrictions on sidewalk speech are an even more egregious free speech violation. As the Court said in *Minnesota Voters Alliance v. Mansky,* 138 S. Ct. 1876, 1885 (2018): "In a traditional public forum – parks, streets, sidewalks, and the like -- … restrictions based on content must satisfy strict scrutiny and those based on viewpoint are prohibited." For that reason, in *Snyder v. Phelps*, 562 U.S. 443 (2011), and in *Boos v. Barry*, 485 U.S. 312 (1988), the Court struck down viewpoint restrictions on sidewalk picketing. The NLRB's rule must, likewise, be struck down.

The Board's approach to labor protest is wildly out of compliance with current First Amendment jurisprudence. The Board subjects worker protest at a shared worksite (like the office building in this case) to "a strong rebuttable presumption," of illegality, 366 N.L.R.B. No. 159, at *4, unless the workers limit their message according to four criteria laid out in *Sailors' Union of the Pacific (Moore Dry Dock Co.*), 92 N.L.R.B. 547 (1950). But under current Supreme Court law, peaceful speech on a public sidewalk on a matter of public concern is

presumptively entitled to First Amendment protection, *Snyder*, 562 U.S. at 452, not a "strong … presumption" of illegality.

The *Moore Dry Dock* criteria require workers to picket only (1) when the picketers' employer is on site; (2) when the picketers' employer is "engaged in its normal business"; (3) at "places reasonably close to the location of" the primary employer. Most problematic under modern free speech law is the fourth criterion: the picket signs must "disclose[] clearly that the dispute is with the primary employer." 92 N.L.R.B. at 549. This is precisely the form of law compelling speakers to alter their message that *NIFLA* condemned. 138 S. Ct. at 2371.

Moreover, as the Board held in this case, even if the four *Moore* limitations are met, picketing "will still be found unlawful if there is independent evidence that it had the secondary object prohibited by § 8(b)(4)(ii)(B)." 366 N.L.R.B. No. 159 at *4; *see also Teamsters Local 560 (County Concrete Corp.)*, 360 N.L.R.B. 1067, 1067-68 (2014). Thus, even if the picket signs and leaflets contain all the language required by the Board and none of the language proscribed, the Board might still conclude that the picketing is unlawful based on statements the union made *elsewhere*. *International Bhd. of Elec. Workers, Local Union 357*, 367 N.L.R.B. No. 61 (2018) (union's failure to promise, in a letter calling for a strike sanction, that any picketing would be lawful rendered the letter an unlawful threat under §8(b)(4)(ii)(B)). Although this Circuit has twice condemned the Board's

broad approach to threats in this "independent evidence" rule as "without foundation in the Act, relevant case law or any general legal principles … [and] irrational and beyond the Board's authority," *United Ass'n of Journeymen of Plumbing Indus. v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990); *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 557 (9th Cir. 1988), the Board has persisted in punishing peaceful picketing when, as here, the Board believes the employees extraneous statements suggest their picketing had an impermissible object.

The Board found that the picketing did not meet the fourth *Moore Dry Dock* criterion because one word on one leaflet mentioned another employer and statements the workers made elsewhere suggested that the protest had a secondary object. 366 N.L.R.B. No. 159, at *4. The Board conceded that the picket signs clearly stated that the workers were not employed by Harvest (the building management company) or by any of the tenants in the building. *Id*. at *1. And the Board conceded that the picketers stated they were not calling for a strike or boycott, but were seeking freedom from workplace sexual harassment, and other improvements in their working conditions. *Id*. at *2. What got the workers into trouble with the Board was the following:

- A leaflet distributed on one of the two days of protest "requested that KGO ensure that 'their' janitors obtain better working conditions." *Id*. at *4. This, the

Board held, converted a primary dispute with Ortiz into an illegal secondary dispute with KGO.[2]

- Workers who met with the building's property manager (Harvest) explained "it was 'inappropriate' that Ortiz was still working there" because he had sexually harassed the workers. *Id*. This, the Board reasoned, suggested the workers were not simply protesting sexual harassment but were trying to get Harvest involved in ending it.
- A San Francisco Living Wage Coalition video about the protest that aired on local television and the Coalition's website depicted one worker saying their efforts had persuaded Harvest to suspend Ortiz and promise changes in their working conditions. *Id*. at *5. This, too, made the protest secondary rather than primary because it mentioned Harvest.

[2] In the Board's view, the word "their" was problematic because it "led the public to believe that [the tenant] – who was not involved in the dispute – was their employer and had the ability to adjust their working conditions." 366 N.L.R.B. No. 159 at *4. First, this is a tendentious reading of the leaflet – most people would understand "their janitor" to be the person who cleaned their office, whether pursuant to an employment or contractual relationship. Second, First Amendment protections should not turn on such fine distinctions. *See Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech," so courts should find political speech violates campaign finance law only if it "is susceptible of no reasonable [alternative] interpretation").

- The employees expressed a "happy reaction" when a Harvest representative said he was seeking a unionized janitorial contractor. *Id*. at *6.

All of this makes clear that the Board's rule is a content-based and viewpoint-based regulation of speech. Had the workers not mentioned KGO, Harvest, or Preferred in any of their materials, the Board would have found that their picketing had only a "primary" object (protesting Ortiz's conduct). Had the workers sought only the support of the Coalition (which appears from its website to be a tax-exempt organization[3]) rather than SEIU, they would have been free to discuss Preferred or Harvest or KGO on their picket signs and leaflets because only labor unions are covered by § 8(b)(4). *Center for United Labor Action*, 219 N.L.R.B. 873 (1975). Finally, had the workers not expressed their concerns to the building manager, the picketing and leafleting would not have been unlawful under the Board's rule that "independent evidence" of a secondary object can render otherwise permissible picketing unlawful. 366 N.L.R.B. No. 159 at *4.

"In a traditional public forum – parks, streets, sidewalks, and the like – … restrictions based on content must satisfy strict scrutiny and those based on viewpoint are prohibited." *Minnesota Voters Alliance*, 138 S. Ct. at 1885. The Board's application of § 8(b)(4) was viewpoint-based, and therefore inconsistent

[3] https://www.livingwage-sf.org/who-we-are/.

with the First Amendment. But even if the Board's rule were taken to be only as a content restriction, it fails strict scrutiny.

Section 8(b)(4)(ii)(B), as interpreted by the Board, is not narrowly tailored and does not achieve a compelling governmental interest. The Supreme Court rejected the notion that the government has a compelling interest in protecting businesses from peaceful appeals by employees of others; indeed, it said that if a union were to appeal to "the public generally, including those entering every shopping mall in town, pursuant to an annual educational effort against substandard pay, there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988). As to narrow tailoring, this case illustrates that the Board sweeps in a great deal of harmless speech. If the Board confined itself to prohibiting actual threats of coercion – such as threatening to block building entrances – the rule might be narrowly tailored. But prohibiting peaceful picketing and leaflets aiming to persuade are way beyond what the Supreme Court tolerates in restrictions of any other speaker.[4]

[4] It might be argued that labor protest is a form of commercial speech and, therefore, that the Board's interpretation of § 8(b)(4) should be upheld if it passes intermediate scrutiny. Commercial speech is that which "proposes a commercial transaction," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

D. The NLRB's Decision is Inconsistent with Current Ninth Circuit and Supreme Court Precedent

This case, along with other recent Board enforcement guidance and actions targeting the use of banners and cat and rat balloons, shows that the Board remains committed to enforcing § 8(b)(4) broadly to prohibit peaceful speech. In an Advice Memorandum dated December 20, 2018, the Board's Division of Advice directed a Regional Attorney to treat banners, balloons, and similar peaceful protest as coercive under § 8(b)(4). *Int'l Bhd. of Elec. Workers, Local 134*, 13-CC-225655 (Dec. 20, 2018) (Advice Memorandum). This is notwithstanding the fact that this

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Council, Inc., 425 U.S. 748, 760 (1976), or is "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). The protests here meet neither of those definitions. Moreover, the Supreme Court's recent cases have left unclear whether content regulation of commercial speech is judged by strict scrutiny, as recent cases such as *Iancu,*139 S. Ct. at 2299; *Matal*, 137 S. Ct. at 1764, and *Sorrell*, 564 U.S. at 557, suggest, or intermediate scrutiny, as earlier cases regarding advertising regulation held. *See Central Hudson,* , 447 U.S. at 566.

Even if intermediate scrutiny were applied to § 8(b)(4), on the theory that it is commercial speech, the Board's very broad interpretation of the scope of the prohibition on speech fails. The test is whether the government has a "substantial" interest and whether the Board's restriction "directly advances the governmental interest asserted" and "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. Even if the government, as a general matter, has an interest in restricting coercion as a way of inducing secondary boycott in order to prevent interruptions in commerce entailed when one business is embroiled in another's labor dispute, this application of the statute is far more extensive than is necessary to serve that interest and is therefore unconstitutional. *Matal*, 137 S. Ct. at 1765. There was no evidence that the sidewalk speech affected the activities of any consumers or other businesses, except for Ortiz and Preferred, who lost a contract with Harvest because of their labor law violations.

and other Circuits have found unions' display of banners and balloons to be protected First Amendment speech. *Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1219 (9th Cir. 2005); *Construction & Laborers' Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1127 (7th Cir. 2019); *Tucker v. City of Fairfield*, 398 F.3d 457, 462-63 (6th Cir. 2005). Given how far the Board's current view of the constitutional scope of § 8(b)(4) is from the current First Amendment jurisprudence, it is important to clarify that labor unions have the same First Amendment protection as others.

When the Court last addressed a First Amendment challenge to § 8(b)(4), in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988), it found "serious constitutional issues" with the statute's restriction on speech and, therefore, narrowly construed the terms "threaten, restrain, or coerce" to not cover the distribution of leaflets urging a secondary boycott. And in 1964, the Court found significant constitutional issues in applying § 8(b)(4) to consumer-facing secondary picketing. *NLRB v. Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 (1964) *(Tree Fruits*) (§ 8(b)(4) could not constitutionally be applied to picketing aimed at persuading grocery store shoppers

not to purchase apples grown in Washington while Washington fruit packers were on strike).[5]

The Court has not addressed the constitutionality of § 8(b)(4) since *DeBartolo*, and has not rejected a constitutional challenge to any application of it since 1982. *See Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.,* 456 U.S. 212, 226 (1982) (holding, in a single paragraph, that a partial work stoppage to protest Soviet invasion of Afghanistan was not speech protected by the First Amendment).[6] Since then, the Supreme Court has grown more receptive to First Amendment challenges. With two exceptions – involving laws protecting election integrity and prohibiting support for terrorism – the Supreme Court has not upheld against First Amendment challenge a law that discriminates on the basis of the content of protected speech in nearly three decades.[7] The Court has struck down

[5] In *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 610 (1980) ("*Safeco*"), the Court held that the *Tree Fruits* rule did not apply when the struck product accounted for "substantially all" of the neutral employer's business. The significance of this rule is discussed *infra* note 9.

[6] A more sustained discussion of the constitutional infirmity of § 8(b)(4) in light of recent decisions may be found in Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 Columbia L. Rev. 2057 (2018); Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 Berkeley J. Emp. & Labor L. 277 (2015); Charlotte Garden, *Labor Values are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 Fordham L. Rev. 2617 (2011).

[7] The two exceptions were *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015) (upholding Canon of the Code of Judicial Conduct prohibiting judges from making direct fundraising appeals) and *Holder v. Humanitarian Law Project*,

every content-based restriction on speech since *Burson v. Freeman*, 504 U.S. 191, 210 (1992) (upholding statute prohibiting electioneering within 100 feet of the entrance to a polling place).

Outside the labor union context, the Court has long rejected the idea that picketing is coercive. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court held that civil rights activists' picketing was protected even though they used intimidation and social ostracism to enforce a massive boycott of white-owned businesses in Mississippi: "The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id*. at 903-04, 911. The Court noted, "[s]peech does not lose its protected character … simply because it may embarrass others or coerce them into action." *Id*. at 910.[8]

561 U.S. 1, 39 (2010) (upholding prohibitions on providing material support to terrorist organizations). A third case, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), would also qualify, but it was overruled in *Citizens United*, 558 U.S. at 319.

[8] The Court struck down content-based restrictions on picketing in two cases involving ordinances that prohibited some picketing but exempted labor picketing. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 460-61 (1980). The Court has upheld such restrictions only when the ordinance prohibited picketing targeted at a particular residence, *Frisby v. Schultz*, 487 U.S. 474, 482 (1988).

In 2011 and 2014, the Court invalidated prohibitions on picketing and similar sidewalk appeals, in both cases rejecting arguments that picketing can be prohibited because it is harmful or coercive conduct. In *McCullen v. Coakley*, the Court invalidated a Massachusetts law that prohibited all speech on public property within thirty-five feet of a clinic that performs abortions. Noting the constraints on government's power to limit speech in public forums such as streets and sidewalks, the Court held that "in such a forum the government may not selectively … shield the public from some kinds of speech on the grounds that they are more offensive than others." 134 S. Ct. 2518, 2529 (2014) (citation omitted). In *Snyder v. Phelps*, 562 U.S. 443 (2011), the Court held that the First Amendment shields picketers from tort liability for foulmouthed and homophobic picketing on public property near a military funeral. The Court emphasized "speech on matters of public concern is at the heart of the First Amendment's protection" and "occupies the highest rung of the hierarchy of First Amendment values." *Id*. at 451-52 (internal punctuation omitted). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Id*. at 453 (internal quotation marks omitted). If there is a First Amendment right to stand on a public sidewalk with a sign saying that "God hates fags," and "Thank God for 9/11," surely there must be a First Amendment right to

stand on a sidewalk with a sign asking for help in ending workplace sexual harassment, for a raise, and for a union.

Moreover, this Court has recently explicitly held that labor picketing is speech protected by the First Amendment. *Eagle Point Educ. Ass'n v. Jackson Cnty. School Dist. No. 9*, 880 F.3d 1097 (9th Cir. 2018). In *Eagle Point*, a school district prohibited picketing and also display of signs and banners on school property during a strike. This Court treated the policy as restricting speech in a non-public forum (because it applied only to school property) and therefore applied the more deferential intermediate scrutiny standard applicable to speech restrictions in non-public forums. *Id.* at 1105. Even so, the Court struck down the restriction on the basis both that it was not reasonable as a means of "avoiding disruption," *id.*, and was aimed at restricting expression of a particular viewpoint, *id.* at 1107. *But see NLRB v. Int'l Ass'n of Ironworkers, Local 433*, 891 F.3d 1182 (9th Cir. 2018) (denying Rule 60 motion to set aside permanent injunction against secondary picketing on the ground that picketing is symbolic conduct that can be upheld on review less than "exacting").

II. THE NLRB'S BROAD APPROACH TO § 8(b)(4) RAISES UNNECESSARY CONSTITUTIONAL PROBLEMS

As the previous section explains, the Board's reading of § 8(b)(4) to cover peaceful picketing aimed at protesting sexual harassment violates the First

Amendment. We urge the Court to reverse the Board on that basis. However, it is also true that the Board's approach is inconsistent with the Supreme Court's directive that § 8(b)(4) should be read narrowly, in order to avoid unnecessary conflict with the First Amendment. Such a reading is supported by Supreme Court precedent, and the text and legislative history of the statute.

A. The Supreme Court and the Courts of Appeals Construe § 8(b)(4) Narrowly To Avoid "Serious Constitutional Problems" That Would Otherwise Arise

In multiple cases – including its most recent decision on the scope of § 8(b)(4) – the Supreme Court has held that the statute should be construed narrowly to avoid "serious constitutional problems." *DeBartolo*, 485 U.S. at 575. This Court has followed that directive in previous cases.

In *Tree Fruits*, 377 U.S. at 71, the Court held that § 8(b)(4)(ii)(B) should be construed not to cover picketing in support of a call for a consumer boycott of a struck product sold by a neutral employer. Presumably recognizing that it would be difficult to draw attention to their cause if they confined their picketing to the primary employers' operations, fruit packers expanded to their picketing to Seattle grocery stores. Their picket signs called on consumers to boycott Washington state apples, but did not suggest boycotting the stores as a whole. *Id*. at 59-60.

The NLRB concluded that this picketing violated § 8(b)(4), reasoning that the statutory language covered all consumer-facing picketing at secondary sites. But the Court reversed because "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *Id*. at 63. After reviewing the legislative history of §8(b)(4), the Court construed the statute not to reach non-coercive consumer picketing, which it distinguished from "consumer picketing [intended] to shut off all trade with the secondary employer unless he aids the union in its dispute." *Id*. at 70-71.

The same approach led to a similar result in *DeBartolo*. There, union representatives passed out handbills asking consumers not to shop at any of the stores in a shopping mall because one of the stores employed a construction firm that paid substandard wages. 485 U.S. at 570. Again, the NLRB held that the union's secondary activity violated the literal language of § 8(b)(4). And again, the Court reversed; obvious constitutional difficulties would arise if the NLRA were construed to forbid peaceful handbilling calling for a consumer boycott, and neither the statutory text nor the legislative history contained a clear statement of congressional intent to that effect. *Id*. at 588. Significantly, the Court did not conclude the reading of § 8(b)(4) that it adopted was the *best* reading based on the statutory text – instead, it wrote that this reading was "*not foreclosed*," and therefore should be adopted. *Id*. (emphasis added).

This Court has followed the same approach. In *Overstreet*, this Court avoided a constitutional question by refusing to enjoin union members from holding banners reading "SHAME ON [RETAILER]" and "LABOR DISPUTE" near neutral businesses. 409 F.3d at 1201. This Court's interpretation of the statutory language was driven in part by its recognition that "First Amendment jurisprudence establishes that individuals ordinarily have the constitutional right to communicate their views in the presence of individuals they believe are engaging in immoral or hurtful behavior." *Id*. at 1211; *see also Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 439 (D.C. Cir. 2007) (secondary mock funeral did not violate §8(b)(4) because, in light of then-recent First Amendment cases, it did not threaten, coerce, or restrain those who saw it).

B. Holding That § 8(b)(4) Covers the Picketing in This Case Would Raise Serious Constitutional Questions, And Another Reading Is Possible

The NLRB concluded that the workers in this case violated § 8(b)(4) because they engaged in picketing "to pressure Harvest, a neutral employer, to cease doing business with Preferred unless it increased wages for janitorial employees working in that building and removed Ortiz." 366 N.L.R.B. No. 159 at *5. But under *Tree Fruits*, 377 U.S. 58, and *DeBartolo*, 485 U.S. 568, the Board's conclusion was flawed for at least two reasons: First, neither the statutory language nor the relevant legislative history reflects clear congressional intent to cover

picketing that is visible to consumers, but does not call for a secondary consumer boycott or prevent customers or delivery drivers from accessing the picketed business; and second, the picketing in this case was not coercive by that or any other plausible measure.

1. The Picketing In This Case Was Not Coercive

The Board's conclusion that the picketing in this case was coercive apparently rested on the Administrative Law Judge's finding that the workers and their allies held picket signs and "patrolled in circles in front of the lobby of 55 Hawthorne." 366 N.L.R.B. No. 159 at *18. But, based on *Tree Fruits* as well as the Court's more recent decisions concerning picketing and protest, these facts alone cannot support a finding of coercion under § 8(b)(4).

Tree Fruits rejected the proposition that picketing – even when accompanied by patrolling – is necessarily coercive. Instead, consumer-facing secondary picketing is coercive only if it is also intended to "persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." *Tree Fruits*, 377 U.S. at 63. This means that the existence of a picket line in front of a secondary employer is not enough to establish coercion – instead, the potential for coercion

arises only if the neutral employer faces a boycott with severe economic consequences, as may occur when picketers demand that consumers boycott the neutral business in its entirety, or that third parties stop making deliveries. In other words, a picket line involving signs reading "WE PREFER NO MORE SEXUAL HARASSMENT" is not more inherently coercive than one reading "Thank God for 9/11" or "God Hates You," *Snyder*, 562 U.S. at 454 – but both of these situations are distinguishable from a picket line that effectively shuts down a neutral business by depriving it of deliveries or customers. Only in the latter situation might a neutral business reasonably feel compelled to act out of fear for its own economic well-being, rather than because it has been persuaded by the picketers' message.[9] *Cf. NLRB v. Servette, Inc.*, 377 U.S. 46, 51 (1964) (union did not violate §8(b)(4) when it requested that a manager stop handling struck product, where request did not involve threats, coercion, or restraint).

Here, the picketing was consumer facing, but the Board's decision does not suggest that the picketers ever called for consumers to boycott Harvest or any of its

[9] This distinction explains the outcome in *Safeco*. There, the Court held that a union violated § 8(b)(4) when, in the course of a dispute with Safeco Title Insurance Company, the union picketed in support of a consumer boycott of Safeco policies at a title company that sold almost nothing except Safeco policies. 447 U.S. at 610. In a plurality opinion, Justice Powell wrote that the picketing violated § 8(b)(4) "[s]ince successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco." *Id*. at 615.

tenants, and it also does not reflect that a spontaneous boycott of Harvest occurred, or that any consumer or delivery person was prevented from entering Harvest's building -- this makes this case easier than *Tree Fruits*, where there the call for a consumer boycott of a struck product could have had a small effect on Safeway's bottom line. Absent any evidence either that the picketers called for any boycott or that a boycott occurred, there is no reason to believe that Harvest or any of its tenants could have been coerced. Instead, the facts suggest that the picketing was persuasive – a representative of Harvest was understandably motivated to take action in response to learning of the picketers' allegations, and requested that Preferred investigate the picketers' allegations of sexual harassment; Preferred then cancelled its contract with Harvest. 366 N.L.R.B. No. 159 at * 3.

2. Legislative History Suggests Congress Did Not Intend To Prohibit Non-Coercive Consumer-Facing Picketing

It should be sufficient that the Board's view of what qualifies as coercive picketing is out of line with recent First Amendment case law, Supreme Court precedent interpreting § 8(b)(4), and any common-sense understanding of what qualifies as coercive. But it is also out of line with the legislative history of the Labor Management Reporting And Disclosure Act, the 1959 statute that added the relevant language of § 8(b)(4). *See Tree Fruits*, 377 U.S. at 63 (peaceful picketing does not violate § 8(b)(4) if legislative history is silent or ambiguous); *NLRB v. Drivers, Chauffeurs, Helpers Local Union 639*, 362 U.S. 274, 284 (1960) (peaceful

labor picketing does not violate the NLRA "unless there is the clearest indication in the legislative history" of congressional desire to outlaw the particular tactic).

As the Supreme Court discussed in *NLRB v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964), and *Tree Fruits*, 377 U.S. at 64-70, § 8(b)(4) originally covered only secondary strikes and refusals by employees of neutral employers to handle struck goods. The LMRDA's amendments were meant to close several loopholes in this formulation by covering "direct inducement of a supervisor or the secondary employer [in support of one of the prohibited goals] by threats of labor trouble"; by making clear that coercing a single employee could violate the statute; and by ensuring that entities that are not employers under the NLRA, such as "railroads, airlines, and municipalities," were nonetheless entitled to § 8(b)(4)'s protection. *Tree Fruits*, 377 U.S. at 64-65. These loophole closures were not aimed at ending labor picketing in general – to the contrary, they targeted what Congress perceived as economically disruptive labor practices, such as the ability of unions to stop deliveries into a neutral business as long as they prevailed upon only one delivery driver at a time. *Id.*; *see also, e.g.*, *Message from the President of the United States Transmitting a 20-Point Program to Eliminate Abuses and Improper Practices in Labor-Management Relations*, S. Doc. No. 10 (Jan. 28, 1959) (discussing specific loopholes in § 8(b)(4)); 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 ("Leg. Hist."), at 1193-94 (Senator

McClellan describing loopholes to be filled by the LMRDA, and describing problem of secondary picket lines shutting down deliveries to neutral businesses because "the Teamsters will not cross the picket-line"). The legislative history emphasizes that Congress amended § 8(b)(4) in order to prevent relatively powerful unions from effectively shutting down small businesses in order to achieve unlawful ends, such as the unionizing of a group of employees without winning majority support. *E.g.*, 2 Leg. Hist. at 1568 (Representative Griffin, describing use of secondary boycotts against companies whose employees voted against union representation, or voted for representation by a different union).

The situations with which Congress was concerned in 1959 could not be further from this case. Here, a group of low-wage workers protested sexual harassment at the place where they worked. Because this workplace contracted with a janitorial services company rather than hiring cleaners directly, it was a "neutral" employer. But persuasive picketing in this case differs in important ways from picketing that threatens to close down a neutral business.

CONCLUSION

For the foregoing reasons, the petition for review should be granted and the Board's decision rejected.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Circuit Rule 28.1 and Rule 32(g)(1), as it contains 6,871 words and is prepared using Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 29, 2019

By /s/ Catherine L. Fisk