Nos. 20-35818 & 20-35819

IN THE

United States Court of Appeals for the Ninth Circuit

ICTSI OREGON, INC.,

Plaintiff-Appellee/Cross-Appellant,

v.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND ILWU LOCAL 8,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court for the District of Oregon
Case No. 3:12-CV-01058-SI
The Honorable Michael H. Simon, Presiding

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE/CROSS-APPELLANT ICTSI OREGON, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel hereby states the following:

Amicus the Chamber of Commerce of the United States of America has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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INTERESTS OF *AMICUS CURIAE*[1]

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

The Chamber has an interest in the critical protection afforded by the "secondary boycott" provisions in the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq*., which make it unlawful for a union to entangle a "neutral" employer in labor disputes not their own. A proper

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), *amicus* certifies that no counsel for a party authored the brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties consented to the filing of this brief.

and effective application of that prohibition is essential to the free flow of commerce. The Chamber submits this brief in support of Appellee/Cross-Appellant ICTSI Oregon, Inc. ("ICTSI") to respond to the account of the legislative history offered by Appellants/Cross-Appellees International Longshore and Warehouse Union ("ILWU") and ILWU Local 8 (collectively, "ILWU"), Br. at 5-8, as well as the First Amendment objections advanced by certain *amici*, although tellingly not by ILWU itself, *see generally* Brief of 11 Scholars and Professors of Labor History, Labor Law and the Constitution as *Amici Curiae* ("Scholars' Br.").

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 8(b)(4) of the NLRA makes it "an unfair labor practice for a labor organization or its agents … to threaten, coerce, or restrain any person engaged in commerce … where … an object thereof is ... forcing or requiring any person ... to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). This provision has long been understood to maintain a distinction between permissible "primary" boycotting activities and impermissible "secondary" boycotting activities, even though the Act "does not expressly mention 'primary' or

'secondary' disputes." *N.L.R.B. v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 686 (1951). A primary strike or boycott "is addressed to the labor relations of the contracting employer *vis-à-vis* his own [union] employees," and is lawful. *Nat'l Woodwork Mfrs. Ass'n v. N.L.R.B.*, 386 U.S. 612, 645 (1967). So, of course, a union may generally go on strike with the aim of persuading its employer to, for example, raise wages or improve labor conditions.

A secondary boycott, however, generally consists of "pressure tactically directed toward a neutral employer in a labor dispute not his own" in order "to induce [the neutral employer] to cease doing business with the primary employer," who is feuding with the union. *Id.* at 623-24. Secondary boycotts are *prohibited* by § 8(b)(4). *Id.* A union cannot, for example, "engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B." S. Rep. No. 80-105, at 22 (1947); *accord Ahearn ex rel. N.L.R.B. v. ILWU, Local 21*, 721 F.3d 1122, 1128 (9th Cir. 2013). Nor can a union, having no relationship to employer A, picket or boycott employer A to coerce it to discharge employees who decline to join a union. *See*, *e.g.*, 93 Cong. Rec. 3424 (1947). And, as relevant here, a union cannot "coerce[] an

employer in order to obtain work that the employer has no power to assign." *N.L.R.B. v. Enters. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & Gen. Pipefitters, Local 638*, 429 U.S. 507, 521 (1977).

Prohibition of secondary boycotts has long been a feature of American law. The ban on secondary boycotts was lifted temporarily during the Great Depression—with neutral employers (particularly small businesses) suffering devastating consequences. Congress took note of the problem and corrected course. It enacted § 8(b)(4), which reinstated the longstanding ban on secondary boycotts and, at the same time, preserved the unions' right to engage in primary activities. *Infra* § I.A. Courts interpreting § 8(b)(4) have sought to respect that balance, ensuring that unions can take collective action against employers with whom they have a labor dispute (primary employers), while protecting neutral employers from collateral attacks seeking to pressure primary employers by harming their business partners. *Infra* § I.B.

Moreover, courts have carefully separated noncoercive forms of expression from the sort of coercive *conduct* that § 8(b)(4) prohibits. While noncoercive expression is protected by the First Amendment,

coercive conduct is not. Accordingly, the federal ban on coercive secondary boycotts does not violate the First Amendment, *infra* § II.A; nor does a compensatory damages award resulting from a violation of that ban, *infra* § II.B. The application of § 8(b)(4) in this case does not implicate any constitutional concerns, and the Scholars' attempt to inject a First Amendment issue into the union's appeal of the verdict is without merit.

ARGUMENT

I. Section 8(b)(4) Restored The Longstanding And Critical Distinction Between Primary And Secondary Boycotts.

ILWU's history of secondary boycotts (at 5-8) is incomplete. The full picture reveals how, over time, Congress has worked to achieve—and maintain—a balance between the respective rights and responsibilities of employers and labor unions. An important part of that balance is the principle, recognized by Congress and enforced by the courts, that labor unions cannot attempt to coerce neutral employers with whom they have no direct dispute.

A. Prohibitions on secondary boycotts have enjoyed wide support as part of an effort to ensure appropriate balance in power between labor and management.

While *federal* treatment of secondary boycotts began in earnest with the Sherman Antitrust Act of 1890, *cf.* ILWU Br. at 5, the full story begins even earlier. Years before, state law (statutory and common law) developed a "recognized distinction between a primary and secondary boycott." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466 (1921). Such laws prohibited secondary boycotts[2] but allowed primary strikes and boycotts.[3] After the Sherman Act was passed, however, federal courts began enjoining "all manner of strikes and boycotts"—both primary and secondary—"under rulings that condemned virtually every collective activity of labor as an unlawful restraint of trade." *Nat'l Woodwork*, 386 U.S. at 620.

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[2] *See, e.g.*, *Auburn Draying Co. v. Wardell*, 227 N.Y. 1, 4 (1919); *Beck v. Ry. Teamsters' Protective Union*, 77 N.W. 13, 22 (Mich. 1898); *Crump v. Commonwealth*, 6 S.E. 620, 622-23, 627-29 (Va. 1888); *State v. Glidden*, 8 A. 890, 891, 894 (Conn. 1887).

[3] *See, e.g.*, *Nat'l Protective Ass'n of Steam Fitters & Helpers v. Cumming*, 170 N.Y. 315, 326 (1902); *Beck*, 77 N.W. at 21; *cf. Toledo, A. A. & N. M. Ry. Co. v. Penn. Co.*, 54 F. 730, 738 (Ohio C.C. 1893).

Congress found this unbalanced situation unsatisfactory and enacted the Clayton Antitrust Act of 1914 to protect unions "recommending, advising, or persuading others" to strike or boycott "by peaceful and lawful means." *Id.* at 621 (quoting 38 Stat. 738). Unions "hailed the law as a charter immunizing [their] activities from the antitrust laws." *Id.* But the Supreme Court did not interpret the Clayton Act so broadly. It held that the Clayton Act had reinstated the "recognized distinction between a primary and a secondary boycott." *Duplex*, 254 U.S. at 466. Far from "defy[ing] Congress," ILWU Br. at 6, the Supreme Court respected the balance Congress intended to restore.

That remained the state of play for more than a decade. But in 1932, during the Great Depression, "Congress enacted the Norris-LaGuardia Act," which "abolished … the distinction between primary activity … and secondary activity." *Nat'l Woodwork*, 386 U.S. at 622-623.[4] The Act "immunized" unions from liability for secondary strikes and boycotts that "trapp[ed] a neutral employer in the middle of" disputes between other parties (including disputes between unions). *Id.*

[4] The NLRA followed soon after but did not at that time address secondary boycotts. *See* Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151 *et seq.*).

at 623 (citing *United States v. Hutcheson*, 312 U.S. 219, 232 (1941)). After World War II, Congress recognized that the balance between employers and labor unions was again upset and was negatively affecting commerce. Accordingly, Congress sought to curtail the "[l]abor abuses of the broad immunity granted by the Norris-LaGuardia Act." *Id.*

Enter the Taft-Hartley Act of 1947. As one of the bill's proponents explained, "[w]hen the Norris-LaGuardia Act was passed in 1932, … labor was the underdog, and such legislation was needed to equalize labor's bargaining position," given "the tremendous advantage of management over labor." 93 Cong. Rec. 3413; *see also id.* at 3834 (similar). Everyone—even *opponents* of the Taft-Hartley Act—agreed that, in the years after the Norris-LaGuardia Act, the labor unions "abuse[d]" the immunity afforded them by the statute. *E.g.*, *id.* at 4767; *see also* H.R. Rep. 80-245, at 95 (1947) (Minority Report) ("No one can deny that labor unions have engaged in some activities that are so clearly unjustifiable that this Congress can and should legislate against them immediately."); S. Rep. 80-105, pt. 2, at 19 (1947) (Minority Report) (similar).

Thus, the House Committee on Education and Labor, which prepared the initial draft of the Taft-Harley Act, stressed "the absolute necessity of steering a course which would recognize the rights of all interested parties in labor relations and which would be scrupulously fair to each." H.R. Rep. No. 80-245, at 4. The goal was to give the employer and the employees "substantially equal bargaining power, so that neither side feels that it can make an unreasonable demand and get away with it." 93 Cong. Rec. 3835.

A focus of that effort was the secondary boycott, which was near "universally condemned." *Id.* at 4834. The legislative history is replete with discussions of such boycotts and their pernicious consequences. For example:

- The employees of a manufacturer of neon signs "were organized by a CIO union," and as a result, "the A.F. of L. sign hangers' union refused to hang [the manufacturer's] signs before any store." *Id.* at 3838.

- "[T]he New York Electrical Workers' Union … said, 'We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City.'" *Id.* at 4199; *see also* S. Rep. 80-105, at 22.

- When employees of a small paint-making manufacturer declined to join a union, "members of the paint-makers [union] joined forces with the teamsters local and the teamsters refused to pick up or

> deliver any products of the paint maker," which forced him out of business. 93 Cong. Rec. 3424.

Worried about how secondary boycotts could devastate small businesses, H.R. Rep. No. 80-245, at 24, "tie up the entire United States" economy, and generally hinder the free flow of commerce, the proponents of the Taft-Hartley Act sought to "reverse the effect of the [Norris-LaGuardia Act] as to secondary boycotts," 93 Cong. Rec. 4198 (statement of Sen. Taft). Under the bill, "it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B," or to "boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute)." S. Rep. 80-105, at 22. Nor would it be lawful "to engage in the type of secondary boycott … conducted in New York City …, where[] electricians have refused to install electrical products of manufacturers employing electricians who are members of some [other] labor organization." *Id.*

The proposed ban on secondary boycotts was not as controversial as ILWU suggests (*e.g.*, at 6-9). "[T]he great majority of Senators … agreed that secondary boycotts … [were] wrong, and that they should be

stopped." 93 Cong. Rec. 4838. For precisely that reason, some individuals who opposed other aspects of the Taft-Hartley Act supported the ban on secondary boycotts. *See*, *e.g.*, *id.* at 3432 (statement of Sen. Landis). Even those opposed to the ban conceded that labor unions' resort to secondary boycotts was often dangerous and unjustified. *E.g.*, *id.* at 4767 (statement of Sen. Murray) ("Admittedly, there are abuses in labor's resort to unjustifiable secondary boycotts … which are proper subjects of Federal legislation."); S. Rep. 80-105, pt. 2, at 21 (describing some secondary boycotts as "clearly unjustified").[5]

The minority of Senators who opposed the ban on secondary boycotts had a few primary concerns echoed by ILWU and the *amici* Scholars here—two of which the Supreme Court has addressed over the years and all of which were rejected by the majority in passing the Act.

[5] There was virtually unanimous support for "outlawing the secondary boycott in aid of jurisdictional strikes." 93 Cong. Rec. 4199 (statement of Sen. Pepper); *see also id.* at 4841, 4845, 4899. (A jurisdictional strike involves a dispute over "which labor union is entitled to perform a particular task." *Id.* at 3420.) Notably, the dispute in this case began as a jurisdictional dispute: The question was whether ILWU or another union (the International Brotherhood of Electrical Workers) should provide the required maintenance for refrigerated shipping containers. *See ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union, Local 8*, 442 F. Supp. 3d 1329, 1338 (D. Or. 2020).

One concern, which ILWU references (*e.g.*, at 8), was that the language of the Taft-Hartley Act was so broad that what was described as a ban on "secondary boycotts" would in fact prohibit primary boycotts. *See*, *e.g.*, 93 Cong. Rec. 4197-4198 (statement of Sen. Pepper). The majority of Senators disagreed and went so far as to defend the critical role of the primary boycott in labor relations. *See*, *e.g.*, *id*. at 4198 (Sen. Taft agreeing with a quote from Chief Justice Taft, his father, on the importance of "[t]he strike [as] a lawful instrument in a lawful economic struggle"); ILWU Br. at 8 (discussing this same exchange). Indeed, the Supreme Court has consistently interpreted the Taft-Hartley Act as distinguishing between secondary and primary boycotts, rendering only the former unlawful. *See infra* § I.B. To make this clear, Congress later added a proviso to § 8(b)(4) of the NLRA. *See* 29 U.S.C. § 158(b)(4)(i)(B).

A second concern, echoed by certain of ILWU's *amici*, *see* Scholars' Br. at 18-29, was about free speech. Opponents of the Taft-Hartley Act worried that the ban on secondary boycotts infringed on "the right of an American citizen to speak his mind to his neighbor" and "petition to their fellow workers for help." 93 Cong. Rec. 4199 (statement of Sen.

Pepper). The majority again disagreed, emphasizing that workers retained their "right to organize and to require the [primary] employer to bargain with them." *Id.* at 4198 (Sen. Taft). Yet, they understood that secondary boycotts, long prohibited by the common law, posed a unique threat to commerce, as they could cause "a chain reaction that [would] tie up the entire United States." *Id.* And again, the Supreme Court has been attentive to the First Amendment in interpreting § 8(b)(4). *See infra* § II.A.

Third, as ILWU notes (at 7), one senator was concerned with the scope of damages available under the bill. *See* 93 Cong. Rec. 4872-73 (statement of Sen. Morse). ILWU, however, does not accurately capture the thrust of this objection. Senator Morse expressed concern that damages under the bill were "not limited to the so-called direct injury suffered by the employer." *Id.* at 4872. In particular, he worried that *consequential damages* would be awarded to downstream market participants indirectly harmed by a secondary boycott. *See id.* (giving example of "a thousand drug stores" suing a union for lost profits after failing to receive "a certain issue of a popular magazine" due to the secondary boycott of a print shop). Senator Taft correctly denied that

the statute would have such an effect. *Id*. at 4872-73; *see also* ICTSI Br. at 47-48.

Ultimately, the Taft-Hartley Act passed, amending § 8(b)(4) of the NLRA to prohibit secondary boycotts. *See* 29 U.S.C. § 158(b)(4).[6]

B. Courts interpreting § 8(b)(4) have carefully distinguished lawful primary boycotts from unlawful secondary boycotts.

Responding to the concerns of § 8(b)(4) skeptics—which ILWU echoes here, *see supra* at 12—the Supreme Court has long made clear that the provision bars only *secondary* boycotts. Primary boycotts (or strikes) against an employer with which a union has a dispute remain entirely lawful. *See, e.g.*, *Nat'l Woodwork*, 386 U.S. at 626 ("Judicial decisions interpreting … [§] 8(b)(4)(A) … uniformly limited its application to … 'secondary' situations."); *Denver Bldg.*, 341 U.S. at 687 ("At the same time that [the Taft-Hartley Act] safeguard[s] collective bargaining, concerted activities and strikes between the primary parties to a labor dispute, [§] 8(b)(4) restricts a labor organization and its

[6] Further amendments to § 8(b)(4) were made in the Landrum-Griffin Act of 1959, *see*, *e.g., infra* at 17-18 n.8, to strengthen the ban on secondary boycotts by "clos[ing] various loopholes in the application of" the provision. *Nat'l Woodwork*, 386 U.S. at 634. Those amendments are not relevant here.

agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else."); *N.L.R.B. v. Int'l Rice Mill. Co.*, 341 U.S. 665, 672 (1951) ("Congress did not seek, by [§] 8(b)(4), to interfere with the ordinary strike.").

As its precedent shows, the Supreme Court has elaborated at some length on the distinction between primary and secondary boycotts. That distinction is hardly "illusive." ILWU Br. at 7 (quoting 93 Cong. Rec. 4844).

Two Supreme Court cases demonstrate the distinction.

National Woodwork. There, a general contractor's collective bargaining agreement with its carpenters' union required the contractor to use doors that had *not* been pre-cut and pre-fitted. 386 U.S. at 615-16. The general contractor nonetheless "contracted for the purchase of [pre-fitted] doors," and the carpenters' union ordered its members "not to hang the doors when they arrived at the jobsite." *Id.* at 616. Was this a permissible primary boycott or an unlawful secondary boycott? The Supreme Court held it was a primary boycott. "The touchstone" of the inquiry into whether a boycott is primary or secondary, the Court explained, "is whether the agreement or its maintenance is addressed to

the labor relations of the contracting employer vis-a-vis his own employees." *Id.* at 645. The union there sought to hold its employer to its collective bargaining agreement, and thus the union engaged in primary conduct. *Id.* at 646.

Denver Building. There, a general contractor hired an electrical subcontractor. 341 U.S. at 677. While that subcontractor used nonunion employees, the general contractor and all other subcontractors used union employees. *Id.* The unions decided to strike, protesting the electrical subcontractor's employment of nonunion employees. *Id.* at 678. The question for the Supreme Court: "[W]hether a labor organization committed an unfair labor practice … by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on that project." *Id.* at 677. Put simply: Was this an unlawful secondary boycott? The answer: Yes. *Id.*

As the Supreme Court explained:

> The nonunion employees were employees of [the electrical subcontractor]. The only way that [the unions] could attain their purpose was to force [the electrical subcontractor] itself off the job. This, in turn, could be done only through [the general contractor's] termination of [the electrical subcontractor's] subcontract. The result is that the [unions']

> strike, in order to attain its ultimate purpose, must have included among its objects that of forcing [the general contractor] to terminate that subcontract.

Id. at 688.[7]

"[T]he fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." *Id.* at 689-90; *see also Int'l Bhd. of Elec. Workers, Local 501 v. N.L.R.B.*, 181 F.2d 34, 37 (2d Cir. 1950) (Hand, J.) ("We cannot see why it should make any difference that the third person is engaged in a common venture with the employer, or whether he is dealing with him independently."). Accordingly, the conduct at issue in *Denver Building* was unlawful secondary activity, and thus an unfair labor practice.[8]

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[7] The Court also made clear that "[i]t [wa]s not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract" to find an unlawful secondary boycott. *Id.* at 689 (emphasis added).

[8] At least partially in response to *Denver Building*, Congress enacted § 8(e) of the NLRA, *codified at* 29 U.S.C. § 158(e). The "construction industry proviso" in that subsection permits (but does not require) a collective bargaining agreement between a union and a general

These cases confirm that the gravamen of an unlawful secondary boycott is that its target is not the employer with whom the union has a direct labor dispute, but a neutral party that the union wishes would cease doing business with someone else (usually either the primary employer or the neutral party's employees). *See*, *e.g.*, ICTSI Br. at 1-2 (quoting *ILWU v. N.L.R.B.*, 705 F. App'x 1, 3 (D.C. Cir. 2017) (*per curiam*) ("ILWU labor practices targeted against ICTSI … to pressure the Port to re-assign the [other union's jobs] were unlawful secondary boycotts targeting an employer that did not have the right to control the work.")).

***

This history shows that the distinction between primary and secondary boycotts preserves the balance of power between employers and labor unions necessary to a healthy and functioning economy. And, as Supreme Court and this Court's precedents demonstrate, that distinction is workable, if "not always … simple." *Nat'l Woodwork*, 386 U.S. at 645.

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contractor to "bar subcontracting except to subcontractors who are signatories to agreements with particular unions." *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 456 U.S. 645, 648, 661 (1982).

II. Neither The Prohibition On Secondary Boycotts Nor Damages For Breaching That Prohibition Violates The First Amendment.

The Scholars supporting ILWU have previously argued that Congress's prohibition of coercive secondary boycotts violates the First Amendment. *See generally* Brief of Amici Curiae Labor Law Professors In Support Of Petitioner at 4-7, 21-27, *SEIU, Local 87 v. N.L.R.B.*, No. 19-70334 (9th Cir. Aug. 26, 2019); Scholars' Br. at 9, 11, 20-21, 25, 27 (citing secondary sources by *amici* where they have previously argued that *all* picketing is protected speech and that the Supreme Court's precedent on unlawful secondary activities is wrong and must be reconsidered). But Supreme Court and Circuit precedent squarely forecloses that challenge. So *amici* now cloak these same First Amendment objections in the garb of "constitutional avoidance." Scholars' Br. at 18-29. Specifically, they maintain that "constitutional avoidance" militates against what they view as an "excessive" damages award here. *See id.* 18, 23. But constitutional avoidance has no role when precedent already forecloses a constitutional challenge. *Infra* § II.A.

Tellingly, ILWU does not press a First Amendment argument. Instead, the questions that ILWU presents on appeal—whether the jury was properly instructed on causation and damages under the statute and whether substantial evidence supports the jury's verdicts—do not implicate the First Amendment, making constitutional "avoidance" all the more irrelevant. *Infra* § II.B.

A. Prohibiting coercive secondary boycotts does not violate the First Amendment.

The Supreme Court has held that the First Amendment does not protect "speech or picketing in furtherance of unfair labor practices such as are defined in [§] 8(b)(4)." *Int'l Bhd. of Elec. Workers v. N.L.R.B.*, 341 U.S. 694, 704-05 (1951). That principle has endured for 70 years. Indeed, since then, the Supreme Court has "consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment." *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226-27 (1982); *N.L.R.B. v. Retail Store Emps. Union, Local No. 1001*, 447 U.S. 607, 616 (1980) (*Safeco*) (holding that the prohibition of secondary picketing "imposes no impermissible restrictions upon constitutionally protected speech"

(quoting *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 63 (1964) (*Tree Fruits*))).

This Court recently reaffirmed the vitality of this longstanding precedent, holding that § 8(b)(4)'s prohibition on secondary boycott activities does not offend the First Amendment. *N.L.R.B. v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 941 F.3d 902, 905-07 (9th Cir. 2019) (*Iron Workers, Local 229*), *petition for cert. pending*, No. 20-1111 (filed Feb. 8, 2021); *N.L.R.B. v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433*, 891 F.3d 1182, 1186-87 (9th Cir. 2018) (*Ironworkers Union, Local 433*).

1. The prohibition of secondary boycotts accords with the First Amendment by regulating coercive conduct, not communicative speech.

The underlying rationale for this longstanding precedent is straightforward: The prohibition against secondary boycotts targets conduct that is designed to intimidate and coerce, not communicate, and thus does not infringe speech that is otherwise protected under the First Amendment. *Longshoremen's*, 456 U.S. at 226. As this Court aptly noted, "a plain reading of § 8(b)(4)(ii)(B) reflects that the statute

regulates *conduct* rather than content," as it "prohibits 'threatening, coercing, or restraining any person engaged in commerce.'" *Ironworkers Union, Local 433*, 891 F.3d at 1187 (emphasis added). As also noted above (at 10, 14-18), Congress prohibited only conduct designed to "spread[] labor discord by coercing a neutral party to join the fray," not primary boycotts and protests. *Safeco*, 447 U.S. at 616.

Unlike a verbal protest or the peaceful broadcast of a message, "the[] forms of harassing and intimidating conduct" prohibited by § 8(b)(4)(ii)(B) are not "afford[ed] unbridled protection" under the Constitution. *Ironworkers Union, Local 433*, 891 F.3d at 1187. To be sure, a lot of conduct contains expressive elements. A union certainly communicates something as it engages in activities designed to intimidate or coerce a secondary, neutral employer. But those expressive elements are not so pervasive to transform unlawful coercion into protected speech. "In the labor context, it is the [coercive] conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a

business establishment." *Safeco*, 447 U.S. at 619 (Stevens, J., concurring) (quoted by *Longshoremen's*, 456 U.S. at 226 n.26).[9]

While picketing, for example, "is a mode of communication," *Hughes v. Superior Court*, 339 U.S. 460, 464 (1950), it "involves more than an expression of ideas," *Am. Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 419 U.S. 215, 229 (1974) (citing *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289 (1957))—something that "is qualitatively 'different from other modes of communication,'" *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 580 (1988). Labor picketing involves elements of coercive conduct, such as the "patrol of a particular locality" and a "picket line" that "may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring). It is that "mixture of conduct and communication," *Safeco*, 447 U.S. at 619 (Stevens, J., concurring), that allows for labor picketing to be subject to stricter

[9] Justice Stevens's concurring opinion in *Safeco* "provided the rationale for prohibiting secondary picketing consistent with the First Amendment that a majority of the Court eventually adopted." *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1210 (9th Cir. 2005).

regulation without running afoul of the First Amendment. *Miller v. United Food & Comm. Workers Union, Local 498,* 708 F.2d 467, 471 (9th Cir. 1983); *see also Bakery Drivers*, 315 U.S. at 776-77 (Douglas, J., concurring).

The Supreme Court has made clear that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (*quoted by Longshoremen's*, 456 U.S. at 226 n.26); *accord NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). That is precisely the situation here.

Congress had a "strong governmental interest" in prohibiting unfair labor practices, including certain secondary boycotts. *Claiborne Hardware*, 458 U.S. at 912; *see also Miller*, 708 F.2d at 471. Specifically, Congress wanted to "eliminate the causes of certain substantial obstructions to the free flow of commerce," while "encouraging … collective bargaining and … protecting the exercise by workers of" their rights. 29 U.S.C. § 151. And one of the ways in which

it sought to achieve this goal was by prohibiting conduct by labor unions that seeks to "embroil[] neutrals in a third party's labor dispute," *Safeco*, 447 U.S. at 619 (Stevens, J., concurring)—"neutral" businesses entitled to engage in commerce "free from coerced participation in industrial strife," *Claiborne Hardware*, 458 U.S. at 912 (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring in part)); *see also supra* at 8-14 (discussing legislative history).

The resulting conclusion is clear: Congress's interest in protecting commerce from the deleterious effects of unlawful secondary boycotts justifies whatever incidental limitation on First Amendment rights that may result from a prohibition on picketing, work stoppages, slowdowns, and other forms of non-speech, coercive conduct against a secondary employer.

2. Other forms of protest remain available to labor unions notwithstanding § 8(b)(4).

"[N]ot all forms of secondary protest are impermissible under" § 8(b)(4). *Ironworkers Union, Local 433*, 891 F.3d at 1187. Congress did not prohibit secondary activity that seeks to communicate rather than to coerce or intimidate. The statute, for example, includes the so-called "publicity proviso," under which it is lawful to engage in

"*publicity, other than picketing*, for the purpose of truthfully advising the public, including consumers …, that a product or products are produced by an employer with whom the labor organization has a primary dispute." 29 U.S.C. § 158(b)(4) (emphasis added).

Thus, in *Tree Fruits*, the Supreme Court held that a peaceful campaign where people "wore placards and distributed handbills which appealed to Safeway customers … to refrain from buying Washington State apples," was not a prohibited unfair labor practice under § 8(b)(4). 377 U.S. at 60, 71.[10] Similarly, in *DeBartolo*, the Court held that the peaceful distribution of "handbills asking mall customers not to shop at any of the stores in the mall" was lawful. 485 U.S. at 570, 578. "[N]ewspaper, radio, and television appeals" are similarly lawful speech that Congress did not prohibit in § 8(b)(4). *Id.* at 583 (dicta).

This conduct stands in stark contrast to the secondary picketing and related coercive conduct at issue in this case. *See ICTSI Oregon*,

[10] Although the *Tree Fruits* Court used the term "picket" to refer to the union's conduct, that "picket" consisted of two or three people "walk[ing] back and forth before the customers' entrances" to the store, handing out handbills. *Id.* at 60. This activity is more akin to handbilling than the traditional "picket line." *Bakery Drivers*, 315 U.S. at 777 (Douglas, J., concurring).

442 F. Supp. 3d at 1338 (stating that the "evidence presented at trial" showed that "ILWU engaged in work stoppages, slowdowns, 'safety gimmicks,' and other *coercive* actions" (emphasis added)); *see also* ICTSI Br. at 9-18 (providing fuller account of ILWU's coercive conduct against ICTSI).

The conduct in *Tree Fruits* and *DeBartolo* was permissible for one fundamental reason: These activities were meant to communicate an idea and lacked the coercive-conduct element that Congress prohibited in § 8(b)(4). For example, the subject of the union's campaign in *Tree Fruits* involved only "one item among the many that made up the [neutral] retailer's trade," and, because the campaign was so limited in scope, it was not coercive enough for the "neutral [employer] … to become involved in the labor dispute." *Safeco*, 447 U.S. at 613 (citing *Tree Fruits*, 377 U.S. at 72-73). Similarly, the handbilling in *DeBartolo* "'depend[ed] entirely on the persuasive force of the idea'" conveyed in the handbills, not any coercive tactics to pressure customers or retailers (such as blocking store entrances). 485 U.S. at 580 (quoting *Safeco*, 447 U.S. at 619 (Stevens, J., concurring)).

The distinction between coercive conduct and speech is further confirmed by this Court's decision in *Overstreet*. There, this Court held, at the preliminary injunction stage, that a union likely did not violate § 8(b)(4) by publicly displaying banners targeting retailers for contracting with companies that employed non-union employees and failed to satisfy wage standards. 409 F.3d at 1201, 1216. Such bannering activity was not in any way coercive; "[i]f anything, the [union's] behavior involved less potential for 'coerc[ing]' the public than the handbilling in *DeBartolo*, as there was no one-on-one physical interaction or communication." *Id.* at 1214. Unlike secondary picketing, this Court explained, the union's "bannering d[id] not involve patrolling in front of an entrance way," nor did it "create any physical barrier blocking the entrances to the Retailers or the walkways approaching those entrances." *Id.* at 1211. More importantly, nothing in the display of banners "could be regarded as threatening or coercive," *id.*—a far cry from the coercive "physical conduct of picketing," *id.* at 1210 (citing *Safeco*, 447 U.S. at 619 (Stevens, J., concurring)).

These lawful forms of secondary protest are always available to labor unions to persuade a neutral employer (and the public) of the

righteousness of their cause. Indeed, they are examples of the myriad "ways in which a union and its individual members may express their opposition … without infringing upon the rights of others," particularly, neutral businesses who do not wish to get involved in a union's labor disputes. *Longshoremen's*, 456 U.S. at 227. That Congress chose to protect these forms of secondary protest does not make the prohibition of unlawful secondary activities unconstitutional. If anything, the existence of protected alternatives proves the narrowness of Congress's prohibition.[11]

3. The principle of constitutional avoidance is not applicable when precedent rejects the constitutional question.

Amici seek to evade binding precedent by refashioning their First Amendment objections to § 8(b)(4) into a constitutional-avoidance-based objection. *See* Scholars' Br. at 18-19, 23. That strategy must fail. The

[11] This case demonstrates the point. ILWU observes in passing that certain of its activity—most notably, its participation in a Port of Portland Commission meeting—was "core First Amendment activity." ILWU Br. at 46-47. But, for the reasons just explained, the district court protected ILWU's supposed core First Amendment expression and separated it from impermissible secondary coercive conduct by instructing "the jury [that] … it could not hold ILWU liable for participating in 'court actions, NLRB proceedings, or meetings of the Port of Portland Commission." ICTSI Br. at 58 n.10.

precedent rejecting a First Amendment challenge forecloses *amici*'s repackaged objections under the guise of "constitutional avoidance." Stated differently, because there is no constitutional question implicated, none need be "avoided."

Amici correctly note that the Supreme Court and this Court have relied upon the principle of constitutional avoidance to construe the prohibition in § 8(b)(4) narrowly where necessary to avoid a significant risk that the First Amendment is infringed. *See, e.g.*, *id.* at 20-22. But where § 8(b)(4) has *already* been interpreted to avoid any First Amendment problem by prohibiting only unlawful conduct and not permissible speech, and where that prohibition on unlawful conduct has *repeatedly* been upheld against constitutional challenge, there is no further role for constitutional avoidance.

Amici's real goal, it seems, is to mount a collateral attack on this Court's clear precedent: "It is no longer possible to justify section 8(b)(4)'s draconian regulation of labor union speech," *amici* maintain, "when the speech of business entities and many other forms of picketing

and protest enjoy heightened First Amendment protection." Scholars' Br. at 28.[12]

The Supreme Court and this Court, however, have already rejected the argument that § 8(b)(4)'s prohibition of unlawful secondary boycotts raises any First Amendment questions. As noted, just two years ago, this Court refused to apply strict scrutiny to a § 8(b)(4) restriction. *Iron Workers, Local 229*, 941 F.3d at 905-06; *Ironworkers Union, Local 433*, 891 F.3d at 1186-87. *Amici* cannot rely on the principle of constitutional avoidance to revive a First Amendment argument that is already foreclosed and has been for 70 years.

B. Damages awards for unlawful secondary boycotts do not raise First Amendment concerns.

Unable to question the constitutionality of the statute, *amici* go after the damages award. They argue that the damages award in this case somehow "raises grave First Amendment concerns." Scholars' Br.

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[12] For example: *Amici* argue that *Tree Fruits*, *DeBartolo*, and *Overstreet* have "recognized the First Amendment issues in section 8(b)(4)'s obvious speaker-based and content-based restrictions on speech." Scholars' Br. at 19-20. But, as explained above (at 26-28), *Tree Fruits*, *DeBartolo*, and *Overstreet* depend on the distinction between permissible *speech* and unlawful coercive *conduct*—not the speaker or the content of the speech.

at 18. As explained above, however, the statutory prohibition giving rise to the claim for damages is perfectly consistent with the First Amendment. It makes little sense to assert that a damages award premised on conduct that is proscribed consistent with the First Amendment nevertheless raises First Amendment concerns.

Amici rely on two hooks to support their contention that damages awards somehow implicate the First Amendment: (1) the damages award here punishes conduct not prohibited by § 8(b)(4); and (2) the size of the award poses an existential threat to ILWU and, if replicated, to other labor unions. Neither is persuasive.

Amici first argue that the damages award "punishing all ILWU labor protest at the Port of Portland for nearly five years is not narrowly tailored to target only prohibited conduct with a prohibited object." Scholars' Br. at 18. Such punishment, *amici* contend, is constitutionally suspect because it condemns, at least in some part, "peaceful protest" at the Port. *Id.*

The issues *amici* highlight—whether ILWU had a secondary motivation and whether the award improperly punishes lawful primary conduct not covered by § 8(b)(4)—do not implicate any First

Amendment questions. Rather, as the district court explained in its decision and ILWU acknowledged in its brief, these disputes implicate a *statutory* issue that involves questions of motive, causation, and damages. *See ICTSI Oregon*, 442 F. Supp. 3d at 1350-51; ILWU's Br. at 29.

Stated simply: The central issues in this appeal are whether the jury was properly instructed, and whether the evidence presented at trial, viewed in the light most favorable to ICTSI, could establish causation and damages *under the statute*. *See, e.g.*, ICTSI Br. at 3 (responding to "ILWU's assignments of error"). *Amici* themselves acknowledge as much. *See, e.g.*, Scholars' Br. at 4-5 ("A central issue in this appeal is whether the verdict punishes protected or unregulated 'primary' labor protest (which cannot be the basis of a section 303 suit) or prohibited 'secondary' labor protest."); *see also id.* at 9, 17 (similar). These are run-of-the-mill, sufficiency-of-the-evidence and jury-instruction questions that have nothing to do with the First Amendment.

The same is true for the second hook upon which *amici* rely to constitutionalize the dispute: the *magnitude* of the damages award.

Amici claim that the damages award here "poses an existential crisis" for unions, *id.* at 2, and thus the Court should proceed carefully to avoid any risk of infringing on the unions' First Amendment rights. But the size of that award does not implicate the First Amendment in any way—it relates exclusively to whether the evidence presented at trial is sufficient to sustain the jury's damages award. *See* ICTSI Br. at 63-71, 78-86.

Moreover, the damages award here is only compensatory, not punitive. *See id.* at 49 (citing 2 NLRB, *Legis. History of the Labor Mgmt. Relations Act*, 1947, 1371 (1948)). And *amici* cite no authority for the proposition that *anyone*—whether a labor union, employer, journalist, politician, nonprofit organization, or private citizen—enjoys immunity under the First Amendment from a compensatory damages award that causes a financial hardship and thus might impede future speech. Many defendants, including corporations, have a whole panoply of rights, including First Amendment protections. *See*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) (collecting cases). Yet it is never a consideration in any other context whether a

compensatory damages award would cause such financial upset as to impact the defendant's opportunities for speech.

Nor is there an "abatement" option under the First Amendment to which labor unions can resort when the damages award is too high. In implicit acknowledgement that this is not a serious basis for constitutional challenge, *amici* do not even attempt to articulate a legal standard—much less a workable one—to govern if and when a damages award becomes too big to fail under the First Amendment.

CONCLUSION

The prohibition on secondary boycotts is a critical tool to avoid the debilitating impact of such boycotts on the free flow of commerce. Neither the prohibition in general, nor its application in this case, poses a threat to the First Amendment.

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FOR THE NINTH CIRCUIT

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