UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150

and **Case 25-CC-228342**

LIPPERT COMPONENTS, INC.

BRIEF OF *AMICUS CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE, CHAMBER OF COMMERCE OF THE UNITED STATES, INDEPENDENT ELECTRICIAL CONTRACTORS, INC., NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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I. STATEMENT OF INTEREST

The **Coalition for a Democratic Workplace ("CDW")** submits this brief as *amicus curiae* in response to the National Labor Relations Board's ("the Board") Notice and Invitation to File Briefs, 370 NLRB No. 40 (Oct. 27, 2020). CDW is a coalition of nearly 500 organizations[1] representing the interests of millions of private-sector employers nationwide. CDW's members are or represent the interests of employers subject to the National Labor Relations Act ("the Act") and are consequently affected by the Board's decision in this case. CDW advocates for its members on numerous issues of significance related to federal labor policy and interpretations and applications of the Act.

CDW and its members have a direct interest in this matter because they include both primary employers that are subject to union bargaining obligations, and neutral employers that are targeted by secondary boycott and picketing activity. Thus, the decision in this case will apply to CDW members both with and without union workforces.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The **Independent Electrical Contractors, Inc.** ("IEC") is the nation's premier trade association representing electrical systems contractors with over 50 chapters, representing 3,400

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

member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to establish a competitive environment for the merit shop – a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all. IEC advocates on behalf of its members on a wide array of legislative and regulatory issues, to include those under the Act.

The **National Association of Wholesaler-Distributors** ("NAW") is a non-profit trade association that represents the wholesale distribution industry, the link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW comprises direct member companies and a federation of national, regional, state and local associations, which together include approximately 40,000 companies operating at more than 150,000 locations throughout the nation. The overwhelming majority of wholesaler distributors are small- to medium-size, closely held businesses. The wholesale distribution industry generates $5.6 trillion in annual sales volume and provides stable and good-paying jobs to more than 5.9 million workers.

The **National Federation of Independent Business** ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

Collectively, CDW, the Chamber, IEC, NAW and NFIB are the "Amici."

II. POSITION ON THE BOARD'S QUESTIONS

The Board sought input from *amici* on four related issues:

1. Should the Board, adhere to, modify, or overrule *Eliason & Knuth* and *Brandon Regional Medical Center*?

2. If you believe the Board should alter its standard for determining what conduct constitutes proscribed picketing under Section 8(b)(4), what should the standard be?

3. If you believe the Board should alter its standard for determining what nonpicketing conduct is otherwise unlawfully coercive under Section 8(b)(4), what should the standard be?

4. Why would finding that the conduct at issue in this case violated the National Labor Relations Act under any proposed standard not result in a violation of the Respondent's rights under the First Amendment?

For the reasons explained herein, Amici support the General Counsel's position with respect to *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011) and asks the Board to overrule those decisions and return to a standard that considers whether the totality of a labor organization's secondary activity qualifies as picketing under Section 8(b)(4)(ii)(B). Amici believe the conduct at issue in the present case, as well as in *Eliason* and *Brandon Regional*, should qualify as picketing under the Act. But even if the Board declines to overrule these cases with respect to their definitions of picketing, the use of large "Scabby the Rat" displays in secondary campaigns should, in most cases, violate Section 8(b)(4) because it is otherwise coercive. This interpretation of the Act does not violate the First Amendment because Supreme Court precedent allows the Board to proscribe secondary picketing. Moreover, the restrictions are primarily focused on regulation of conduct and false or misleading speech, which are entitled to lesser protections than the handbilling deemed lawful by the Supreme Court in *Edward J.*

DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988).

III. ARGUMENT

i. Congress enacted Section 8(b)(4) to provide meaningful protections to neutral secondary employers, and the Board's interpretations should reflect that statutory policy goal.

Section 8(b)(4) of the Act protects neutral employers from certain secondary actions by labor unions aimed at forcing neutrals to cease or refrain from doing business with a primary employer. The policy justifications underlying this restriction are uncomplicated. Congress intended for labor relations to be a bilateral process, between an employer and its own employees. The Act was not designed to cause unrelated, neutral employers to become enmeshed in their labor disputes.[2] Without meaningful regulation to safeguard this principle, a primary labor dispute can metastasize and envelop neutral businesses with only tangential connections to the negotiating parties, resulting in significant restraints on free trade. Secondary pressure disrupts the balance of power in union-management relations by allowing the union to forcefully use management's business relationships against it. A primary employer, having no such arrow in its quiver, faces a material disadvantage in bargaining when labor can involve the employer's neutral business interests in the dispute. Congress therefore had sound reasons for regulating labor activity aimed at neutral businesses.

[2] *See* National Labor Relations Act, 29 U.S.C. § 151 ("[e]xperience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest…The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.").

Prior to the passage of the Taft-Hartley amendments to the Act, the courts regulated secondary boycotts under various theories, including criminal conspiracy and antitrust law.[3] Early decisions reflected the understanding that unregulated secondary activity created an inappropriate imbalance in labor's bargaining power. Indeed, if unions were unconstrained in their ability to coerce neutral businesses, a single labor dispute could disrupt an entire supply chain, industry or economic sector.

Congress addressed these ills in the Taft-Hartley amendments. The version of Section 8(b)(4) enacted through Taft-Hartley made it an unfair labor practice to induce or encourage employees of neutral employers to strike or refuse to do business where the union's motivation was a "secondary object."[4] These initial amendments, which focused only on concerted actions aimed at neutral employees, were underinclusive, and failed to satisfy Congress' stated policy objectives.[5] Congress revisited Section 8(b)(4) in the Landrum-Griffin amendments to the Act in 1959. Those amendments expanded the scope of protection for neutrals, and made it an unfair labor practice to "threaten, coerce, or restrain *any person* engaged in commerce, where in either case an object thereof is…forcing" that person to cease doing business with another. In making these amendments, Congress clearly indicated its intent to broadly prohibit labor from pressuring both neutral employees ***and employers*** during a labor dispute.

At the same time, Congress understood it was limited in its ability to restrict pure speech under the First Amendment. The "publicity proviso" included in the 1959 amendments to

[3] *See* Richard A. Bock, Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act, 7 U. Pa. J. Lab. & Emp. L. 905, 913 (2005).

[4] 29 U.S.C. § 158(b)(4)(A) (1947).

[5] *See N. L. R. B. v. Fruit & Vegetable Packers & Warehousemen, Local 760 ("Tree Fruits")*, 377 U.S. 58, 64, 84 S. Ct. 1063, 1067, 12 L. Ed. 2d 129 (1964) (discussing loopholes in the 1947 amendments that allowed secondary pressure aimed at supervisors and individual employees of neutral employers).

Section 8(b)(4) reflects that recognition. With the publicity proviso, Congress exempted from censure a narrow category of secondary activity involving truthful speech about particular products related to a labor dispute.[6] Specifically, Congress was concerned that, without the publicity proviso, Section 8(b)(4) could be read to preclude leafletting, radio broadcasts or newspaper advertisements aimed at discouraging consumers from purchasing products related to a labor dispute from secondary employers.[7] By enacting the proviso and carving out exceptions for activity like radio and newspaper advertisements that clearly caused First Amendment conflict, Congress signaled its intent to regulate secondary activity as broadly as possible within the confines of the First Amendment.

This historical background establishes two touchstone principles that should inform the Board's interpretation of Section 8(b)(4). First, Congress recognized that secondary boycott activity aimed at neutral employers is a significant industrial evil, both because of its impact on neutral businesses—and, in turn, interstate commerce—and because of the unnatural and unfair leverage it provided a union vis-à-vis the employer, industry and workers. Second, Congress intended to regulate secondary activity strictly, to the point that it amended the Act ***twice*** in an effort to accomplish its purpose. These two clear policy objectives guide the Board's interpretation of Section 8(b)(4) and augur against interpretations that undermine protections for neutral employers.

ii. The Board should overrule *Eliason & Knuth* and *Brandon Regional Medical Center* because both decisions artificially narrow the definition of picketing.

The Board should overrule both *Eliason* and *Brandon Regional*. In those cases, the Board strayed from Congressional intent, relied on artificial distinctions to narrow the scope of proscribed

[6] 29 U.S.C. § 158(b)(4).

[7] *Tree Fruits*, 377 U.S. at 69 (discussing the legislative history of the publicity proviso).

picketing, misinterpreted the relevant Supreme Court precedent, and relied unnecessarily on constitutional avoidance to sidestep its clear Congressional mandate to proscribe secondary activity.

a The Board in *Eliason* improperly framed the question presented, which resulted in a strained interpretation of Section 8(b)(4).

The Board's decision in *Eliason* was flawed from the outset. Rather than interpret the Act according to its terms and established precedent, the Board sought to use the First Amendment to sidestep its obligation to enforce the Act as written. Indeed, in the third paragraph of the decision, the Board opined that "[o]ur conclusion about the reach of the prohibition contained in Section 8(b)(4)(ii)(B) is strongly supported, *if not compelled*, by our obligation to seek to avoid construing the Act in a manner that would create a serious constitutional question."[8] Instead of deciding whether the facts reasonably showed that the union's conduct qualified as picketing, or otherwise as threatening, coercive or restraining, the Board framed its task as having to determine whether it could make any argument that the conduct *was not* threatening, coercive or restraining. In essence, the Board considered the abstract question of what kind of restriction on secondary activity *might* offend the First Amendment and failed to consider whether finding secondary picketing on the particular facts of the case would do so.

While the Board has an obligation to carry out its duties in a constitutional manner, its primary purpose is to apply its special expertise to applications of the Act. By focusing too heavily on the constitutional elements of the case, which, based on the facts, did not cabin the Board's determination, the Board abandoned its obligation to interpret and enforce the language of the Act.[9]

[8] *Eliason*, 355 NLRB 797, 797 (emphasis added).

[9] Even the Supreme Court disagrees on the proper application of constitutional avoidance. *See Clark v. Martinez,* 543 U.S. 371, 396 (2005) (Thomas, J., dissenting) (Justice Thomas argued that the majority's application

The Board's flawed methodology in *Eliason* resulted in a decision that downplayed—and, as a result, misinterpreted—the relevant precedent on secondary picketing. Indeed, as Member Hayes recognized in dissent, consistent with the intent of Section 8(b)(4), secondary picketing traditionally included a wide range of activity beyond "patrol[ling] in an elliptical pattern while carrying placards affixed to sticks."[10] The dissent cited numerous examples of Board and federal court cases finding secondary picketing where the picketers were not walking or carrying picket signs.[11] But because the Board in *Eliason* was preoccupied with potential First Amendment issues, it disregarded that precedent, rather than faithfully applying it.

The framing also caused the Board to deemphasize the conduct of the union agents in the case. The facts showed that between two and four union members held the banners in place at all times, while others walked around passing out flyers. These agents were, in some cases, as close as 15 feet from the entrance of the neutral employer facilities, with banners that were 4 feet high and 20 feet long.[12] Their presence at the entrance of secondary employer locations is a form of conduct, not speech. The presence of these union agents also distinguishes the bannering activity

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of constitutional avoidance was improper and that the Court should only apply the canon if constitutional questions were clearly raised by the application of the statute to the particular facts of the case); *Bond v. United States*, 134 S. Ct. 2077, 2095, 2097 (2014) (Scalia, J., concurring in the judgment) (referring to the Court's constitutional avoidance method as "results-driven antitextualism"); Eric S. Fish, Constitutional Avoidance As Interpretation and As Remedy, 114 Mich. L. Rev. 1275, 1276 (2016).

Given the disagreements even at the Supreme Court about the proper role of constitutional avoidance, the Board should certainly exercise restraint in applying the doctrine. As explained in Part iii, infra, the activities at issue in *Eliason* and *Brandon Regional* are subject to only limited constitutional protection and the Board's overreliance on constitutional avoidance was particularly inapt.

[10] *Eliason* at 815.

[11] *See id.* at (Members Schaumber and Hayes, dissenting); *Jeddo Coal Co.*, 334 NLRB 677, 686 (2001) ("neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather, the essential feature of picketing is the posting of individuals at entrances to a place of work"); *Trinity Maintenance*, 312 NLRB 715, 743 (1993) (same); *Kansas Color Press*, 169 NLRB 279, 283 (1968) ("The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business"); *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), *enforcing*, 135 NLRB 851 (1962) (finding picketing where union planted signs in a snowbank and watched from a parked car).

[12] *Eliason* at 798.

from permissible promotional action by unions, like newspaper or radio advertisements, that Congress intended to protect with the publicity proviso.

To distinguish the facts in *Eliason*, the Board relied on the unconvincing distinction that "[b]anners are not picket signs" and focused on the fact that the messaging on the signs faced the street.[13] If anything, that point *undercuts* the Board's conclusion that there was no confrontational element to union members holding massive banners at the entrance of neutral employer worksite. Would any reasonable person consider a small sign on a stick more confrontational than a large banner? The Board's strained attempt in *Eliason* to carve out an exception for bannering from its traditional restrictions on picketing was a departure from the Congressional intent underlying Section 8(b)(4).

Both the conduct and speech elements in *Eliason* were also readily distinguishable from *DeBartolo*, which the Board majority attempted to use to support its decision. The banners at issue in *Eliason* included virtually no factual information. One of the banners said "SHAME ON [neutral secondary employer]." Another banner said "Labor Dispute." But they did not include any information about ***who*** was involved in a labor dispute or ***why*** the public should shame the neutral. As a result, these banners were, at best, misleading because they falsely suggested a primary labor dispute between the union and the neutral employer. The banners did not attempt to "persuade" anyone under the traditional meaning of that term. Instead, they attempted to shock the public into an instant reaction and induce the consumer into a general boycott of the neutral employer to coerce it into dissociating with the primary employer. This is precisely the type of activity and the type of result that Section 8(b)(4) sought to proscribe.

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[13] *Eliason* at 802.

b The *Eliason* Dissent Convincingly Explains Why the Majority Misinterpreted *DeBartolo* and the Board's Precedent on Picketing.

Unlike the majority opinion, Member Hayes' *Eliason* dissent considered the proper foundational question: whether the bannering at issue in *Eliason* was analogous to conduct traditionally determined to be secondary picketing under the Act.

The dissent explains the key distinctions that make bannering coercive, and distinguishable from the conduct deemed lawful in *DeBartolo*. First, the banners were designed to elicit an "automatic response to a signal" – namely, that consumers and employees should not cross into the contested territory of the neutral employer. Second, the banners contained very limited speech. Unlike handbills, the banners broadcast nothing more than tidbits of misleading, if not outright false, information. They did not rely on 'mere persuasion,' as the Court found proper in *DeBartolo*, because persuasion suggests communicating facts and allowing observers to make informed decisions.[14] In *Eliason*, there was simply not enough information on the banners to persuade, particularly because the information on the banners, "Labor Dispute" and "Shame on [Employer]," suggested that the neutral employer was the party embroiled in the labor dispute. Propagating these misleading messages on large signs held by union agents is no different from advertising the same limited, false or misleading information on picket signs.

The majority in *Eliason* sought to legislate, rather than faithfully interpret Congressional intent. The Board majority evidently would have preferred Congress to provide wider latitude for unions to engage in secondary activity, and attempted to use constitutional avoidance and an

[14] *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568 (1988). The facts in *DeBartolo* are distinguishable because the union's conduct there involved *only* the distribution of handbills. The handbills also contained significantly more information, including appeals that "[t]he payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community." The banners in *Eliason* contained no such information.

artificial distinction between marching and standing in place to satisfy that aim. That approach is improper and beyond the Board's authority. As the dissent properly noted, "peaceful display of stationary signs by union agents posted at a neutral's premises, in support of a secondary objective, is among the class of confrontational actions Congress condemned."[15] *DeBartolo* did not change that fact or alter the Board's precedent on picketing. To restore the protections that Congress intended to provide to neutral employers in the context of secondary boycott activity, the Board should overrule *Eliason*.

c *Brandon Regional* and the use of inflatable rats is clear intimidation, and the Board should overrule it either as picketing or other coercive conduct.

The Board in *Brandon Regional* relied on the improper foundation established in *Eliason* to determine that stationing union agents with an inflatable rat balloon did not qualify as picketing.[16] If the Board agrees with the General Counsel and overrules *Eliason*, it follows that *Brandon Regional* should also fall. That said, the facts in *Brandon Regional* even more clearly evidence an intent to intimidate. Thus, even if the Board declines to overrule *Eliason*, it should overrule *Brandon Regional* because the use of large inflatable rat displays is inherently confrontational and coercive.

As with *Eliason*, there was no dispute in *Brandon Regional* about the union's intent – it hoped its tactics would encourage the public to boycott a neutral medical center and force it to cease doing business with a contractor subject to a labor dispute. In *Brandon Regional*, however, the union used a giant rat balloon instead of banners. They positioned the rat close to the entrance of the neutral employer – only 100 feet from the front door of the medical center. The balloon was 16-feet tall and 12-feet wide, and contained virtually no other communicative content – only a sign

[15] *Eliason*, 355 NLRB No. 159 at 817.

[16] *Brandon Regional*, 356 NLRB 1290, 1290 ("[a]pplying the reasoning of [*Eliason*] that the display of large stationary banners at secondary employees locations did not violate [the Act]…)".

that read "WTS," a three-letter combination meaningless to virtually all passersby.[17] Like in *Eliason*, the rat was accompanied by union members standing watch outside the neutral facility. The union admitted it used the rat to "get the attention of the public more than just regular handbills."[18]

The significance of inflatable caricatures of the vermin known as "Scabby the Rat" in labor disputes is well-known. Scabby developed because union officials wanted something scary and intimidating to signal to employers: don't cross us.[19] When used in the context of secondary boycotts, this is exactly the aim that it accomplishes. Through its massive presence and intimidating appearance, Scabby conveys an especially sinister message to the public. Because of its threatening appearance, its positioning near the entrance of a neutral employer forces consumers and neutral employees to make an immediate choice of whether to violate what the *Brandon Regional* dissent properly characterizes as "an invisible picket line that should not be crossed."[20] This is the same choice consumers face when confronted with secondary picketing by union members with sticks and signs.

In the years since *Brandon Regional*, the Board has recognized that Scabby and similar inflatable displays can have a significant confrontational and coercive effect on neutral secondary employers.[21] Indeed, even the Board in *Brandon Regional* conceded that the rat display *could* qualify as coercive under certain circumstances, but declined to find those circumstances satisfied

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[17] "WTS" was the abbreviation for "Workers Temporary Staffing," the contractor with whom the union had a primary labor dispute. *Id*. at 1290.

[18] *Id*. at 1291.

[19] *See* Scabby, the Giant Inflatable Union Protest Rat, Faces Extermination, Michael Gold, THE NEW YORK TIMES, July 31, 2019, available at https://www.nytimes.com/2019/07/31/nyregion/rat-balloon-union.html ("[t]hey wanted a mean, ghastly looking kind of rat")

[20] *Brandon Regional* at 1296.

[21] *See* Office of the General Counsel, Advice Memorandum, Case 13-CC-225655 (December 20, 2018) (addressing case where union used large banners and inflatable of a cat choking a worker).

in the case.[22] But if the facts of *Brandon Regional* do not qualify as picketing or other coercive conduct, then what is required? A 20-foot rat, stationed 20 feet from a neutral entrance? Congress drafted Section 8(b)(4) broadly so the Board would not need to engage in such line-drawing exercises. The language of the statute is clear, and confrontational conduct intended to intimidate neutral employers violates the Act. Scabby is merely the union's attempt to circumvent Section 8(b)(4)'s proscription on secondary picketing, and the Board should act to ensure that it is not used to vitiate the protections Congress intended to provide for neutral employers.

d The use of Scabby the Rat Should Also Qualify as Signal Picketing Because of its Intended Coercive Effect on Neutral Employees.

Union conduct can be proscribed by Section 8(b)(4) because of its coercive effect on any person engaged in commerce. Amici agree with the General Counsel that the use of Scabby the Rat should violate Section 8(b)(4) because it qualifies as secondary picketing. But there is also an alternative justification for restricting union use of large inflatables – signal picketing directed at neutral employees.[23]

Signal picketing occurs when a union's activities indicate to neutral employees that they should refuse to work.[24] Even if conduct would not otherwise qualify as secondary picketing under the Act, the Board may lawfully restrict it if it targets neutral employees with a message to cease work. Scabby is the quintessential example of signal picketing, particularly when aimed at neutral unionized employees, because union employees universally understand what Scabby means. Indeed, unions use Scabby specifically because of his history and ubiquity across the labor

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[22] *Brandon Regional* at 1294.

[23] The majority opinion in *Brandon Regional* noted that the employer did not argue that the use of the inflatable rat in that case qualified as signal picketing. Nevertheless, consideration of signal picketing is relevant to determination of the case at bar.

[24] *See Electrical Workers Local 98 (Telephone Man),* 327 NLRB 593, 593 (1999).

landscape. It sends the intimidating message to employees that they are doing something fundamentally disloyal and wrong by rendering their services to the targeted neutral employer. This is plainly improper.

e The Board Should Overrule *Eliason* and *Brandon Regional* and Restore its Previous Precedent that Did Not Consider Marching with Picket Signs Dispositive.

Both *Eliason* and *Brandon Regional* were wrongly decided. The Board set itself up for failure in deciding *Eliason* because it unnecessarily prioritized constitutional avoidance over its obligation to enforce the Act. The trickle-down effect of that decision led the Board to find the use of a giant, inflatable rat balloon was not confrontational, despite decades of history supporting the General Counsel's argument that these alternative forms of union conduct serve as stand-ins for traditional picketing. The plain text and history of Section 8(b)(4) demonstrate Congress' clear intent to shelter secondary, neutral employers from union harassment that embroils them in labor disputes that are not their own. The Board should reject these attempts by unions to work-around lawful restrictions on secondary picketing and restore the protections for neutral employers that existed before these decisions took the Board's 8(b)(4) precedent off-course.

iii. The Pre-*Eliason* Standard Urged by the General Counsel and *Amici* Does Not Offend the First Amendment

The position urged by the General Counsel and *amici*, applied to the facts of *Eliason*, *Brandon Regional*, or the present case, would raise no First Amendment concerns under controlling Supreme Court precedent. The Supreme Court has made clear that secondary picketing that seeks to induce a general boycott of the neutral employer is unprotected by the First Amendment. That is the holding of *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607 (1980). In *Safeco*, the Supreme Court held there is "no doubt that Congress may prohibit secondary picketing calculated '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.'"[25] The Court distinguished "secondary picketing [that] only discourages consumption of a struck product," where the product is just one among many carried by the neutral. Such picketing "simply induces the neutral retailer to reduce his orders for the product or 'to drop the item as a poor seller,'" which has "marginal injury to the neutral retailer."[26] What *may be prohibited* consistent with the First Amendment, the Court explained, is secondary picketing that "leaves responsive consumers no realistic option other than to boycott the [neutral] altogether" or that "predictably encourages consumers to boycott a secondary business."[27]

The Supreme Court reaffirmed that principle in *DeBartolo*, which held that picketing is a crucial aspect of what makes such activity prohibitable under the First Amendment. It recognized that the First Amendment permits the prohibition of "consumer picketing urging a general boycott of a secondary employer aimed at causing him to sever relations with the union's real antagonist."[28] But it held that handbilling with the same aim could not be prohibited under the First Amendment. That is because "picketing 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.'"[29] In contrast, handbills "depend entirely on the persuasive force of the idea."[30]

The emphasis on the conduct aspect of picketing is consistent with the Supreme Court's long-standing differentiation between conduct and speech. The Supreme Court has consistently

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[25] *N. L. R. B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 616 (1980).

[26] *Id*. at 613.

[27] *Id* at 613, 616.

[28] *DeBartolo*, 485 U.S. at 579.

[29] *Id.* at 580.

[30] *Id*.

found that "conduct designed not to communicate but to coerce" can be restricted within the bounds of the Constitution.[31] For example, in *Ohralik v. Ohio State Bar Ass'n*, the Court upheld a regulation that prohibited in-person solicitation of legal services.[32] The Court noted "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoke, written or printed."[33] The Court went on to cite numerous other contexts in which restrictions on conduct that incidentally affected speech had been upheld, including "employers' threats of retaliation for the labor activities of employees."

As described above, the use of inflatable Scabby the Rat and stationary bannering are the equivalent of secondary picketing that seeks to induce a general boycott of a neutral employer. To begin with, it is clear that they do not simply discourage consumption of a struck product, but rather predictably encourage an overall boycott. In both *Eliason* and *Brandon Regional*, the union conduct sought to stop consumers and neutral employees before they entered the doors of the neutral employer for any reason. The banners in *Eliason* asserted general "SHAME ON" the neutral employer – not a particular product or limited aspect of its business. In *Brandon Regional*, the inflatable rat created an invisible picket line for neutral employees and the public, suggesting they should stop patronizing the medical center in any manner. The union had the same intent in the present case, *Lippert Components*, because it set up the rat at the entrance to the trade show, in hopes of discouraging patrons from attending at all. As such, these cases are readily

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[31] *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212 (1982).

[32] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[33] *Id*. (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834 (1949)).

distinguishable from the limited picketing at issue in *Tree Fruits* and within the scope of conduct that may be restricted under the First Amendment.

Moreover, Scabby and stationary bannering do not depend solely on the persuasive force of speech, but rather depend primarily on conduct as the most persuasive deterrent to third persons about to enter a business. In each case, the displays are accompanied by union agents who stand guard outside the employer's entrance, a hallmark of restricted picketing. An imposing inflatable rat is clearly distinguishable from the distribution of a handbill containing truthful information about a labor dispute. The unions in these cases elected confrontational conduct, as opposed to handbilling, and the Board should not allow them to escape the consequences of that choice by equating it to nonconfrontational speech previously found to merit constitutional protection.

Importantly, a conclusion that the specific conduct at issue in these cases does not merit First Amendment protection does not mean, per se, that bannering can never merit First Amendment protection. If the conduct does not otherwise qualify as picketing and contains truthful speech more similar to the leaflets in *DeBartolo*, then the particular facts of those cases may merit additional analysis and lesser regulation. But given the conduct aspects of the two challenged cases and the case at bar, and the misleading nature of the speech elements of those cases, the Board can exercise its authority to regulate that union activity without offending the Constitution.

Respectfully submitted this 28th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2020, the foregoing Amicus Brief of Coalition for a Democratic Workplace, Chamber of Commerce of the United States, Independent Electrical Contractors, Inc., National Association of Wholesaler-Distributors, and National Federation of Independent Business was electronically filed and served by email on the following:

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