No. _____

IN THE

Supreme Court of the United States

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS, LOCAL 229, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for A Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner was subject to an order of the National Labor Relations Board enforced by the court below because a business agent asked employees to cease working in support of a dispute between a different union and a different employer on the same job. Only a labor organization within the meaning of the National Labor Relations Act (NLRA) and no other entity can be found to have engaged in unlawful secondary boycotting by making this request to the employees. The employees themselves have the right to leave the job. Any other person could have made the same request. This case is about whether the Court's current First Amendment jurisprudence applies to the content of labor speech. Nearly 70 years ago, this Court decided a labor case which included dicta that such speech can be prohibited. The Court did not apply any level of scrutiny. Since this Court decided that case, its First Amendment jurisprudence has evolved tremendously, applying free speech protections to all persons. This case now presents the issue whether labor speech is the only exception simply because it is regulated by the NLRA.

The Question Presented is:

Whether the secondary boycott provision of the National Labor Relations Act prohibiting peaceful and non-coercive Union inducement of workers to leave their jobs in support of a lawful labor dispute violates the First Amendment where the restriction is content based, speaker based, view point discriminatory and where there is no effort to justify the speech restriction under strict scrutiny?

PARTIES TO THE PROCEEDING

The petitioner is Iron Workers Local 229, and was the respondent in the court below. The respondent is the National Labor Relations Board, the petitioner in the court below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a labor organization and an unincorporated association.

RELATED PROCEEDINGS

The case before the National Labor Relations Board is Case 21-CC-183510 and the Decision and Order is reported at 365 NLRB No. 126 (August 30, 2017).

The Proceedings in the Court below are *National Labor Relations Board v. International Association of Bridge, Ornamental, Structural and Reinforcing Iron Workers, Local 229. AFL-CIO*, Case No 17-73210 (Panel Opinion Oct. 28, 2019, Rehearing and En Banc Denied, Sept. 11 (2020).

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I. PETITION FOR WRIT OF CERTIORARI

Petitioner, Iron Workers Local 229, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

II. OPINIONS BELOW

The order of the court of appeals with dissents denying the petition for rehearing and rehearing en banc is reported at 941 F.3d 902. App., *infra*, 1a–28a. The opinion of the panel of the court of appeals is reported at 874 F. 3d 1106. App., *infra*, 41a–59a. The decision and order of the National Labor Relations Board is reported at 365 N.L.R.B. No. 126. App., *infra*, 41a–59a.

III. JURISDICTION

The judgment of the court of appeals was entered on October 28, 2019. A petition for rehearing and rehearing en banc was denied on September 11, 2020

(App., *infra*, 1a–28a). Jurisdiction of this Court rests on 28 U.S.C. 1254.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution states in relevant part:

"Congress shall make no law * * * abridging the freedom of speech."

29 U.S.C. 158(b) of the National Labor Relations Act (NLRA) provides as follows:

> It shall be an unfair labor practice for a labor organization or its agents
>
> * * *
>
> (4)(i) * * * to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment * * * to perform any services * * *
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

V. STATEMENT

Iron Workers Local 229 is a labor organization. In support of a labor dispute between another union and a contractor on a construction job site in Southern California, a business agent induced (unsuccessfully) employees working for a different contractor to leave work. This conduct is secondary boycott activity prohibited by the NLRA, 29 U.S.C. 158(b)(4)(i)(B). The facts are un-

disputed as contained in the stipulated record presented to the National Labor Relations Board (Board).

Commercial Metals Company d/b/a CMC Rebar (CMC) was a rebar contractor furnishing and installing steel and post-tension reinforcement for the construction of a parking structure at the Pechanga Resort & Casino in Temecula, California. Western Concrete Pumping (WCP) was a non-union contractor performing concrete work at the same jobsite. Operating Engineers Local 12 had a dispute with WCP for failure to pay area standards, undermining wages established in an area by Local 12 through collective bargaining. Such area standards picketing is lawful.

In support of Local 12, a business agent of Local 229 sought to have employees of CMC leave the job to apply pressure to WCP to pay prevailing area standards. It is undisputed, as described by the panel, that the business agent used peaceful and non-coercive communication to seek to induce employees not to perform work. App., *infra*, 32a–33a. The inducement had no effect, and no one stopped working.

It is also undisputed that, under current Board law, such inducement without more violates the secondary boycott provision, even absent any coercion, picketing, threats to picket or any other action.

Region 31 of the National Labor Relations Board issued a complaint alleging that the communication was unlawful secondary boycotting. The parties stipulated to the facts and submitted the matter to an administrative law judge, who issued a decision finding that the conduct violated the NLRA. The Union filed exceptions, and the Board affirmed. See App., *infra*, 41a–43a.

The Board sought enforcement in the court below. See 29 U.S.C. 160(e). The court enforced the Board's

decision, agreeing that the speech violated the NLRA. Relying upon a decision of this Court from 1951, *International Brotherhood of Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694 (1951) (*IBEW*), it rejected the First Amendment argument of the petitioner. Petitioner then sought rehearing. The court below denied the petition, but six judges of the court joined in a lengthy and vigorous dissent, which pointed out that the Board's order, as enforced by the court, violated the First Amendment because it was entirely content-based and there was no strict scrutiny analysis even attempted of the prohibition. See App., *infra*, 1a–28a.

VI. REASONS FOR GRANTING THE WRIT

A. Because The Board And The Court Below Have Relied Exclusively Upon *IBEW*, Which Did Not Apply Any Level Of Scrutiny To Speech, The First Amendment Issue Is Unavoidably Presented.

The Board and the court below found the speech unlawful, relying exclusively upon *IBEW*: "Without applying strict scrutiny, the Supreme Court concluded that even peaceful picketing violates the NLRA's prohibition on secondary boycotts, and held that the prohibition 'carries no unconstitutional abridgment of free speech.'" App., *infra*, 35a (quoting *IBEW*, 341 U.S. at 699-700). The court below disregarded 70 years of First Amendment jurisprudence that has developed since *IBEW*, stating that "[t]here have been no changes to First Amendment jurisprudence in the interim that warrant divergence from the Supreme Court's analysis in *IBEW* or the interpretation of *IBEW* in the decisions from [two other circuits]." App., *infra*, 3a. The court further declined to address these issues, recognizing that it was hemmed in by this Court's com-

mand in *Agostini* v. *Felton*, 521 U.S. 203 (1997) (*Agostini*): "Moreover, we think it highly unlikely that the Supreme Court would have limited or implicitly overruled the detailed analysis of the NLRA in *IBEW* without even mentioning *IBEW* in its *Reed* [v. *Town of Gilbert*, 576 U.S. 155 (2015) (*Reed*)] decision. App., *infra*, 36a (citing *Agostini*, 521 U.S. at 237).

Though the court assumed this was content-based regulation of speech, it found itself bound by *IBEW*. This Court must therefore address the First Amendment issue which the court below did not.

B. Because The Regulation Of Speech Is Content-Based, The Petitioner's Speech Must Be Subjected To Strict Scrutiny

The speech of the business agent was the only conduct regulated. No doubt, the prohibition of the business agent's speech here was wholly content-based:

> Government regulation of speech is content based if a law applies to particular speech **because of the topic discussed or the idea or message expressed.** This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys.

Reed, 576 U.S. at 163 (emphasis added) (internal citations omitted). Here, the business agent's speech encouraging employees to cease work in solidarity with the Union was regulated only because of the message being expressed. As Judge Berzon noted in the dissent supported by five other judges, in the 70 years since *IBEW* was decided, this kind of content-based regulation is now all but universally subject to strict scrutiny:

> In *Boos v. Barry* [, 485 U.S. 312 (1988)], * * * [t]he Supreme Court determined that the restriction was content-based because it proscribed "an entire category of speech—signs or displays critical of foreign governments." *Id.* at 319–21. Because the restriction was content-based, the Court applied strict scrutiny * * *. *Id.* at 321–27. And although some language in the Boos Court's opinion suggests that the need to apply strict scrutiny depended upon the political nature of the speech prohibited and the public nature of the forum to which the prohibition applied, *id.* at 321, the Supreme Court has more recently backed away from any such limitations, repeatedly declaring that "content-based regulations of speech are subject to strict scrutiny" without regard to whether the speech is political or the forum public.

App., *infra*, 13a–14a (citing *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018) (*Becerra*)); see also *Reed*, 576 U.S. at 163–164.

The content-based regulation must also be subject to strict scrutiny because it is not viewpoint neutral. "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Reed*, 576 U.S. at 168 (quoting *Rosenberger* v. *Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995) (*Rosenberger*)). 29 U.S.C. 158(b)(4)(i)(B) "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 565 (2011) (quoting *R.A.V.* v. *St. Paul*, 505 U.S. 377, 391 (1992)). Given that the law only prohibits explaining the benefits of leaving work, "it is apparent that [29 U.S.C. 158(b)(4)(i)(B)] imposes burdens that are based on the content of speech and

that are aimed at a particular viewpoint." *Ibid*. Even though Local 229 was muzzled from encouraging CMC workers to leave work in support of another union, it would have been perfectly free to discourage them from leaving work.

Finally, the content-based regulation must be subject to strict scrutiny because it is an identity-based restriction. As Judge Berzon aptly observed in the dissent, this Court found in *Citizens United* v. *FEC*, 558 U.S. 310 (2010) (*Citizens United*), that even regulation restricting commercial speech—which, like labor speech, has historically enjoyed fewer First Amendment protections—must be subject to strict scrutiny if the regulation is an identity-based restriction: "The Court explained * * * that government may not 'deprive the public of the right to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.'" App., *infra*, 15a (quoting *Citizens United*, 558 U.S. at 340-341).

The dissent was correct when it stated that 29 U.S.C. 158(b)(4)(i)(B) poses all three of the content, viewpoint, and identity-based discrimination problems that this Court has made repeatedly clear cannot withstand strict scrutiny. App., *infra*, 5a.

Indeed, in assessing such "content-based restrictions on protected speech, the [Supreme] Court has * * * applied the 'most exacting scrutiny.'" *United States* v. *Alvarez*, 567 U.S. 709, 724 (2012) (internal citations omitted) (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994)). Under this standard, 29 U.S.C. 158(b)(4)(i)(B) is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compel-

ling state interests." *Reed*, 576 U.S. at 163. This is a high bar, and this Court has rejected similar viewpoint-based regulations with commendable justifications. *E.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 450, 457 (2011) (*Snyder*) (rejecting restrictions on "picketing [that] turned on the content and viewpoint of the message conveyed" despite the speech causing "emotional anguish [resulting] in severe depression and [exacerbating] pre-existing health conditions"). Because the panel refused the application of strict scrutiny, it did not even reach the question of whether 29 U.S.C. 158(b)(4)(i)(B) is narrowly tailored to serve a compelling state interest.

But even assuming that 29 U.S.C. 158(b)(4)(i)(B)'s limitations on speech of labor unions helps the government regulate the relationship between labor and management, 29 U.S.C. 158(b)(4)(i)(B) cannot survive strict scrutiny.

The statute's restrictions are woefully under-inclusive, and a "law cannot be regarded as protecting an interest of the highest order * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 576 U.S. at 172 (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 780 (2002)). Here, the content-based restriction is suspect and cannot pass strict scrutiny because it applies only to agents of labor organizations within the meaning of 29 U.S.C. 152(5). Anyone but an NLRA-governed union may ask CMC employees to cease work for any reason. Any other person or organization would be free to adopt Local 229's speech in exactly the same manner and for the same purpose. 29 U.S.C. 158(b)(4)(i)(B) does not apply to agents of other labor organizations such as public employee unions, agricultural worker unions, or Railway La-

bor Act, 45 U.S.C. 151 et seq., unions, which are all excluded from the secondary boycott ban.[1] It does not apply to nonprofit organizations or individual activists, who would be free to make the same plea to workers to leave work. It does not prohibit the employees themselves from agreeing to leave work in support of a dispute with another contractor, as long as they are not doing so at the request of a labor organization. It does not prohibit employers like CMC from asking employees to cease work. One of CMC's competitors could ask employees of CMC or any other employer to cease working in order to harm CMC or to recruit. A competitor could even picket CMC to induce employees to cease working. There is no justifiable basis for silencing a union while protecting the right of every other person to engage in exactly the same expressive activity. By allowing anyone else to engage in identical speech for identical reasons, the government "leaves appreciable damage to [its] supposedly vital interest unprohibited." Thus, the prohibitions on speech in 29 U.S.C. 158(b)(4)(i)(B) are under-inclusive and cannot not survive strict scrutiny. The six judges who dissented from the order denying the Petition for Panel Rehearing and Rehearing En Banc made this clear.

Further, the conduct that the union sought to induce was lawful. Employees may walk off the job, and the NLRA does not prohibit them from taking that action individually or concertedly. The NLRA only regulates the conduct of employers and labor

[1] The Board has held that secondary boycotts by these exempt categories and the inducement of such boycotts are not unfair labor practices. See *Int'l Bhd. of Teamsters, Local No. 201*, 84 N.L.R.B. 360 (1949); *Int'l Bhd. of Teamsters, Local 87*, 87 N.L.R.B. 720 (1949); and *Local 3, IBEW*, 244 N.L.R.B. 357, 359 (1979).

organizations, it does not make employees liable for any conduct. Long ago, the courts recognized that the NLRA imposed no restriction on the right of employees to strike. *E.g.*, *IBEW, Local 501* v. *NLRB*, 181 F.2d 34, 35 (2d Cir. 1950). To be clear, such workers may lose their jobs, but that is the only consequence of leaving work in protest. 29 U.S.C. 158(b)(4)(i)(B) only prohibits a labor organization from asking workers to leave work in solidarity of a labor dispute involving other workers. Individual employees singley or concertedly may leave their job; their action may not be protected within the meaning of 29 U.S.C. 157, but it is not prohibited by the NLRA, and workers are under no statutory sanction if they leave work. *St. Louis Cardinals, LLC*, 369 N.L.R.B. No. 3 (Jan. 3, 2020).

Here, the employer could choose to lawfully cease doing business on the job site. Here, the Union could lawfully ask the employer to cease doing business. *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964). Here, a union on a construction jobsite could enter into an agreement with the employer to cease doing business with another employer. 29 U.S.C. 158(e).

The Thirteenth Amendment would bar any statute restricting the right of employees to leave work in protest. See *Bailey* v. *Alabama*, 219 U.S. 219 (1911), and *Pollock* v. *Williams*, 322 U.S. 4 (1944). Under California law and the law of every state, employment is at will, and workers can quit with or without notice. See Cal. Lab. Code § 2922.

There is no constitutional justification to prohibit any person from asking any other person to do what that person may lawfully do and which is additionally protected by the U.S. Constitution and state statute.

C. The Panel's Failure To Apply Strict Scrutiny Conflicts With Recent Decisions Of This Court, Recent Decisions Of The Court Below And Every Other Circuit, All Of Which Have Applied Strict Scrutiny To Every Content-Based Regulation

The panel failed to grapple with the first step of analysis required by *Reed*, *supra*: a determination of whether or not the regulation is content neutral. The panel ignored this analysis and unconvincingly distinguished *Reed*, stating that "*Reed* involved content-based restrictions in a municipal ordinance regulating signs directed toward the general public" in contrast to this case, which "involves communications addressed to neutral employees within the highly regulated contours of labor negotiations." App., *infra*, 36a. This distinction does not support dismissing the requirement to subject content-based regulations to strict scrutiny.

As an initial matter, this case does not take place in the "contours of labor negotiations," but rather in the context of a labor dispute over the failure of a different employer to pay area standards and economic action in support of the dispute. While that area of the labor law is also highly regulated, the First Amendment has been applied to circumscribe that area of regulation. *E.g.*, *Overstreet* v. *United Bhd. of Carpenters, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005). Moreover, being a "highly regulated" field cannot be enough to justify abandonment of the First Amendment's broad protections:

> It is not enough to assert flatly, as the panel did, that these First Amendment doctrines do not apply "within the highly regulated contours of labor nego-

> tiations," as though the fact that union activity is highly regulated permanently siloes it from otherwise generally applicable developments in constitutional law. *Local 229*, 941 F.3d at 906. The Supreme Court has recently applied these very doctrines in other highly regulated contexts, including those involving regulations of the pharmaceutical industry, *see Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563–66, (2011), and of licensed reproductive healthcare providers, *see Becerra*, 138 S. Ct. at 2371.

App., *infra*, 16a (Berzon, J., dissenting).

The panel's refusal to address the question of whether the regulation was content-neutral—and by extension its failure to apply strict scrutiny to content-based regulation of speech—conflicts with an ever-growing list of this Court's decisions concerning speech. *Iancu* v. *Brunetti*, 139 S. Ct. 2294 (2019) (*Brunetti*); *Matal* v. *Tam*, 137 S. Ct. 1744 (2017) (*Matal*) (content-based statute does not survive even intermediate scrutiny); *Becerra*, 138 S. Ct. at 2371; *Janus* v. *Am. Fed'n of State, County & Municipal Emps.*, 138 S. Ct. 2448 (2018) (*Janus*); and *Barr* v. *Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (*Am. Political Consultants*). The panel's decision also conflicts with every other recent decision from the same circuit, which has uniformly found that content-based regulation is subject to strict scrutiny in every other context after applying the first step in the analysis required by *Reed*. *IMDB.com Inc.* v. *Becerra*, 962 F.3d 1111 (9th Cir. 2020); *Pac. Coast Horseshoeing Sch., Inc.* v. *Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020); *United States* v. *Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), rev'd on other grounds, 140 S. Ct. 1575 (2020)[2];

[2] In that case, the "encourage[ing] or induce[ing]" was of con-

Victory Processing, LLC v. *Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019); *Duguid* v. *Facebook, Inc.*, 926 F.3d 1146, 1153 (9th Cir. 2019); *Tschida* v. *Motl*, 924 F.3d 1297, 1303 (9th Cir. 2019); *Eagle Point Educ. Ass'n/SOBC/OEA* v. *Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1108 (9th Cir. 2018) (union picketing); *Animal Legal Def. Fund* v. *Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018); *In re Nat'l Sec. Letter* v. *Sessions*, 863 F.3d 1110, 1123 (9th Cir. 2017) (finding provision meets strict scrutiny); *United States* v. *Swisher*, 811 F.3d 299, 318 (9th Cir. 2016) (en banc); and *Boyer* v. *City of Simi Valley*, 978 F.3d 618, 621 (9th Cir. 2020). There is no case except this one, where the court below has failed to apply strict scrutiny to content-based regulation, including in "highly regulated" regimes.

The panel's opinion is also undeniably in conflict with the decisions from other circuits before and after *Reed* where every form of content-based regulation has been subject to strict scrutiny. See *Free Speech Coal., Inc.* v. *Att'y Gen. U.S.*, 825 F.3d 149, 153 (3d Cir. 2016); *Zukerman* v. *U.S. Postal Serv.*, 961 F.3d 431 (D.C. Cir. 2020); *In re Murphy-Brown, LLC*, 907 F.3d 788, 797 (4th Cir. 2018); *Seals* v. *McBee*, 898 F.3d 587, 598 (5th Cir. 2018); *Constr. & Gen. Laborers' Local Union No. 330* v. *Town of Grand Chute, Wis.*, 834 F.3d 745, 750-761 (7th Cir. 2016) (Posner, J., concurring and dissenting), aff'd in part, vacated in part, 915 F.3d 1120 (7th Cir. 2019); *Norton* v. *City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015), cert. denied, 136 S. Ct. 1173 (2016); *Telescope Media Grp.* v. *Lucero*, 936 F.3d 740, 754 (8th

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duct which was illegal, that is, for "an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." 8 U.S.C. 1324(a)(1)(A)(iv).

Cir. 2019); *Willson* v. *City of Bel-Nor, Mo.*, 924 F.3d 995, 1000 (8th Cir. 2019); *Wollschlaeger* v. *Governor, Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017), *Pursuing Am.'s Greatness* v. *FEC*, 831 F.3d 500, 509 (D.C. Cir. 2016); *Int'l Outdoor, Inc.* v. *City of Troy, Mich.*, 974 F.3d 690, 703 (6th Cir. 2020); *Otto* v. *City of Boca Raton, Fla.*, 981 F.3d 854, 861 (11th Cir. 2020); *United States* v. *Miselis,* 972 F.3d 518, 537 (4th Cir. 2020) ("encourage" overbroad); *Free Speech Coal., Inc.* v. *Att'y Gen. U.S.*, 974 F.3d 408, 424 (3d Cir. 2020); *Am. Freedom Def. Initiative* v. *Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481, 491 (6th Cir. 2020); and *Billups* v. *City of Charleston, S.C.*, 961 F.3d 673, 684 (4th Cir. 2020).

The decision conflicts internally with decisions of the court below, decisions from other courts of appeals, and recent decisions of this Court. The only difference is that labor speech is treated differently under the First Amendment based on a case now 70 years old.

D. This Court Did Not Address The First Amendment Aspect Of Speech In *IBEW*, It Addressed Only Picketing

The court below relied on *IBEW*, but, as the dissent correctly pointed out, the issue before this Court was the lawfulness of the picketing, not the speech of the union business agent. App., *infra*, 8a. Judge Bumatay joined in dissent explaining why IBEW did not address speech but addressed picketing only, stating, "*IBEW* deals with picketing and this case does not." App., *infra*, 27a.

In an effort to sidestep the key distinguishing fact that, unlike here, *IBEW* involved picketing, the panel relies on one phrase plucked from the opinion, assert-

ing that "the Supreme Court concluded that '[t]he words "induce or encourage" [in 29 U.S.C. 158(b)(4)] are broad enough to include in them every form of influence and persuasion.'" App., *infra*, 35a (quoting *IBEW*, 341 U.S. at 701-702).

But this Court's observation regarding the breadth of the language of 29 U.S.C. 158(b)(4) is dicta directed at explaining that picketing was a "form of influence and persuasion." It cannot be applied to prohibit pure speech.

The panel cited two cases that reference the same phrase, *Warshawsky & Co.* v. *NLRB*, 182 F.3d 948 (D.C. Cir. 1999) (*Warshawsky*), and *NLRB* v. *Local Union No. 3, IBEW*, 477 F.2d 260, 266 (2d Cir. 1973). Neither case acknowledges the strict scrutiny doctrine, thus underscoring the need for this Court to clarify that the same analysis applies to all speech no matter what regulatory regime is involved.

Warshawsky demonstrates the conflict with the First Amendment. *Warshawsky* addressed a leafletting campaign by union agents of workers of neutral employers—like CMC in the present matter—on a job site. The union had a dispute with another employer on the job site that was not paying area standard wages. The court quoted the language from *IBEW* explaining that the prohibition on inducing and encouraging includes "every form of influence and persuasion" to support its finding that the leafletting was unlawful under 29 U.S.C. 158(b)(4)(i)(B). However, it relied on the additional fact that the leafletting actually led to a work stoppage by neutral employees on the job site. *Warshawsky*, 182 F.3d at 956 ("work stoppage as probative evidence of inducement"). The Second Circuit relied on the same phrase in *NLRB* v. *Local Union No. 3, IBEW*, 477 F.2d 260. Because the statement was

made in the context of actual strike activity by the members in response to the statement, the court was not faced with the constitutional conflict.

Finally, the panel speculates that this Court had no intention of modifying the relic of *IBEW* because it failed to explicitly overrule it in *Reed*. App., *infra*, 36a. As this Court has made clear when deciding First Amendment issues, "the reach of our opinion is limited to the facts before us." *Snyder*, 562 U.S. at 460; see also *Fla. Star* v. *B.J.F.*, 491 U.S. 524, 533 (1989) ("[T]he sensitivity and significance of the interests presented * * * counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."); *Bartnicki* v. *Vopper*, 532 U.S. 514, 529 (2001).

E. Under The Panel's Opinion, The Only Topic Of Speech Regulation Not Subject To Strict Scrutiny Is Labor Speech

As previously noted, the panel held that labor speech is not subject to strict scrutiny standards because it is "highly regulated," although it failed to elaborate on why the regulatory regime of labor speech precludes the need to apply strict scrutiny. Even though any other person could have said exactly what the union agent said, only labor organizations are prohibited from making those statements. If this Court allows this opinion to stand, it will have carved out an exception from the strict scrutiny standard for content-based regulation only in the area of labor speech, a remarkable content-based decision.

Most fundamentally, however, labor organizations cannot engage in the kind of communication involved in this case without subjecting themselves to immediate compulsory injunctive relief under 29 U.S.C. 160(l)

or a court enforced order. Such labor speech cannot be treated differently than any other kind of speech. A decision finding the speech in this case to be protected by the First Amendment will not upset the field of labor relations. It will only set straight the fact that the First Amendment applies to the labor speech as it does to all other forms of speech which induce people to engage in a perfectly lawful conduct. The restriction of labor speech here is viewpoint discrimination and is "an 'egregious form of content discrimination' and is 'presumptively unconstitutional.'" *Brunetti*, 139 S. Ct. at 2299 (quoting *Rosenberger*, 515 U.S. at 829-830). Scholars have repeatedly observed the inexplicable exclusion of labor speech from First Amendment protections. See Case Comment, *First Amendment—Labor Speech—Ninth Circuit Holds that First Amendment Does Not Protect Encouraging Secondary Boycotts:* NLRB *v.* International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, *941 F.3d 902*, 133 Harv. L. Rev. 2619, 2620–2626 (2020); and Catherine L. Fisk, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment is a Friend or Foe of Labor*, 39 Berkeley J. Emp. & Lab. L. 253, 258–267 (2018).

F. There Are Important Principles Requiring This Court To Grant This Petition

1. The Decision In *IBEW* Should Be Expressly Discarded

IBEW is a relic which needs to be expressly overruled. It is the only remaining outlier among all of this Court's decisions which is contrary to current First Amendment doctrine. The NLRB continues to rely upon it as the basis to administer and enforce the NLRA.

This Court has overruled old doctrines which are inconsistent with current First Amendment doctrine. See *Janus*, *supra*. This Court has struck down statutes which are older than the 1947 NLRA involved in this case. In *Brunetti*, *supra*, and *Matal*, *supra*, this Court struck down statutes in effect since the 1940s, because "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.

This Court has struck down more recent statutes as well. *Am. Political Consultants*, *supra* (striking down 2015 amendment to 30 year old statute). It should do so here because this Court's 1951 decision is inarguably inconsistent with every aspect of current First Amendment doctrine as developed by this Court.

2. Unions Are Subject To Orders Of The Courts Of Appeal In Every Circuit Which Subjects Them To Contempt For Engaging In What Is Now Protected Speech.

There are outstanding court orders in every circuit which would subject unions to contempt sanctions if they engage in the communication at issue in this case. See, *e.g.*, *Warshawsky*, *supra*, and *NLRB* v. *Local Union No. 3, IBEW*, *supra*. These are all now invalid prior restraints on speech. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (applying "somewhat more stringent application of general First Amendment principles in [the context of an injunction]").[3]

Presently, unions (and their officers) who are subject to these now-invalid court orders cannot challenge

[3] The Board will be required to seek temporary injunctive relief. 29 U.S.C. 160(l) (interim injunctive relief mandatory).

those orders by violating them. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). The Ninth Circuit has in two recent cases refused to modify Board orders which prohibit conduct in violation of 29 U.S.C. 158(b)(4). See *NLRB* v. *Teamsters Union Local No. 70*, 668 F. App'x 283 (9th Cir. 2016), cert. denied, 136 S. Ct. 2214 (2017); and *NLRB* v. *Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433*, 891 F.3d 1182 (9th Cir. 2018).

Unions will be subject to repeated temporary injunctions as required by the statute provision requiring the Board to seek injunctive relief. 29 U.S.C. 160(l). *E.g.*, *Ohr* v. *Int'l Union of Operating Eng'rs, Local 150*, No. 18 C 8414, 2020 WL 1639987 (N.D. Ill. Apr. 2, 2020) (*Ohr*); and *King* v. *Constr. & Gen. Bldg. Laborers' Local 79*, 393 F. Supp. 3d 181 (E.D.N.Y. 2019) (*King*).

3. The Board Will Continue To Ignore The First Amendment When Considering Union Expressive Activity With A Secondary Purpose

Most recently, the Board has again asked for briefing on the question of whether it should regulate banners and inflatable critters. See *Int'l Union of Operating Eng'rs, Local Union No. 150*, 370 N.L.R.B. No. 40 (Oct. 27, 2020). The General Counsel has expressly asserted in response to the request for briefing that labor speech is not subject to the same protections of the First Amendment that apply to all other forms of speech.[4] See Br. of General Counsel to the NLRB, *Int'l*

[4] The General Counsel's Division of Advice directed a Regional Attorney to treat banners, balloons, and similar peaceful protest as coercive under 29 U.S.C. 158(b)(4). NLRB Office of the Gen. Counsel, Div. of Advice, Advice Memorandum, *IBEW, Local 134 (Summit Design + Build) Case 13-CC-225655* (Dec. 20,

Union of Operating Eng'rs, Local Union No. 150, Case 25-CC-228342 (Nov. 27, 2020), https://www.nlrb.gov/case/25-CC-228342 (scroll through the "Docket Activity" to the 11/27/2020 date; then click "Post-Hearing Brief to Board"). The General Counsel advocated:

> The Union's conduct is entitled to less First Amendment protection because it is labor and/or commercial speech. The Government has a heightened interest in regulating labor speech because of its direct effect on interstate commerce. * * * To the extent this conduct involved "speech," it was unlawful labor speech and conduct, and was therefore entitled to lesser First Amendment protection.

Id. at 18-19.

In those cases, the Board authorized injunctive relief where the union did not agree to cease the conduct. See *Ohr*, *supra*, and *King*, *supra*.

The Board itself continues to find union conduct unlawful based wholly upon the content of the union's communication. See *Preferred Bldg. Servs., Inc.*, 366 N.L.R.B. No. 159 (Aug. 28, 2018). Absent this Court's intervention, the Board will continue to ignore the limits of the First Amendment, relying on *IBEW*.

4. Although The Courts Have Relied On *IBEW* Since 1951, A Circuit Split Exists Since Every Other Circuit Has Held That The First Amendment Still Applies To Heavily Regulated Areas Of Law, Including The Ninth Circuit In Areas Besides Labor

Although there is no explicit circuit split on the application of strict scrutiny to 29 U.S.C. 158(b)(4)(i)(B),

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2018), https://www.nlrb.gov/case/13-CC-225655 (click "Advice Response Memo").

it is because courts have felt bound by the dicta in *IBEW* since 1951. However, as the dissent—in particular Judge Bumatay—pointed out, *IBEW* involved only picketing, not pure speech like here, which was devoid of any threat of picketing. App., *infra*, 26a. The circuits have misread *IBEW* for the broader principle. See App., *infra*, 12a–13a.

The circuits, however, have ruled in related labor speech cases that the principles of heightened or strict scrutiny can apply. *Constr. & Gen. Laborers' Local Union No. 330* v. *Town of Grand Chute, Wis.*, 834 F.3d at 750-761 (Posner, J., concurring and dissenting); *Eagle Point Educ. Ass'n/SOBC/OEA* v. *Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d at 1108 (union picketing); *Sheet Metal Workers' Int'l Ass'n, Local 15* v. *NLRB*, 491 F.3d 429 (D.C. Cir. 2007); *Overstreet* v. *United Bhd. of Carpenters, Local Union No. 1506*, 409 F.2d 1199 (bannering not picketing); and *Tucker* v. *City of Fairfield, Ohio*, 398 F.3d 457 (6th Cir. 2005).

5. There Is No Remaining Justification For *IBEW*

This Court affirmed the constitutional protections which organizations have to encourage boycotts. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (noting that it involves four elements of the First Amendment: speech, assembly, association, and petition). Boycotts are so commonplace today that there is no remaining justification to uphold this limit only on unions.

6. The Board Has Taken A Position Which Compels This Court's Intervention

The Board's position has been only that *IBEW* controls. See App., *infra*, 36a. Yet it has never sought to

defend its position on any ground or on any level of scrutiny under the First Amendment, let alone strict scrutiny. Instead, the Board has relied upon *Agostini*, *supra*, to resist review.

The Board has not argued that the law is narrowly tailored to serve an important governmental purpose for good reason. This Court 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. *Fla. Bar*, 575 U.S. 433, 444 (2015).

G. This Court Could Summarily Reverse And Remand To The Court Below To Reconsider In Light Of Current First Amendment Doctrines And Without Regard To *IBEW*

The court below felt itself constrained by *Agostini* and *IBEW*. This Court could reverse and direct the court below to reconsider in light of recent First Amendment cases such as *Reed*, *Snyder*, *American Political Consultants*, *Matal* and *Brunetti*. This would allow the court below to consider the enforcement of the Board decision without the constraint of *IBEW* 's obsolete dicta.

VII. CONCLUSION

For the reasons suggested above, this Petition for a Writ of Certiorari should be granted.

February 8, 2021

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-73210
NLRB No. 21-CC-183510

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS, LOCAL 229, AFL-CIO,
Respondent.

ORDER
Filed September 11, 2020

Before: Mary M. Schroeder and Johnnie B. Rawlinson, Circuit Judges, and Robert S. Lasnik,* District Judge.

Order;
Dissent by Judge Berzon;
Dissent by Judge Bumatay

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* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY**

Labor Law

The panel denied a petition for panel rehearing and denied on behalf of the court a petition for rehearing en banc.

In its opinion, filed October 28, 2019, the panel granted the National Labor Relations Board's petition for enforcement of its order entered against International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 229, enjoining Local 229 from committing violations of the National Labor Relations Act ("NLRA"). The Board affirmed the administrative law judge's finding that Local 229 had violated Section 8(b)(4)(i)(B) of the NLRA by inducing or encouraging Commercial Metals Company's neutral employees to strike or stop work for the unlawful secondary purpose of furthering Local 229's primary labor dispute with Western Concrete Pumping. The panel rejected Local 229's contention that the Board's application of the NLRA to its conduct punished expressive activity protected by the First Amendment. Specifically, the panel refused to extend the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and refused to apply strict scrutiny to the analysis of Section 8(b)(4)(i)(B). The panel explained that *Reed* involved content-based restrictions in a municipal ordinance regulating signs directed toward the general public, whereas this case involved communications addressed to neutral employees within the tightly regulated contours of labor negotiations. The panel held that the Board reasonably rejected Local 229's

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** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

contention that Section 8(c) of the NLRA protected its communications because the Supreme Court has concluded that Section 8(c) does not immunize activities that violate Section 8(b)(4). The panel held that the Board properly rejected the challenges asserted by Local 229 under the Religious Freedom Restoration Act and under the Thirteenth Amendment to the United States Constitution. Finally, the panel held that the language of the Board's order adequately apprised Local 229 of its notice obligations.

Judge Berzon, joined by Judges Graber, Wardlaw, W. Fletcher, Paez, and Bumatay, dissented from the denial of rehearing en banc because she would hold that the pure speech enjoined in this case was entitled to full First Amendment protection. By declining to undertake any identity-, content-, or viewpoint-based analysis—including the strict scrutiny inquiry those features should have triggered—and instead relying on an inapposite Supreme Court opinion, *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951), the panel in this case relegated to second-class constitutional status the right of labor organizations to speak on matters that may concern them greatly.

Judge Bumatay dissented from the denial of rehearing en banc. He agreed with Judge Berzon that the case should have been taken en banc, and wrote separately to emphasize his views on why the Supreme Court's decision in *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951), was not binding in this case.

COUNSEL

Greg P. Lauro (argued), Attorney; Elizabeth A. Heaney, Supervisory Attorney; David Habenstreit, Assistant General Counsel; Meredith Jason, Acting Dep-

uty Associate General Counsel; John W. Kyle and Alice B. Stock, Deputy General Counsel; Peter B. Robb, General Counsel; National Labor Relations Board, Washington, D.C.; for Petitioner.

David A. Rosenfeld (argued) and Caitlin E. Gray, Weinberg Roger & Rosenfeld, Alameda, California, for Respondent.

ORDER

The panel has unanimously voted to deny the Respondent's Petition for Panel Rehearing. Judge Rawlinson voted, and Judges Schroeder and Lasnik recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc. A judge of the court called for a vote on the Petition for Rehearing En Banc. A vote was taken, and a majority of the active judges of the court failed to vote for an en banc rehearing.

The Respondent's Petition for Panel Rehearing and Rehearing En Banc, filed December 12, 2019, is **DENIED**. No future petitions for rehearing or rehearing en banc will be entertained.

BERZON, Circuit Judge, joined by GRABER, WARDLAW, FLETCHER, PAEZ, and BUMATAY, Circuit Judges, dissenting from the denial of rehearing en banc:

Suppose that a devoted member of the American Vegetarian Society chooses to exercise her First Amendment right to the freedom of speech. Standing on a public sidewalk outside a McDonald's, she distributes to McDonald's employees pamphlets declaring that "Meat is Murder," detailing various criticisms of the meat industry, and asking them to stop working for McDonald's. Suppose, further, that a federal stat-

ute prohibits those affiliated with "anti-meat organizations" from "inducing or encouraging" employees of businesses that traffic in meat to "cease participation in the meat market," and that, pursuant to that statute, a federal court enjoins our vegetarian's peaceful distribution of pamphlets. Our vegetarian challenges the injunction as forbidden by the First Amendment.

The case presented by this challenge would be an easy one under current First Amendment doctrine. The imagined statute unconstitutionally discriminates on identity, content, and viewpoint bases. The statute unconstitutionally discriminates on the basis of the speaker's identity, because by its terms it prohibits the distribution of these pamphlets by those affiliated with "anti-meat organizations," whereas those not so affiliated could distribute them unimpeded. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). It unconstitutionally discriminates on the basis of content, because an affiliate of an anti-meat organization is left free to take to the sidewalk outside McDonald's to express her views on, say, the wages that McDonald's pays its workers—it is only meat-related speech that is proscribed. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 317–22 (1988). And the statute unconstitutionally discriminates on the basis of viewpoint, because while pamphlets *encouraging* people to "cease participation in the meat market" are prohibited, a pamphlet *discouraging* such cessation—say, "Increase Meat Sales, Work for McDonald's"—remains permissible. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388–92 (1992). The district court's injunction would be unlawful in each of these respects.

The facts and the statute at issue in this case mirror those in the hypothetical. *Nat'l Labor Relations Bd. v. International Ass'n of Bridge, Structural, Ornamen-*

tal, & Reinforcing Iron Workers, Local 229, 941 F.3d 902, 904 (2019) ("*Local 229*"). An agent of Local 229—a union concerned that an employer with which Commercial Metals Company (CMC) contracted was paying wages lower than the area standard—encouraged employees of CMC to cease work by circulating to employees via text message a link to a webpage, distributing flyers at the CMC worksite, speaking on two occasions with CMC employees at the worksite, and placing a phone call to one CMC employee. *Id.* The parties and the panel agreed that this activity was "pure speech"; it was peaceful, non-coercive, and did not include any picketing by the union.[1] *Id.* at 904–05. Moreover, the conduct peaceably encouraged by the union—the voluntary cessation of work by individual employees—was lawful. 29 U.S.C. § 163; *see also, e.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965). The National Labor Relations Board nonetheless enjoined this speech pursuant to Section 8(b)(4)(i)(B) of the National Labor Relations Act, which prohibits unions from "inducing or encouraging" employees neutral to a labor dispute to cease work in support of the union's dispute with a separate contractor. 29 U.S.C. § 158(b)(4)(i)(B).

The NLRB's injunction would seem to pose the very same identity-, content-, and viewpoint-based discrimination problems as would be posed by the case of our imagined vegetarian: identity-based, because the speech could not have been enjoined if not for the fact that the

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[1] Another union, Operating Engineers Local 12, was picketing outside the jobsite at the time Local 229 engaged in these activities. Local 12's primary picketing over compliance with area standards was lawful. *See United Steelworkers of America, AFL-CIO v. NLRB*, 376 U.S. 492, 501–02 (1964). Neither the parties nor the panel asserted that Local 12's lawful picketing activity bears on the legality of Local 229's speech. *Local 229*, 941 F.3d at 904–05.

speaker is a union; content-based, because the union would be free to distribute pamphlets bearing subject matter unrelated to employee relations; and viewpoint-based, because the union would be free to speak on the subject matter of CMC management-employee relations if the union were inducing and encouraging CMC employees to *continue* work rather than to cease it.

Why, then, has this Court denied to the union the First Amendment protection that it would surely have extended to our imagined vegetarian? One could be forgiven for answering: Because unions seem to operate under a different First Amendment than the one that protects the rest of us.

Much has been written about the apparently anomalous First Amendment status of unions. *See, e.g.*, Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich. L. Rev. 169, 193–211 (2015); Catherine L. Fisk, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment is a Friend or Foe of Labor*, 39 Berkeley J. Emp. & Lab. L. 253, 258–67 (2018); *see also* Case Comment, *NLRB v. International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 133 Harv. L. Rev. 2619, 2620–26 (2020). But the scholarly engagement with that anomaly, as well as the development of labor doctrine in our courts, has always focused on the reasons *why*, and the particular contexts *where*, labor speech receives less constitutional protection than non-labor speech would. The panel opinion, by contrast, elides these difficult labor law questions and the rich history from which they spring. Instead, it treats this difficult case as squarely settled by a single 1951 Supreme Court precedent, *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951) ("*IBEW*"), which it treats as having held that

even the "pure speech" here at issue may be enjoined without offending the First Amendment, because the words "induce or encourage" as used in Section 8(b)(4)(i)(B) are "broad enough to include in them every form of influence and persuasion." *Local 229*, 941 F.3d at 905–06 (quoting *IBEW*, 341 U.S. at 701–02).

As I shall show, *IBEW* does not compel, or even support, the result reached in the panel's decision. The only unlawful conduct at issue in *IBEW* consisted in the union's *picketing* activity directed at neutral employees, considered together with a subsequent phone call emphasizing the purpose of the picketing. *Id.* at 705. Those facts are critically different from those in this case, where the speech enjoined was not picketing. That difference is made all the more critical by the transformative developments in First Amendment doctrine that unfolded in the decades that followed *IBEW*, and, in particular, by the picketing-based theory that the Supreme Court adopted as its rationale for differential treatment of labor speech in the First Amendment context.

When contemporary doctrine is applied, there can be little doubt that the pure speech here enjoined is entitled to full First Amendment protection. By declining to undertake any identity-, content-, or viewpoint-based analysis—including the strict scrutiny inquiry those features should have triggered—and instead relying on an inapposite, seventy-year-old Supreme Court opinion, the panel here has needlessly relegated to second-class constitutional status the right of labor organizations to speak peacefully and non-coercively on matters that may concern them greatly. And by refusing to hear this case en banc, our Court has acquiesced in a significant curtailment of the liberty secured by the First Amendment. I respectfully dissent.

I.

In *IBEW*, the "principal question" was whether a union violated a prior version of Section 8(b)(4)(i)(B)'s prohibition on inducing or encouraging cessation of work for a secondary contractor "when, *by peaceful picketing*, the [union's] agent induced employees of a subcontractor on a construction project to engage in a strike in the course of their employment." 341 U.S. at 695–96 (emphasis added). Much of the opinion is devoted to the question whether the peaceful picketing there at issue fell within the statutory prohibition that is now Section 8(b)(4)(i)(B). *See generally id.*

Section 8(b)(4)(i)(B) makes it an unfair labor practice for a union to "induce or encourage any individuals employed by any person" to refuse "to perform any services" where the objective of such inducement or encouragement is "forcing or requiring any person . . . to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(i)(B).[2] Interpreting the "intended breadth" of that statute, the Court remarked that "[t]he words 'induce or encourage' [as used in section 8(b)(4)(i)(B)] are broad enough to include in them every form of influence and persuasion." *IBEW*, 341 U.S. at 701–02. Separately, in a single paragraph, the Court rejected a First Amendment challenge to the statute's proscription of the union's conduct. I quote that paragraph in its entirety:

> The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgment of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone

[2] When *IBEW* was decided, this provision was instead codified at 29 U.S.C. § 158(b)(4)(A).

> call emphasizing its purpose. The constitutionality of § 8(b)(4)(A) is here questioned only as to its possible relation to the freedom of speech guaranteed by the First Amendment. This provision has been sustained by several Courts of Appeals. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise.

Id. at 705.

Although it begins with broad language, the quoted paragraph as a whole focuses on the particular type of speech at issue before the Court—"picketing followed by a telephone call emphasizing its purpose," *id.*, which is all that the National Labor Relations Board's order covered. Before the NLRB, the charging party argued only that the union's "*picketing*" had induced the cessation of work, *Int'l Bhd. of Elec. Workers, Local 501*, 82 N.L.R.B 1028, 1042 (1949) (emphasis added), and the Board concluded accordingly that the union, "*by picketing*," had induced such cessation, *id.* at 1029 (emphasis added). The Second Circuit similarly understood that only picketing was at issue, holding that "the First Amendment does not excuse *picketing* to compel an employer . . . even though the pickets carry placards which bear statements of the grievances involved." *IBEW, Local 501 v. NLRB*, 181. F.2d 34, 40 (2nd Cir. 1950) (emphasis added).

Faced with that context, the Court reasoned that, given its recognition of "the constitutional right of states to proscribe *picketing* in furtherance of comparably unlawful objectives[, t]here is no reason why

Congress may not do *likewise*." *Id.* (emphases added). There was not at the time, and there is not now, any comparable recognized constitutional right of states to proscribe peaceful, *non-picketing* speech. So the actual holding in *IBEW* was limited to picketing; it cannot be extended to the speech at issue here, which undisputedly was not picketing.

That *IBEW*'s constitutional reasoning extends only to picketing is confirmed by the Supreme Court precedents upon which it relied, each of which conditioned its holding on the unique First Amendment status of picketing. In *Giboney v. Empire Storage & Ice Co.*, the Supreme Court explained that "[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." 336 U.S. 490, 503 n.6 (1949) (citation omitted). The Court accordingly concluded that "the state is not required to tolerate in all places . . . even peaceful picketing by an individual." *Id.* at 501 (citation omitted). In *Building Service Employees International Union v. Gazzam*, the Supreme Court stated that, because "picketing is more than speech[,] . . . this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of *the right to picket*." 339 U.S. 532, 537 (1950) (emphasis added). *International Brotherhood of Teamsters v. Hanke* again emphasized that "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech," and went on to uphold yet another injunction against picketing. 339 U.S. 470, 474, 481 (1950). And in *Hughes v. Superior Court*, the Supreme Court summarized: "[W]hile picketing is a mode of commu-

nication it is inseparably something more and different." 339 U.S. 460, 464–65 (1950).[3]

In the decades that followed *IBEW*, two circuit courts ignored its picketing-specific context and reasoning, extending it to uphold against First Amendment challenge applications of Section 8(b)(4)(i)(B) to pure speech. *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 952 (D.C. Cir. 1999); *NLRB v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 477 F.2d 260, 266 (2d Cir. 1973). In so holding, these opinions treated the opening sentence of the quoted paragraph as foreclosing any constitutional challenge to any application of Section 8(b)(4)(i)(B), disregarding the picketing context of the opinion and the picketing-specific reasoning of the paragraph as a whole. And the opinions did so without regard for any subsequent developments in First Amendment doctrine. *Warshasky*, 182 F.3d at 952; *Local Union No. 3*, 477 F.2d at 266; *see also* Case Comment, *NLRB v. IAB, Local 229*, 133 Harv. L. Rev. at 2621–23.

Relying on these unreasoned and nonbinding opinions, the panel here repeated their mistake, again relying on *IBEW*'s broad language while ignoring both the picketing-specific context of the case and the limited actual holding set forth later in the paragraph. *Local*

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[3] Some of the circuit court decisions cited in *IBEW*'s brief constitutional section did not involve any picketing. *See IBEW*, 341 U.S. at 705 n.9. But to assess the significance of such citations, we must take note of the proposition in support of which they were cited: namely, that Section 8(b)(4)(i)(B) "has been sustained by several Courts of Appeals." *Id.* at 705. That proposition contains no reasoning whatsoever; it is entirely empirical. The actual holding unfolds in the subsequent two sentences. And for those propositions, the only citations are to Supreme Court precedents which, as I have demonstrated, explicitly condition their constitutional analyses on the unique First Amendment status of labor picketing.

229, 941 F.3d at 905. From there, the panel invoked *IBEW*'s language interpreting the "intended breadth" of the statute to extend the picketing-specific constitutional holding to "every form of influence or persuasion"—erroneously transforming an interpretation of a statute into a sweeping constitutional holding. *IBEW*, 341 U.S. at 701–03; *Local 229*, 941 F.3d at 905.

II.

The panel's uncritical extension of *IBEW* is particularly troubling in view of the seismic changes in First Amendment jurisprudence since *IBEW* was decided. The panel invoked the fact that *IBEW*'s brief constitutional analysis was conducted "[w]ithout applying strict scrutiny" as a reason to ignore all subsequent legal developments. *Id.* at 905 (citing *IBEW*, 341 U.S. at 699–700, 705). But *IBEW* was decided long before the Supreme Court articulated its First Amendment doctrines as to content-, viewpoint-, and identity-based discrimination in anything like their current form. The strict scrutiny standard applicable to such discrimination was at best in a nascent state; its application in the First Amendment context developed only gradually. *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (collecting cases).

A few examples of the doctrinal developments that unfolded after *IBEW* was decided demonstrate the significance of this transformation. Take content discrimination: In *Boos v. Barry*, the District of Columbia had prohibited, within 500 feet of a foreign embassy, any sign tending to bring that foreign government into "public odium" or "disrepute." 485 U.S. 312, 315 (1988). The Supreme Court determined that the restriction was content-based because it proscribed "an entire category of speech—signs or displays critical of foreign governments." *Id.* at 319–21. Because the re-

striction was content-based, the Court applied strict scrutiny and concluded that, even assuming that the law furthered a compelling interest in protecting the "dignity" of foreign diplomats, it was not narrowly tailored to serve that interest in view of the less restrictive protections for embassies that prevailed across the rest of the country. *Id.* at 321–27. And although some language in the *Boos* Court's opinion suggests that the need to apply strict scrutiny depended upon the political nature of the speech prohibited and the public nature of the forum to which the prohibition applied, *id.* at 321, the Supreme Court has more recently backed away from any such limitations, repeatedly declaring that "content-based regulations of speech are subject to strict scrutiny" without regard to whether the speech is political or the forum public. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *see also, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015).

Or consider viewpoint discrimination: In *R.A.V. v. City of St. Paul*, a municipal ordinance made it a misdemeanor to place on public or private property any "symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. 377, 380 (1992). A state high court had interpreted the phrase "arouses anger, alarm or resentment in others" to limit the reach of the ordinance to "fighting words," which are generally denied First Amendment protection on account of the conduct element that they involve. *Id.* at 381. The Supreme Court determined that, even as applied to "fighting words," the ordinance went "beyond mere content discrimination[] to actual viewpoint discrimination" in that only fighting words which aroused "anger, alarm and

resentment" in others were prohibited, while fighting words used "*in favor* of racial, color, etc., tolerance and equality" remained permissible. *Id.* at 391–92 (emphasis in original). Recognizing that viewpoint discrimination is even more offensive to First Amendment values than is content discrimination, the Court struck down the ordinance, declining to apply even the strict scrutiny standard that "mere content discrimination" would demand. *Id.* at 391–93. Thus, as to speech that involves a conduct element, as picketing does, the application of the unforgiving viewpoint discrimination doctrine is required by *R.A.V.* Where, as here, only "pure speech" is implicated, the doctrine's application should be even more uncontroversial. *Local 229*, 941 F.3d at 904–05.

Finally, consider the First Amendment doctrine concerning identity-based discrimination. In *Citizens United v. Federal Election Commission*, the Court confronted a federal statute which prohibited only corporations and unions from making, within 30 days of a primary or 60 days of a general election, "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office." 558 U.S. 310, 320–21 (2010). The Court explained the First Amendment problems posed when government "identifies certain preferred speakers" by law, writing that government may not "deprive the public of the right to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* at 340–41. Applying strict scrutiny and acknowledging that some identity-based restrictions may be justified when necessary to prevent interference with "certain government functions," the Court concluded that no such interest justified the statute's identity-based discrimination against

corporations and unions, and accordingly held that the statute violated the First Amendment. *Id* at 341.

None of these now well-developed doctrines had yet been crystalized when the Supreme Court decided *IBEW*. Given such a sea change in First Amendment jurisprudence, a case that predates it would need to be quite directly on point to be controlling today. *IBEW,* with its picketing-specific reasoning, does not fit that bill.

It is not enough to assert flatly, as the panel did, that these First Amendment doctrines do not apply "within the highly regulated contours of labor negotiations," as though the fact that union activity is highly regulated permanently siloes it from otherwise generally applicable developments in constitutional law. *Local 229*, 941 F.3d at 906. The Supreme Court has recently applied these very doctrines in other highly regulated contexts, including those involving regulations of the pharmaceutical industry, *see Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563–66 (2011), and of licensed reproductive healthcare providers, *see Becerra*, 138 S. Ct. at 2371.

III.

Post-*IBEW* developments in the labor context specifically affirm that the "highly regulated" rationale cannot fly, and that it is instead the distinction between picketing and "pure speech" that has constitutional salience in the labor context.

After *IBEW* was decided, the Supreme Court made clear that although certain forms of labor *picketing* do not receive the full First Amendment protection that courts extend to other forms of speech, other labor speech does. As explained already, *IBEW*'s focus on

secondary picketing in the First Amendment part of the opinion reflects that distinction. But it does so incompletely, for the Court had not yet decided any of the major cases concerning the First Amendment protection that political picketing enjoys, and so there was no need to explain why labor picketing should be treated differently.

Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972), brought the problem into view. There, peaceful picketing on the subject of a labor dispute was the only type of picketing the City of Chicago permitted. *Id.* at 94–95. The Supreme Court held that Chicago's regime violated the First Amendment because it made the legality of peaceful picketing depend upon the subject matter of the message that such picketing advanced: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. If the content-discrimination doctrine precludes government from singling out picketing on the subject of a labor dispute as the only type of picketing permitted, it would seem straightforwardly to follow that a regime which singled out picketing on the subject of a labor dispute as the only type of picketing prohibited would violate the First Amendment as well.

But the Supreme Court did not take that path. In *NLRB v. Retail Store Employees Union, Local 1001* ("*Safeco*"), unions embroiled in a labor dispute with an insurance company picketed outside agencies that sold the company's insurance policies, urging customers to boycott those policies. 447 U.S. 607, 609 (1980). The Court held that Section 8(b)(4)(ii)(B) lawfully prohibited this secondary consumer picketing, but the majority could not agree on an explanation for why

the prohibition was permitted by the First Amendment.

Justice Powell, in a plurality opinion, treated the case as squarely controlled by *IBEW*'s picketing-specific reasoning. He wrote:

> 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. Such picketing spreads labor discord by coercing a neutral party to join the fray. In *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951) [("*IBEW*")], this Court expressly held that a prohibition on "picketing in furtherance of [such] unlawful objectives" did not offend the First Amendment. We perceive no reason to depart from that well-established understanding. *As applied to picketing* that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech.

Id. at 616 (some internal quotation marks and citations omitted) (emphasis added).

In a concurrence, Justice Stevens wrote that the First Amendment issue "is not quite as easy as the plurality would make it seem," offering an alternative rationale for upholding the prohibition on secondary labor picketing as consistent with the First Amendment. *Id.* at 618 (Stevens, J., concurring). Such picketing may be regulated without violating the constitution, he wrote, because it "is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deter-

rent to third persons about to enter a business establishment." *Id.* at 619.

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council ("*DeBartolo*") emphasized, as Justice Stevens had in *Safeco*, that non-picketing labor speech is more protected by the First Amendment than is labor picketing. 485 U.S. 568, 575 (1988). The Court observed that "picketing is qualitatively different from other modes of communication" and cited Justice Stevens's *Safeco* concurrence for the proposition that the persuasive force of labor picketing draws its strength from such picketing's conduct element rather than from the force of the ideas expressed. *Id.* at 580 (internal quotation marks and citation omitted). Applying this distinction to the facts of the case—which involved union members distributing handbills "without any accompanying picketing or patrolling," *id.* at 571—the Court concluded that because the distribution of handbills constituted "mere persuasion," involving no "intimidat[ion] by a line of picketers," construing the NLRA to prohibit secondary handbilling would raise "serious questions" about its compatibility with the First Amendment that prohibiting secondary picketing does not. *Id.* at 575–76, 580.

DeBartolo thus rejected the *Safeco* plurality's bare reliance on *IBEW* as the basis for upholding restrictions on labor picketing against First Amendment challenge. After *DeBartolo*, First Amendment challenges to restrictions on a union's expressive activity must be evaluated under the rationale that a majority of the Court there endorsed. If the expressive activity, like handbilling, lacks the conduct element that distinguishes labor picketing, the communication falls on the speech side of the *DeBartolo* line, and a serious First Amendment problem is posed.

Until now, our circuit has been faithful to the inquiry *DeBartolo* requires in such cases. In *Overstreet v. United Brotherhood of Carpenters and Joiners of America, Local Union 1506*, union members had held aloft large banners announcing a "labor dispute" and declaring "SHAME ON" certain (secondary) retailers. 409 F.3d 1199, 1201–02 (9th Cir. 2005). The union argued that its bannering activity was protected by the First Amendment, so this Court considered whether such bannering was more like the "mere persuasion" in *DeBartolo*, and therefore potentially entitled to full First Amendment protection, or more like the "intimidation by a line of picketers" in *Safeco*, and therefore unprotected. *Id.* at 1210–11 (citations omitted). Given the stationary nature of the bannering activity and the absence of any physical or symbolic barrier blocking the entrances to the retailers' establishments, this Court concluded that the handbilling in *DeBartolo* was more suitably analogous. *Id.* at 1211–16.

In this case, I note, *DeBartolo*'s speech-conduct distinction is more easily applied than in *Overstreet*. Sending text messages containing a link to a website and distributing flyers is manifestly more analogous to handbilling than it is to picketing: it is the content of the website and the flyer, rather than any intimidating conduct, that does the persuasive work. But the panel refused to undertake this simple analysis. Instead, without engaging at all with the reasoning of *Safeco*, *DeBartolo*, or *Overstreet*, the panel dismissed *DeBartolo* as inapposite because it concerned peaceful, non-picketing, non-coercive speech directed at consumers, whereas here the peaceful, non-picketing, non-coercive speech was directed at secondary employees. *Local 229*, 941 F.3d at 906. The opinion makes no attempt to explain why, as a First Amendment matter,

the audience of the peaceful, non-picketing, non-coercive speech should make any difference. *See id.*

DeBartolo and *Overstreet* involved applications of Section 8(b)(4)(ii)(B), whereas this case concerns the application of Section 8(b)(4)(i)(B). But developments in First Amendment doctrine are not confined to the particular statutory context in which they arise. There is no principled reason why the First Amendment rationale developed by Justice Stevens in *Safeco* and subsequently incorporated by a majority of the Court in *DeBartolo* would be any less applicable to one statutory subsection than to the other.

Indeed, the difference in the underlying statutory subsections at issue undermines rather than strengthens the panel's reasoning. Section 8(b)(4)(ii)(B), at issue in *DeBartolo and Overstreet*, by its terms applies only when a labor organization "threaten[s], coerce[s], or restrain[s] any person engaged in commerce," such as a customer of a secondary business who is intimidated by picketing. 29 U.S.C. § 158(b)(4)(ii). In *DeBartolo*, as in *Overstreet,* our courts avoided the First Amendment problems that they explicitly acknowledged would be posed by applying Section 8 to peaceful, non-picketing, non-coercive speech by adopting a saving construction of Section 8(b)(4)(ii)(B). *DeBartolo*, 485 U.S. at 575–76, 580; *Overstreet*, 409 F.3d at 1211–12. In both cases, our courts interpreted "threaten, coerce, or restrain" in such a way that the statute did not reach the speech for which a prohibition would potentially violate the First Amendment. Section 8(b)(4)(i)(B), by contrast, frames its prohibition under the broader "induce or encourage" language as interpreted in *IBEW*, which, as the parties and the panel in this case agreed, admits of no such saving construction. 941 F.3d at 905; *see also* 29 U.S.C. § 158(b)(4)(i)

(B). That difference in statutory language in no way mitigates the First Amendment problems acknowledged in *DeBartolo* and *Overstreet*; to the contrary, it requires us to confront head-on the serious but long-avoided First Amendment problems with identity-, content-, and viewpoint-based discrimination against non-picketing labor speech.

IV.

Nothing in *IBEW* excuses the panel's avoidance of these problems. We cannot faithfully interpret any utterance of the Supreme Court in isolation from the context in which it arises, so we are frequently confronted with the question of just how broadly to interpret language which, taken out of context, may appear quite sweeping. By ignoring *IBEW*'s picketing-specific context, and refusing to consider the relevance of that context to the doctrine as it currently stands, the panel here adopted a disturbing approach to the application of precedents.

Consider *Mosley* once again. 408 U.S. 92 (1972). There, the Court stated, in sweeping terms and without qualification: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. This language, if taken on its face and treated with as little regard for modern doctrine as the panel here treated isolated sentences in *IBEW*, would squarely compel a victory for the union in this case, as there is no question that the injunction here at issue is content-discriminatory. What is more, this sweeping utterance in *Mosley* postdates the sweeping utterance in *IBEW* that Section 8(b)(4)(i)(B) "carries no unconstitutional abridgment of free speech." 341 U.S. at 705. But the present state of the doctrine makes clear that we cannot take this

sentence to have the far-reaching implications it may seem to have: we know that the government *does* sometimes have power to restrict speech on a content-discriminatory basis in a number of contexts—say, where a labor organization engages in secondary picketing, or, more generally, where a content discriminatory restriction on speech is narrowly tailored in service of a compelling state interest. *See, e.g.*, *DeBartolo*, 485 U.S. at 575; *Burson v. Freeman,* 504 U.S. 191, 198, 211 (1992). It does not follow from those nuances of modern doctrine that *Mosley* has been overruled; certainly no Supreme Court opinion has said so. Rather, we must view that isolated language from *Mosley* in the context of First Amendment jurisprudence as a whole. When we do, we see that *Mosley*'s *holding*—that the government may not constitutionally forbid peaceful non-labor picketing while permitting only labor picketing—remains intact.

My reading of *IBEW* as limited to picketing is no more or less an artificial narrowing of Supreme Court precedent than that uncontroversial gloss on *Mosley* would be. *IBEW*'s *holding*—that because states may constitutionally proscribe picketing in furtherance of unlawful objectives, they may constitutionally proscribe "peaceful picketing" in service of a secondary boycott, 341 U.S. at 694, 703–05—similarly remains intact.

The possibility of en banc consideration accordingly presented this Court with a choice: to treat *IBEW* the same way we would treat *Mosley*, as appropriately limited to its actual holding, or instead to acquiesce in a new and needless constitutional anomaly—such that our generally applicable content-, viewpoint-, and identity-based discrimination First Amendment doctrines inexplicably exclude Section 8(b)(4)(i)(B) from their reach, and the explanation for differential treat-

ment of picketing from other forms of labor speech for First Amendment purposes, adopted in *DeBartolo*, is inexplicably confined to Section 8(b)(4)(ii)(B) only. I submit that we should not accept such an anomaly unless there is clear Supreme Court precedent which requires us to accept it. As there is not, this Court's choice to acquiesce is an abdication of its responsibilities.

I respectfully dissent from the denial of rehearing en banc.

BUMATAY, Circuit Judge, dissenting from the denial of rehearing en banc.

I agree with Judge Berzon that this case should have been taken up en banc. I write separately to emphasize my views on why the Supreme Court's decision in *International Brotherhood of Electrical Workers, Local 501, A.F. of L. v. NLRB*, 341 U.S. 694 (1951) ("*IBEW*"), is not binding in this case and why it is our duty to apply the Constitution—not extend precedent—here.

I.

As inferior court judges, we are bound to follow Supreme Court precedent. *Hart v. Massanari*, 266 F.3d 1155, 1170–71 (9th Cir. 2001). After all, "[f]idelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). But our fidelity is not blind. We always have a "duty to interpret the Constitution in light of its text, structure, and original understanding." *NLRB v. Noel Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring). The same could be said of precedent that has been eroded by more recent jurisprudence.

This doesn't mean that lower court judges can refuse to follow precedent—even if subsequent caselaw or the

original meaning cast it into doubt. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Lower court judges don't have license to adopt "a cramped reading" of a case in order to "functionally overrule" it. *Thompson v. Marietta Educ. Ass'n*, No. 19-4217, 2020 WL 5015460, at *3 (6th Cir. Aug. 25, 2020). Nor are we permitted to create "razor-thin distinctions" to evade precedent's grasp. Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 NYU J.L. & Liberty 44, 51 (2019).

But, where precedent is seriously questioned "as an original matter" or under current Supreme Court doctrine, courts "should tread carefully before extending" it. *Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting). We can take care not to unduly expand precedents by reading them "in light of and in the direction of the constitutional text and constitutional history." *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting). So too with intervening Supreme Court decisions. And if a faithful reading of precedent shows it is not directly controlling, the rule of law may dictate confining the precedent, rather than extending it further. *Cf. Citizens United*, 558 U.S. at 378 ("*[S]tare decisis* is not an end in itself . . . . Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.").

II.

At issue here are four forms of speech: (1) sending text messages; (2) making phone calls; (3) talking to others; and (4) delivering flyers. *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron*

Workers, Local 229, AFL-CIO, 941 F.3d 902, 904 (9th Cir. 2019). None these encompass the form of communication at issue in *IBEW*: picketing.

At the time of *IBEW*, "picketing" was considered *sui generis* under Supreme Court doctrine. "Picketing by an organized group is *more than free speech*[.]" *Bakery & Pastry Drivers & Helpers Local 802 of Int'l Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring) (emphasis added). Picketing is distinct from other forms of speech, such as "distribution of circulars," because "it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Hughes v. Superior Court*, 339 U.S. 460, 464–65 (1950). Accordingly, *IBEW* made clear that limitations on this form of communication pass constitutional muster. *See IBEW*, 341 U.S. at 705 ("[W]e . . . have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise.") (footnote omitted). *IBEW*'s reach is therefore limited to picketing.

On the other hand, the forms of speech involved in this case go to the heart of protected speech activity. For example, the Court has singled out leafletting, at least in the political realm, as "the essence of First Amendment expression." *McCullen v. Coakley*, 573 U.S. 464, 488–89 (2014) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)). Indeed, "no form of speech is entitled to greater constitutional protection." *Id.* Likewise, the Court has extolled "one-on-one communication," like text messaging or calling someone, as perhaps "the most effective" and "[most] fundamental" speech. *Meyer v. Grant*, 486 U.S. 414,

424 (1988). Thus, under binding precedent, calling, texting, and leafleting are *constitutionally distinct* from picketing a business.

Given this backdrop, nothing in Supreme Court doctrine or principles of stare decisis require the extension of *IBEW* here. *IBEW* deals with picketing and this case does not. As the cases above show, this is not a "razor-thin" distinction. And as Judge Berzon ably demonstrates, *IBEW* cannot be squared with modern First Amendment law. *See* Dissent at 16 (Berzon, J., dissenting) ("Given such a sea change in First Amendment jurisprudence," *IBEW* "would need to be quite directly on point to be controlling today."). Indeed, it is impossible to escape the conclusion that Section 8(b)(4)(i)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i)(B), constitutes an impermissible content-based and viewpoint-based restriction on speech. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 168 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional" and "[g]overnment discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination") (simplified).

Also, I have doubts that § 158(b)(4)(i)(B), as applied here, would be consistent with the original meaning of the First Amendment. That Amendment pronounces that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. While the contours of this language need further explication, and there is ongoing debate about its meaning among scholars, Justice Scalia articulated the convincing view that the First Amendment generally prevents government from proscribing speech on the basis of

content, subject to "traditional categorical exceptions." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382–83 (1992) (identifying obscenity, defamation, and fighting words as examples of such exceptions). Another persuasive view is that the First Amendment cemented the natural right to freely express one's thoughts, spoken or written, subject to restrictions for the common good. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 304–07 (2017). But, under this view, "the Founders widely thought that the freedom to make well-intentioned statements of one's views belonged to a subset of natural rights . . . that could not be restricted in promotion of the public good and thus fell outside legislative authority to curtail." *Id.* at 255–56. As James Madison said, "[o]pinions are not the objects of legislation." 4 Annals of Cong. 934 (1794); *see also* Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779) ("[T]he opinions of men are not the object of civil government, nor under its jurisdiction[.]").

Considering our growing understanding of the First Amendment's original meaning, I question whether Congress can abridge the type of expression at issue here, especially the common catchphrase, "friends don't let friends cross." *NLRB*, 941 F.3d at 904. Such an expression seems precisely like the type of "well-intentioned statement[] of opinion" that the Founders would have thought inalienable. *See* Campbell, *supra,* at 255–56, 284. By denying rehearing en banc, we've passed on a valuable opportunity to examine First Amendment history and further ground our own jurisprudence in the original meaning of the Constitution.

Because *IBEW* doesn't directly control our decision here, I respectfully dissent from the denial of rehearing en banc.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17-73210
NLRB No. 21-CC-183510

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS, LOCAL 229, AFL-CIO,
Respondent.

OPINION

On Petition for Review of an Order of the National Labor Relations Board

Argued and Submitted February 15, 2019
San Francisco, California

Filed October 28, 2019

Before: Mary M. Schroeder and Johnnie B. Rawlinson, Circuit Judges, and Robert S. Lasnik,* District Judge.

Opinion by Judge Rawlinson

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY**

Labor Law

The panel granted the National Labor Relations Board's petition for enforcement of its order entered against International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 229, enjoining Local 229 from committing violations of the National Labor Relations Act ("NLRA").

The Board affirmed the administrative law judge's finding that Local 229 had violated Section 8(b)(4)(i)(B) of the NLRA by inducing or encouraging Commercial Metals Company's neutral employees to strike or stop work for the unlawful secondary purpose of furthering Local 229's primary labor dispute with Western Concrete Pumping.

The panel rejected Local 229's contention that the Board's application of the NLRA to its conduct punished expressive activity protected by the First Amendment. Specifically, the panel refused to extend the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and refused to apply strict scrutiny to the analysis of Section 8(b)(4)(i)(B). The panel explained that *Reed* involved content-based restrictions in a municipal ordinance regulating signs directed toward the general public, whereas this case involved communications addressed to neutral employees within the tightly regulated contours of labor negotiations.

The panel held that the Board reasonably rejected Local 229's contention that Section 8(c) of the NLRA protected its communications because the Supreme

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** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Court has concluded that Section 8(c) does not immunize activities that violate Section 8(b)(4).

The panel held that the Board properly rejected the challenges asserted by Local 229 under the Religious Freedom Restoration Act and under the Thirteenth Amendment to the United States Constitution.

Finally, the panel held that the language of the Board's order adequately apprised Local 229 of its notice obligations.

COUNSEL

Greg P. Lauro (argued), Attorney; Elizabeth A. Heaney, Supervisory Attorney; Linda Dreeben, Deputy Associate General Counsel; John W. Kyle, Deputy General Counsel; Peter B. Robb, General Counsel; National Labor Relations Board, Washington, D.C.; for Petitioner.

David A. Rosenfeld (argued), Weinberg Roger & Rosenfeld, Alameda, California, for Respondent.

OPINION

RAWLINSON, Circuit Judge:

The National Labor Relations Board (Board) petitions for enforcement of an order entered by the Board against the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 229 (Local 229) to "[c]ease and desist from inducing or encouraging" certain persons "to engage in a strike or a refusal to perform work in the course of employment," in order to force various companies to "cease doing business with Western Concrete Pumping, Inc.," in violation of Section 8(b)(4)(i)(B) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(4)(i)(B).

Local 229 opposes enforcement of the order, asserting that the Board's application of Section 8(b)(4)(i)(B) violates the First Amendment. Local 229 contends, alternatively, that its statements are protected under Section 8(c) of the NLRA, 29 U.S.C. § 158(c), the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, and the Thirteenth Amendment of the United States Constitution. Local 229 also seeks clarification of the notice requirement in the Board's order.

We grant the petition to enforce the Board's order, which is supported by substantial evidence that Local 229 violated Section 8(b)(4)(i)(B).

I. Background

The underlying facts in this case are undisputed. McCarthy Building Companies, Inc. (McCarthy), a general contractor, subcontracted with Western Concrete Pumping (WCP) and Commercial Metals Company (CMC) to perform work in connection with the construction of a parking structure for a casino in Temecula, California. Local 229 and Operating Engineers Local 12 (Local 12) engaged in a labor dispute with WCP over allegedly substandard wages. Local 12 lawfully picketed at the jobsite solely against WCP from August to November, 2016.

During the latter half of August, Local 229's business agent, James Alvernaz (Alvernaz), appealed to CMC's neutral employees specifically to induce or encourage a secondary boycott of CMC in support of Local 229's labor dispute with WCP. Alvernaz texted CMC employees a link to a webpage titled "Picket Line Etiquette," with a "No Picket Lines" symbol encircled by the phrase "FRIENDS DON'T LET FRIENDS CROSS." Alvernaz also called a CMC employee to encourage the employee not to perform work

for CMC in solidarity with Local 229. Finally, Alvernaz spoke with CMC employees at the jobsite on two occasions, and placed copies of a flyer entitled "Picket Line Etiquette," in their lunchboxes.

CMC filed a charge against Local 229 for engaging in an unfair labor practice by inducing or encouraging CMC's neutral employees to strike or stop work for the unlawful secondary purpose of furthering Local 229's primary labor dispute with WCP. An Administrative Law Judge (ALJ) found that Local 229 had violated Section 8(b)(4)(i)(B) of the NLRA and recommended that the Board enter a cease and desist order. The Board affirmed the ALJ's factual findings and rejection of Local 229's constitutional and statutory arguments. The Board adopted a modified version of the ALJ's recommended cease and desist order, which it now seeks to enforce.

II. Standards of Review

We uphold a decision of the Board if the findings of fact are supported by substantial evidence and if the agency correctly applied the law. *See United Nurses Ass'ns of Cal. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017).

Although we defer to the Board's reasonable interpretation of the NLRA, *see id.*, we do not defer to the agency's interpretation of constitutional provisions, *see Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1209 (9th Cir. 2005). We similarly review *de novo* an agency's interpretation of a statute outside its administration and expertise—in this case, the RFRA. *See Am. Fed'n of Gov't Emps., AFL-CIO, Council 147 v. Fed. Labor Relations Auth.*, 204 F.3d 1272, 1275 (9th Cir. 2000).

Because "[t]he Board is vested with broad discretion to devise remedies that effectuate the policies of the [NLRA]," we review a remedial order only for a "clear abuse of discretion," such that the Board's remedial order should stand unless "the order is a patent attempt to achieve ends other than" effectuating the policies of the NLRA. *United Nurses*, 871 F.3d at 377 (citations and internal quotation marks omitted).

III. Discussion

It is an unfair labor practice under the NLRA for a labor organization or its agents to "induce or encourage any individual employed by any person engaged in commerce . . . to engage in[] a strike or a refusal to perform any services . . . [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)(i)(B). Stated differently, a union may not exert pressure on employees of a neutral employer to strike against that secondary employer for the purpose of increasing the union's leverage in its dispute against the primary employer. *See Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 222–23 & n.20 (1982) (describing this action as a "secondary boycott").

Local 229 concedes that it violated Section 8(b)(4)(i)(B), and that substantial evidence supports its concession. Nevertheless, Local 229 asserts a number of constitutional and statutory challenges to the Board's application of Section 8(b)(4)(i)(B).

Initially, Local 229 contends that the Board's application of the statute to its conduct punished expressive activity protected by the First Amendment. Specifically, Local 229 invites us to extend the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct.

2218 (2015), to apply strict scrutiny to the analysis of Section 8(b)(4)(i)(B).

Prior to its decision in *Reed*, the Supreme Court addressed the constitutionality of a prior version of Section 8(b)(4)(i)(B) in *International Brotherhood of Electrical Workers v. NLRB* (*IBEW*), 341 U.S. 694 (1951). Without applying strict scrutiny, the Supreme Court concluded that even peaceful picketing violates the NLRA's prohibition on secondary boycotts, and held that the prohibition "carries no unconstitutional abridgment of free speech." *Id.* at 699–700, 705. Contrary to Local 229's contention that *IBEW*'s holding addresses only picketing, and not speech, the Supreme Court concluded that "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion," *id.* at 701–02, in order to prevent the "substantive evil . . . [of] the secondary boycott." *Id.* at 705. The Court explained that "[i]t was the objective of the unions' secondary activities and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision." *Id.* at 704 (citation, alteration, and internal quotation marks omitted). The Court recognized that while the statute's remedial provision, Section 8(c), "protect[s] noncoercive speech by employer and labor organization alike in furtherance of a lawful object," such protection does not extend to "*speech or picketing* in furtherance of unfair labor practices such as are defined in § 8(b)(4)." *Id.* (emphasis added).

The two circuits to address the First Amendment implications of Section 8(b)(4)(i)(B) in the context of pure speech have applied *IBEW* to hold that the "First Amendment is not at all implicated" when activities prohibited by Section 8(b)(4)(i) are proscribed. *War-*

shawsky & Co. v. NLRB, 182 F.3d 948, 952 (D.C. Cir. 1999). The District of Columbia Circuit expressly held that "the First Amendment does not protect communications directed at—and only at—the neutral employees merely because the form of communications is handbilling and conversations." *Id.* (footnote reference omitted). The Second Circuit rejected the same First Amendment argument that Local 229 now makes, holding that "[i]t is thus clear that the [*IBEW*] Court which rejected First Amendment objections to § 8(b)(4) had 'speech' as well as 'picketing' inducements in mind." *NLRB v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 477 F.2d 260, 266 (2d Cir. 1973).

There have been no changes to First Amendment jurisprudence in the interim that warrant divergence from the Supreme Court's analysis in *IBEW* or the interpretation of *IBEW* in the decisions from the District of Columbia and Second Circuits. We are not persuaded that *Reed* can carry the weight that Local 229 ascribes to the decision. *Reed* involved content-based restrictions in a municipal ordinance regulating signs directed toward the general public. S*ee* 135 S.Ct. at 2225–26. In contrast, this case involves communications addressed to neutral employees within the highly regulated contours of labor negotiations. *See IBEW*, 341 U.S. at 702–04. Moreover, we think it highly unlikely that the Supreme Court would have limited or implicitly overruled the detailed analysis of the NLRA in *IBEW* without even mentioning *IBEW* in its *Reed* decision. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (cautioning lower courts against concluding that its more recent cases implicitly overruled earlier precedent); *see also United States v. Garcia*, 768 F.3d 822, 831 (9th Cir. 2014) ("[W]e have expressed a . . . reluctance to abandon Supreme Court precedent on the premise that a subsequent case has

effected an implicit overruling of earlier Supreme Court precedent.").

Local 229's reliance on *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988), is misplaced. *DeBartolo* addressed the issue of whether a different provision of the statute, Section 8(b)(4)(ii), protected handbills urging *consumers* to lawfully boycott a neutral employer. *See id.* at 581–82. *DeBartolo* did not address speech whose object was to encourage or induce the "substantive evil [of] the secondary boycott" by neutral employees that Section 8(b)(4)(i)(B) prohibits, and therefore did not disturb the holding of *IBEW*. 341 U.S. at 705.

Alternatively, Local 229 asserts that Section 8(c) of the NLRA protects its communications. Section 8(c) provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

The Board reasonably rejected Local 229's contention because the Supreme Court has concluded that Section 8(c) does not immunize activities that violate Section 8(b)(4). In *IBEW*, the Court definitively and undeniably rejected the notion that activities proscribed by Section 8(b)(4) could escape prohibition through application of Section 8(c), including the following reasoning:

> There is nothing in the language or legislative history of section 8(c) which indicates persuasively a Congressional intent to create an asylum of immu-

> nity from the proscription of section 8(b)(4)[] for secondary boycotts. 341 U.S. at 701 n.6.
>
> The legislative history does not sustain a congressional purpose to outlaw secondary boycotts under [Section] 8(b)(4) and yet in effect to sanction them under [Section] 8(c). *Id.* at 704.
>
> The remedial function of [Section] 8(c) is to protect non-coercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in [Section] 8(b)(4). The general terms of [Section] 8(c) appropriately give way to the specific provisions of [Section] 8(b)(4). *Id.* at 704–05.

We similarly conclude that the Board properly rejected the challenges asserted by Local 229 under the RFRA and under the Thirteenth Amendment to the United States Constitution. Local 229's bald assertion that its rights under the RFRA were violated, fails to sufficiently demonstrate that prohibiting the union's inducement and encouragement of neutral employees to engage in a secondary boycott substantially burdened its exercise of religion. *See Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016–18 (9th Cir. 2016) (affirming summary judgment against plaintiffs where there was no evidence of a substantial burden on the exercise of their religious beliefs when they were denied the use of cannabis).

Local 229's contention that Section 8(b)(4)(i)(B) runs afoul of the Thirteenth Amendment's prohibition on involuntary servitude, is "patently groundless," particularly in light of Local 229's concession that "under § 8(b)(4), employees are free to leave the job." *Printing*

Specialties & Paper Converters Union, Local 388 AFL v. LeBaron, 171 F.2d 331, 334 & n.2 (9th Cir. 1948) (rejecting similar argument that the NLRA's prohibition on secondary boycotts is tantamount to involuntary servitude).

Finally, we hold that the language of the order adequately apprised Local 229 of its notice obligations. As Local 229 conceded, the language used in the Board's order has been standard for over fifteen years.

IV. Conclusion

Substantial evidence supports the Board's finding that Local 229 violated Section 8(b)(4)(i)(B) of the NLRA. Accordingly, we GRANT the Board's application for enforcement of its order.[1]

PETITION TO ENFORCE GRANTED.

[1] We DENY Local 229's motion for judicial notice. See Escobedo v. Applebees, 787 F.3d 1226, 1228 n.2 (9th Cir. 2015) (denying request for judicial notice because, inter alia, documents were immaterial to the court's analysis).

APPENDIX C

International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229, AFL-CIO *and* Commercial Metals Company d/b/a CMC Rebar. Case 21–CC–183510

August 30, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On May 4, 2017, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, International Association of Bridge,

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[1] We deny the Respondent's exceptions to the remedy as the Respondent has not demonstrated that the remedy or the Board's standard remedial language is inaccurate or should be modified.

[2] We shall modify the judge's recommended Order and substitute a new notice to conform to the Board's standard remedial language.

Structural, Ornamental, and Reinforcing Iron Workers, Local 229, AFL-CIO, San Diego, California, its officers, agents, and representatives, shall

1. Cease and desist from inducing or encouraging any individual employed by Commercial Metals Company d/b/a CMC Rebar (CMC), or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal to perform work in the course of employment, where an object is to force or require CMC, McCarthy Building Companies, Inc., or any other person to cease doing business with Western Concrete Pumping, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its office and union hall in San Diego, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, deliver to the Regional Director for Region 21 signed copies of the notice in sufficient number for posting by the Commercial Metals Company d/b/a CMC Rebar at its Temecula, California facility, if it wishes, in all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 30, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
OMITTED

Lisa McNeill, Esq., for the General Counsel.
David A. Rosenfeld, Esq., for the Respondent.
L. Brent Garrett, Esq., for the Charging Party.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. The issue in this case is whether a labor organization unlawfully induced or encouraged employees of Commercial Metals Company d/b/a CMC Rebar (CMC) to strike or refuse to perform services in support of its labor dispute with Western Concrete Pumping, Inc. (WCP). The violation is found as alleged. Arguments that the Act, as applied here, violates the First and Thirteenth Amendments and the Religious Freedom Restoration Act (RFRA) are rejected.

I. FACTS

Construction of a four-story parking structure at the Pechanga Resort & Casino in Temecula, California (Pechanga jobsite) was the locus of the dispute. The general contractor on the Pechanga jobsite was McCarthy Building Companies, Inc. (McCarthy). Charging Party CMC worked as a subcontractor of McCarthy at the Pechanga jobsite from February 2016 to December 2, 2016. CMC furnished and installed reinforcing steel and post-tensioning reinforcement. WCP, another McCarthy subcontractor, performed concrete work at the Pechanga jobsite.

Labor organization International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229, AFL-CIO (Local 229) and nonparty labor organization Operating Engineers Local 12 (Local 12) have a labor dispute with WCP.[1] The

[1] Stipulation at par. 7(a) and (b), 9(a) and (b).

parties agree that at no time have Local 229 or Local 12 been engaged in a primary labor dispute with CMC, McCarthy, or any other contractors at the Pechanga jobsite other than WCP.[2] However, it is Local 229's position that it has been engaged in a labor dispute with McCarthy and CMC within the meaning of Section 2(9) of the National Labor Relations Act (the Act)[3] because WCP does not pay area standards and is on the Pechanga site.[4] The General Counsel and CMC do not agree with this position and note that there is no contention that CMC and WCP are allied with each other in the performance of any work subject to any labor dispute.[5]

CMC is a signatory to the Iron Workers Master Labor Agreement (Master Agreement) effective July 1, 2014, to June 30, 2017. The Master Agreement applies to projects in Temecula, California, including the Pechanga jobsite.[6]

On August 16, 2016,[7] Local 12, in support of its labor dispute with WCP, began picketing at the Pechenga jobsite. The picketing was aimed solely at WCP. The picketers carried signs reading, "Not Paying Area Standard Wages—Western Pumping." The picketing

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[2] Stipulation at par. 9(c) and (d).

[3] Sec. 2(9) of the Act, 29 U.S.C. §152(9), provides, inter alia, "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee."

[4] Stipulation at par. 9(e). Local 229 does not offer any further explication for its Sec. 2(9) argument.

[5] Stipulation at par. 9(e).

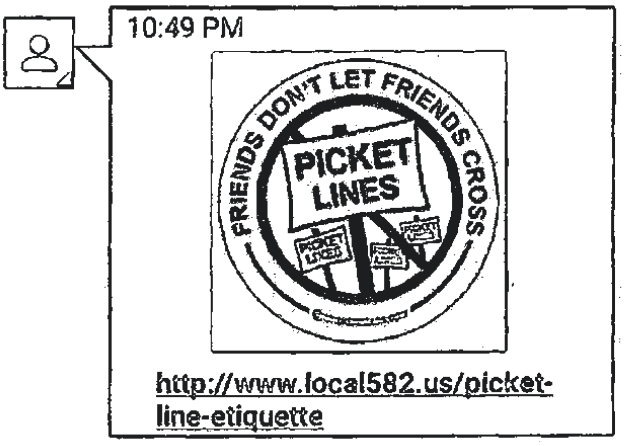
[6] Stipulation at par. 10.

[7] Unless otherwise referenced, all dates are in 2016.

continued on a daily basis until about November 18. The parties do not contend that this picketing was unlawful.[8]

About August 16, through its business agent James Alvernaz (Alvernaz),[9] Local 229 appealed to employees of CMC by sending them a text message, to induce or encourage them to strike or refuse to perform work for CMC at the Pechanga jobsite, in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP.[10] The text message contained a No Picket Lines symbol circled by the words, "FRIENDS DON'T LET FRIENDS CROSS." The text also contained a link to webpage: http://www.local582.us/picket-line-etiquette.

Thus, the text message was as follows:



About August 21, Local 229, by Alvernaz, appealed to CMC employees by calling them on the telephone to

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[8] Stipulation at par. 11.

[9] The parties agree that Alvernaz was at all material times an agent of Local 229 within the meaning of Sec. 2(13) of the Act.

[10] Stipulation at par. 12.

induce or encourage them to strike or refuse to perform work for CMC at the Pechanga jobsite in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP. Specifically, about August 21, Alvernaz telephoned an employee of CMC about the Local 12 picket. Alvernaz encouraged the employee that in support of its dispute with WCP, he and other employees should not perform work for CMC.[11]

About August 29, Local 229, by Alvernaz, at the Pechanga jobsite, appealed to employees of CMC by distributing copies of a flyer to them entitled "Picket Line Etiquette" to induce or encourage them to strike or refuse to perform work for CMC at the Pechanga jobsite in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP. Alvernaz placed copies of the flyer in the employees' lunch boxes. Alvernaz also talked with employees and encouraged them to support its dispute with WCP by not working for CMC.[12] The flyer stated as follows:

> Picket Line Etiquette
> Labor's first commandment:
> "THOU SHALL NOT CROSS THE LINE"
> A good Union member is EXTREMELY CAREFUL when confronted with a picket line situation.
> When a picket line is established on a job where you are working:
> You MAY LEAVE. You DO NOT TALK.
> You READ the PICKET SIGN as you leave.
> You DO NOT hang around near the job.
> You know that ONCE A PICKET LINE IS ESTABLISHED, your Business Agents and other Union Officials are legally gagged and handcuffed from

[11] Stipulation at par. 13.

[12] Stipulation at par. 14.

giving advice pertaining to THAT JOB. They can only tell you if the Picket Line is AUTHORIZED.

A good union member knows their rights:

You have the right not to work behind ANY Picket Line

You have the right to decide for yourself whether to walk off a job being picketed.

You understand that YOUR TRADE may be UNDER ATTACK next and you would want everyone's support.

You know that a two gate system means a PICKET LINE and you have the RIGHT NOT TO WORK, no matter how many gates the employer sets up.

KNOW YOUR RIGHTS.

BE PREPARED AHEAD OF TIME HOW TO REACT TO PICKET LINES.

About August 29, Local 229, by Alvernaz visited the Pechanga jobsite and appealed to employees of CMC by speaking with them to induce or encourage them to strike or refuse to perform work for CMC at the Pechenga jobsite in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP. Alvernaz encouraged the employee that in support of its dispute with WCP, employees should not perform work for CMC.[13]

II. ANALYSIS

Section 8(b)(4)(i)(B) of the Act[14] provides in relevant part that it is an unfair labor practice for a labor organization or its agents "to induce or encourage any in-

[13] Stipulation at par. 15.

[14] 29 U.S.C. §158(b)(4)(i)(B).

dividual employed by any person engaged in commerce to engage in a strike or a refusal . . . to perform any services [where an object thereof is] forcing or requiring any person . . . to cease doing business with any other person " Thus, Section 8(b)(4)(i)(B) is violated "by picketing or activity that induces or encourages the employees of a secondary employer to stop work, where an object is to compel that employer to cease doing business with the struck or primary employer."[15] The phrase "induce or encourage" includes every form of influence and persuasion.[16] Words which are alleged to induce or encourage are judged as they would reasonably be understood by employees:[17]

> In determining whether words constitute inducement or encouragement, the Board has repeatedly found unlawful any statement which agents of a union make directly to the employees of a secondary employer *if such statements would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer.*

A secondary objective has been understood as having a purpose of pressuring a neutral party to become involved in a dispute with a primary target.[18] As relevant in this case, Section 8(b)(4)(i)(B) is violated when

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[15] *Southwest Regional Council of Carpenters (New Star General Contractors),* 356 NLRB 613, 615 (2011); *Teamsters Local 122 (August A. Bush & Co.),* 334 NLRB 1190, 1191 (2001), enf. 2003 WL 880990 (D.C. Cir 2003).

[16] *IBEW Local 501 v. NLRB,* 341 U.S. 694, 701–702 (1951).

[17] *Teamsters Local 122*, supra, 334 NLRB at 1191–1192 fn. 8, cited by the General Counsel.

[18] See, e.g., *Teamsters Local 732 (Servair Maintenance),* 229 NLRB 392, at 392 and 400 (1977).

a labor organization "induces or encourages" employees of a neutral employer such as CMC to stop working if there is a secondary objective of forcing or requiring the neutral employer to cease doing business with the primary target, in this case WCP.[19]

Local 229 does not argue that Alvernaz's actions did not "induce or encourage" employees of CMC "to engage in a strike or a refusal . . . to perform any services." Local 229 does not dispute that an object of its inducement or encouragement was to pressure CMC or McCarthy to cease doing business with WCP. Moreover, the record evidence supports a finding of a violation of Section 8(b)(4)(i)(B).

Thus, as the General Counsel argues, employees would reasonably understand Alvernaz's texts, phone calls, flyers, and conversations as requests that they withhold their services from their neutral employer CMC in order to support the primary labor dispute with WCP. The General Counsel further asserts that the August 16 text message that "friends don't let friends cross . . . picket lines" and the August 29 flyer distributed to CMC employees, "Thou Shall not cross picket lines" specifically request employees to engage in a work stoppage against neutral employer CMC and thus violate Section 8(b)(4)(i)(B) of the Act.

In each of the four instances of alleged violation, the parties stipulated that the purpose of Alvernaz's communication was to induce or encourage CMC employees to strike or refuse to perform work for CMC in support of Local 12's and Local 229's labor dispute with WCP.[20] Consistent with the stipulation, the re-

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[19] *Teamsters Local 122*, supra, 334 NLRB at 1191 at fn. 7.

[20] In two of the four instances of alleged violation, the stipulation itself is unaccompanied by further evidence. Thus, as to the

cord fully supports a finding that employees would have reasonably understood the August 16 text and the August 29 flyer as signals or requests to stop working for neutral employer CMC. Thus, Alvernaz sent CMC employees a text stating, inter alia, "Friends Don't Let Friends Cross Picket Lines." This could only have been understood as a request to withhold services from CMC by refusing to cross Local 12's picket line. Alvernaz placed "picket line etiquette" flyers in CMC employees' lunch boxes on August 29. These flyers contained a blanket admonition not to cross picket lines. Contextually, because CMC employees could not report to work if they honored the picket line, the flyers would reasonably be read as a request to stop working for their employer. Indeed, as the General Counsel notes that in similar circumstances such language was previously found unlawful.[21] In light of the Local 12's picket line, these messages would be reasonably interpreted by CMC employees as inducement or encouragement to honor the picket line, thus refusing to perform services for neutral employer CMC.

Thus, based on the stipulation and the evidence contained in the stipulation, it is found that in each of the

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August 21 phone calls (Stipulation at par. 13) and the August 29 conversations (Stipulation at par. 15), the parties stipulated that Alvernaz appealed to employees to induce or encourage them to strike or refuse to perform work for CMC. No further text in support of these stipulations was offered and no further analysis is required.

[21] *Iron Workers Pacific Northwest Council (Hoffman Construction),* 292 NLRB 562, 571, 584 (1989), enf. 913 F.2d 1470 (9th Cir. 1990), holding leaflets which were virtually identical to those here unlawful. The leaflets stated in part, "A good union member is extremely careful when confronted with a picket line situation. WHEN A PICKET LINE IS ESTABLISHED on a job where he is working . . . He LEAVES. He DOES NOT TALK—JUST LEAVES."

four instances, Local 229 induced or encouraged employees of CMC, a neutral employer, to stop working with the objective of forcing CMC to cease doing business with the primary employer WCP. It is accordingly found that by its August 16 text message, its August 21 telephone calls, its August 29 flyers, and its August 29 conversations, Local 229 induced or encouraged employees of CMC to strike or refuse to perform work for CMC in support of its and Local 12's labor dispute with WCP in violation of Section 8(b)(4)(i)(B) of the Act.

In its defense, Local 229 asserts that Section 8(b)(4)(i)(B) is presumptively unconstitutional when applied to the facts of this case. Under more recent First Amendment jurisprudence, free speech has been expanded, according to Local 229.[22] Specifically, it is argued that strict scrutiny of Section 8(b)(4)(i)(B)'s "content based" regulation of speech is required.[23] Further, Local 229 notes that the Supreme Court has declined

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[22] In *Reed v. Town of Gilbert,* 576 U.S. ___, 135 S. Ct. 2218, 2227 (2015), the Court explained that laws treating speech based on its content are "content based" regardless of the government's interests or motivations. The Court held that the town of Gilbert, Arizona's municipal sign code, which imposed stricter restrictions on non-profit signage than on other signs, constituted a content-based regulation of speech which must be subjected to and could not survive strict scrutiny.

[23] Local 229 notes that in *Safeco*, a plurality of the Court utilized an "unlawful purpose" rationale and held that restrictions on peaceful secondary consumer picketing were constitutional. *Safeco*, however, according to Local 229, failed to rule on the level of constitutional scrutiny applicable to 8(b)(4)(B). In any event, Local 229 avers that the Court abandoned the unlawful objective rationale in *Edward J. DeBartolo Corp. v. Gulf Coast Trades Council,* 485 U.S. 568, 578–588 (1988) (In order to avoid potential First Amendment conflict, the Court held that Sec. 8(b)(4)(ii) does not proscribe peaceful handbilling, unaccompanied by picketing, urging consumer boycott of neutral employer).

to determine what level of constitutional scrutiny applies to Section 8(b)(4)(i)(B).[24] Building on these assertions, Local 229 argues that as a content-based restriction, Section 8(b)(4)(i)(B) is presumptively unconstitutional.[25] Assuming state interests such as unimpeded commerce or prohibiting coercive closing of businesses, coerced participation in a labor strike or preventing threats or violence, Local 229 claims that Section 8(b)(4)(i)(B) is not narrowly tailored to those ends and, thus, violates the First Amendment. Local 229 also categorizes Alvernaz's appeals as "pure speech" and protected by the First Amendment.[26]

These arguments, although eloquently presented, are rejected. In agreement with counsel for the General Counsel, it must be found that the Court answered the free speech argument in 1951 when it decided *IBEW Local 501 v. NLRB,* 341 U.S. 694, 705

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[24] Local 229 acknowledges that in *IBEW Local 501 v. NLRB,* supra, 341 U.S. at 705, the Court held, in the context of picketing followed by a telephone call, that the predecessor to current section 8(b)(4)(i)(B) does not constitute an abridgement of free speech. Local 229 argues that this case is not applicable to pure speech and is not sustainable under current First Amendment jurisprudence. Similarly, Local 229 views the holding in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco),* 447 U.S. 607, 616 (1980), as of limited precedential value. In *Safeco,* a plurality of the Court held that restrictions on peaceful secondary consumer picketing were constitutional.

[25] This would be the case, according to Local 229, under either an "obvious" facially content-based analysis or a "subtle" facially content-based analysis.

[26] Because there is no element of conduct, the communication is protected by the First Amendment pursuant to cases rejecting regulation of such speech, Local 229 argues, citing *Brandenburg v. Ohio,* 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942); *Rosenfeld v. New Jersey,* 408 U.S. 901 (1972); *R.A.V. v. St. Paul, Minnesota,* 505 U.S. 377 (1992).

holding that outlawing inducement or encouragement of "secondary pressure" does not violate the First Amendment. *IBEW Local 501* remains binding law.

Local 229 also asserts that Section 8(c) of the Act[27] protects Alvernaz's requests that employees take action as there was "no threat of reprisal or force or promise of benefit" in his requests. This argument was also rejected in *IBEW Local 501,* supra, 341 U.S. at 701–702 (Sec. 8(c) does not limit the words in Sec. 8(b)(4), "induce or encourage," to require a "threat of reprisal or force or promise of benefit.")

Additionally, Local 229 argues that the application of the Act to prohibit efforts to induce or encourage workers to leave their work violates the Thirteenth Amendment. In 1865, the Thirteenth Amendment to the United States Constitution abolished slavery and involuntary servitude. It provides, in relevant part, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." On this record, however, no evidence of involuntary servitude warranting application of the Thirteenth Amendment exists. Moreover, Local 229 does not explain the theory of this defense. Thus, it is found that this defense lacks merit.

Finally, Local 229 asserts that Alvernaz's communications are protected by the Religious Freedom Restoration Act (RFRA).[28] RFRA provides, inter alia, that

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[27] Sec. 8(c), 29 U.S.C. §158(c), provides that, "The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of any unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

[28] Pursuant to the RFRA, 42 U.S.C. §§ 2000bb-2000bb-4, the government may "substantially burden" exercise of religion only

the government may not substantially burden free exercise of religion. Exercise of religion is defined as "any exercise of religion whether or not compelled by or central to, a system of religious belief."[29]

As explained in *Oklevueha Native American Church Of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1015 (9th Cir. 2016),

> To establish a prima facie claim under RFRA, a plaintiff must "present evidence sufficient to allow a trier of fact rationally to find the existence of two elements." *Navajo Nation v. U.S. Forest Serv.,* 535 F.3d 1058, 1068 (9th Cir.2008) (en banc). "First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion.'" *Id.* (quoting 42 U.S.C. § 2000bb–1(a)); *see also United States v. Zimmerman,* 514 F.3d 851, 853 (9th Cir.2007) (per curiam) (observing that a litigant "may only invoke RFRA if his beliefs are both 'sincerely held' and 'rooted in religious belief, not in "purely secular" philosophical concerns'" (citation omitted)). "Second, the government action must 'substantially burden' the plaintiff's exercise of religion." *Navajo Nation,* 535 F.3d at 1068 (quoting 42 U.S.C. § 2000bb–1(a)). Where a plaintiff has established these elements, "the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a 'compelling governmental interest' and is imple-

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in furtherance of a compelling government interest using the least restrictive means. Local 229 analogizes to the Court's holding in *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014), arguing that protected concerted activity such as Alvernaz's is a core religious right.

[29] RFRA, 42 U.S.C. §2000cc-5(7)(A).

mented by 'the least restrictive means.'" *Id.* (quoting 42 U.S.C. § 2000bb–1(b)).

It is unnecessary that Local 229 specify that engaging in protected, concerted activity is compelled by or central to a system of religious belief as "any exercise of religion" suffices. Thus, assuming without deciding that protected, concerted activity might constitute "any exercise of religion," the RFRA claim must nevertheless fail because Local 229 has not shown that Section 8(b)(4)(i)(B) imposes a substantial burden on a labor organization's exercise of the right to engage in protected, concerted activity.[30] Certainly the Section 8(b)(4)(i)(B) prohibition of inducing or encouraging employees to engage in a strike or a refusal to perform services for a neutral employer does not rise to the level of prohibiting or burdening (substantially or otherwise) labor organizations. Section 8(b)(4)(i)(B) does not generally forbid a labor organization from requesting that individuals honor a lawful picket line. Rather, it forbids enmeshing neutrals in this activity. Local 229 does not argue that enmeshing neutrals is a religious requirement of engaging in protected, concerted activity.

Moreover, even if Local 229 established that its exercise of religion is substantially burdened, it is clear that the challenged action is in furtherance of a compelling governmental interest which was implemented by the least restrictive means.[31] Thus Local 229 has

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[30] To constitute a substantial burden, a limitation on religious practice "must impose a significantly great restriction or onus upon such exercise" or put "substantial pressure on an adherent to modify . . . behavior or to violate . . . beliefs." *Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015).

[31] A strong governmental interest exists in regulating the economic relationship between labor and management. *International Longshoremen's Association v. Allied International, Inc.,* 456

not shown that Section 8(b)(4)(i)(B) substantially burdens its exercise of the right to engage in protected, concerted activity. Local 229's reliance on RFRA is accordingly unavailing.

CONCLUSIONS OF LAW

1. Charging Party CMC is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 229 and Local 12 are labor organizations within the meaning of Section 2(5) of the Act.

3. The NLRB has jurisdiction of this dispute pursuant to Section 10(a) of the Act.

4. On August 16, 2016, Local 229 violated Section 8(b)(4)(i)(B) by appealing to employees of CMC by sending them a text message stating "Friends Don't Let Friends Cross Picket Lines" to induce or encourage the CMC employees to strike or refuse to perform work for CMC in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP.

5. On August 21, 2016, Local 229 violated Section 8(b)(4)(i)(B) by appealing to employees of CMC by calling them on the telephone stating that they and other employees should not perform work for CMC in order to induce or encourage them to strike or refuse to perform work for CMC in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP.

6. On August 29, 2016, Local 229 violated Section 8(b)(4)(i)(B) by appealing to employees of CMC by distributing a flyer entitled "Picket Line Etiquette" to in-

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U.S. 212, 226–227 (1982); *Carroll College, Inc.,* 345 NLRB 254, 257 (2005) (holding compelling governmental interest in ordering employer to bargain overcame RFRA).

duce or encourage them to strike or refuse to perform work for CMC in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP.

7. On August 29, 2016, Local 229 violated Section 8(b)(4)(i)(B) by appealing to employees of CMC by speaking with them to induce or encourage them to strike or refuse to perform work for CMC in support of Local 12's labor dispute with WCP and Local 229's labor dispute with WCP.

8. The First Amendment, the Thirteenth Amendment, Section 10(c) of the Act, and RFRA fail to provide a defense to these findings of violation of 8(b)(4)(i)(B) of the Act.

REMEDY

Having found that Local 229 has violated Section 8(b)(4)(i)(B) of the Act, it is recommended that it be ordered to cease and desist from such action and to take certain affirmative action designed to effectuate the policies of the Act including posting a notice to employees and members at its office and union hall.

ORDER

It is recommended that the Board order International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229, AFL-CIO, San Diego, California, its officers, agents, and representatives to

1. Cease and desist from texting, phoning, distributing flyers, or speaking to employees inducing or encouraging any employee of CMC to strike or refuse to perform work for CMC in support of Local 12's or Local 229's labor dispute with WCP with an object to force or require CMC, McCarthy, and any other per-

sons to cease doing business with WCP or engaging in any like or related conduct.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after serve by the Region, post at its office and union hall in San Diego, California, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Local 229's authorized representative, shall be posted by Local 229 immediately upon receipt and maintained by 60 consecutive days in conspicuous places including all places where notice to members are customarily posted. Reasonable steps shall be taken by Local 229 to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Local 229 has taken to comply.

Dated Washington, D.C. May 4, 2017

APPENDIX
OMITTED