No. 20-1111

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 Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

David A. Rosenfeld
Counsel of Record
Weinberg, Roger & Rosenfeld
1375 55th Street
Emeryville, California 94608
courtnoticees@unioncounsel,net
drosenfeld@unioncounsel.net
Telephone: (510) 3371001

Attorneys for Petitioner

Mosaic - (301) 927-3800 - Cheverly, MD

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ARGUMENT

1. The Board has placed squarely before this Court whether *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951) (*IBEW*), should be overruled in whole or in part. Because the secondary boycott statute has already been definitively interpreted to prohibit the expression evident in this case, there is no viable constitutional avoidance doctrine argument that eludes this conflict.

However, the Court could deconstruct *IBEW* to hold that it only prohibits picketing, not speech. That is contrary to the Board's position and would leave unresolved the question of whether peaceful picketing would be prohibited if the speech involved in this case is protected by the First Amendment. That result is equally untenable.

The Board's brief in opposition highlights why this Court should grant this petition. The Board attempts to deflect the analysis away from the content-based analysis of the dissent in the court below and of this Court's First Amendment jurisprudence by submitting that the commercial speech doctrine applies. As we explain in this reply, that doctrine is not only wholly inapplicable, but the Board's retreat to that argument demonstrates that this Court needs to conclusively clarify that the First

Amendment applies to labor speech intended to correct an injustice in the workplace.

2. The brief in opposition concedes that the union representative engaged only in expressive activity, speech, and there was no other conduct involved. The Board agrees that the union agent sought support in a dispute between the petitioner, Local 229, and an employer, Western Concrete Pumping (WCP), over that other employer's payment of low wages. Another union had the same dispute with that employer and was picketing. Local 229 sought to join that dispute over the failure of that employer to pay adequate wages.

The Board does not contest the proposition that the protest over WCP's low wages was a lawful dispute. The Board does not dispute that Local 229 and the employees of Commercial Metals Company could protest the low wages paid by WCP. The Board does not contest that the individual or collective choice of the employees to leave the job would not be prohibited by the National Labor Relations Act, 29 U.S.C. 151 et seq. (NLRA), and would be protected by various federal and state laws including the Constitution. The Board only claims one thing is unlawful: that a union agent asked employees to support the union's position in the dispute.

3. The Board's attempt to portray *IBEW* as standing for the proposition that speech is prohibited

fails. The brief in opposition does not address the extensive analysis of the dissent of Judge Berzon, App. 4a-24a. See also the separate dissent of Judge Bumatay. App. 24a-28a.

The brief in opposition relies on just one phrase from *IBEW*: "The words 'induce or encourage' are broad enough to include in term every form of influence and persuasion." Br. in Opp. 12.This runs counter to this Court's repeated reminders that "the reach of our opinion is limited to the facts before us." *Snyder* v. *Phelps*, 562 U.S. 443, 460 (2011); 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.").

The Board's brief in opposition ignores the fact that the Board, in its underlying decision which was enforced, found only the picketing to be unlawful. App. 10a. The statement of the union agent was used to establish the purpose of the picketing, not an independent violation. We recognize, as the Board points out, that several courts have treated *IBEW*'s broad language as an instruction of the Court without addressing this constitutional issue. Nonetheless, it is clear that this Court's opinion in *IBEW* did not reach the speech but only the picketing.

4. The Board newly retreats to the argument that the speech involved is a form of commercial speech subject to a less rigorous standard than strict scrutiny. Br. in Opp. 13-17. This remarkable pivot to a different argument just accentuates the vulnerability of *IBEW*.

The "commercial speech" doctrine is not a rationale of the administrative agency. It is only the argument created by its counsel. This Court has long held that the rationale of the lawyer for the agency is not acceptable; the agency's rationale is what matters. See *Sec. & Exch. Comm'n* v. *Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery*); *NLRB* v. *Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 715 n.1 (2001) ("We do not * * * substitute counsel's *post hoc* rationale for the reasoning supplied by the Board itself.")

The Board has never found that union activity such as organizing, representation of employees, bargaining or picketing to be commercial activity or anything resembling commercial activity. Nor has it ever found employer speech or other activity by unions, employers or employees in the context of the NLRA to be a form of commercial speech. To do so would be a dramatic turn that would subject all of the NLRA to a doctrine the Board has never adopted.

Commercial speech is "speech proposing a commercial transaction." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 562

(1980). This Court rejected the Board's argument that peaceful communication about a labor dispute is a form of commercial speech in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575-576 (1988) (*DeBartolo*). This Court stated that "[t]he handbills involved here * * * do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and standard of living of the populace." *Id.* at 575-576. This Court's explanation in *DeBartolo* forecloses the Board's argument.

The Board cites two cases in which this Court, in dicta, referred to treating commercial speech differently than other kinds of speech. Br. in Opp. 14-15. See *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 563–566 (2011) (*Sorrell*); and *Barr* v. *Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (*Barr*). This focus on commercial activity such as peddling drugs or the regulation of debt collection by robocalls demonstrates why the effort to prop up *IBEW* fails. In both cases this Court found that the regulation was content-based and did not survive. If anything, that further points to the demise of *IBEW.*

Local 229's efforts to inform employees that another employer is harming the community by not paying area-standard wages is protected speech that

could "be fairly considered as relating to [a] matter of political, social or other concern to the community." *Snyder* v. *Phelps*, 562 U.S. at 453 (quoting *Connick* v. *Myers*, 461 U.S. 138, 146 (1983)). Such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452 (quoting *Connick*, 461 U.S. at 145). See also *Janus* v. *Am. Fed'n of State, County, & Municipal Emps., Council 31*, 138 S. Ct. 2448, 2464, 2471 (2018) (*Janus*). Thus, such speech cannot be in the furtherance of a "substantive evil."

There is no more fundamental purpose of the NLRA than encouraging the efforts of workers through unions to improve their working conditions including assisting employees of other employers to improve their wages. *Eastex. Inc.* v. *NLRB*, 437 U.S. 556 (1978).

Even if the Court were to apply some aspect of *Sorrell* and *Barr*, this pure content regulation would not survive that analysis. *Sorrell*, 564 U.S. at 565-567 (a standard of heightened scrutiny applies where government "impose[s] a specific, content-based burden on protected expression"). The regulation is wholly content content-based, speaker-based and view-based. The brief in opposition has not sought to explain how this would survive a lower standard of scrutiny.

This Court has "not hesitated to strike down complex regulatory statutes when First Amendment rights are implicated." See, *e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310 (2010); *Sorrell* (striking down a state law regulating pharmaceuticals); *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144 (2017); and *Matal* v. *Tam*, 137 S. Ct. 1744 (2017).[1]

The NLRA regulatory scheme, founded on allowing employees to work together to improve their working conditions, is entitled to the highest constitutional protection.

5. The brief in opposition relies upon two cases that undermine the Board's position. *NLRB* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616 (1980) (*Safeco*), is more relevant. *Safeco* involved boycotting, including picketing. The brief in opposition references the plurality opinion. Br. in Opp. 13.

Safeco's four justice plurality rested its conclusion that the First Amendment did not protect secondary consumer picketing on a finding that such picketing was driven by an "unlawful purpose," *i.e.*,

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[1] The brief in opposition notes *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949) decided before IBEW. This Court has limited *Giboney* to "speech integral to criminal conduct." *United States* v. *Alvarez*, 567 U.S. 709, 717 (2012).

encouraging customers not to shop at a secondary business. This Court's two sentence disposition of this issue is striking in its brevity. *Id.* at 616.

Neither Justice Blackmun's nor Justice Stevens' concurrences endorsed the plurality's "unlawful purpose" rationale. Both recognized the conflict between section 8(b)(4)(ii)(B) of the NLRA, 29 U.S.C. 158(b)(4)(ii)(B), and the First Amendment. See *Safeco,* 447 U.S. at 617 (Blackmun, J., concurring) (noting the "plurality's cursory discussion of what for me are difficult First Amendment issues"); *id.* at 618 (Stevens, J., concurring) (stating "[t]he constitutional issue, however, is not quite as easy as the plurality would make it seem").

Justice Blackmun, invoking the "delicate balance" argument, wrote that section 8(b)(4)(ii)(B), survived First Amendment challenge because of the government's interest in preserving the "delicate balance" Congress had struck in the NLRA between the union's freedom of expression and the general public's freedom from "coerced participation in industrial strife." *Id.* at 617–618 (Blackmun, J., concurring).

Justice Stevens invoked the "speech-plus" argument, relied on the concept of "signal" picketing. Reasoning that picketing is a mixture of conduct and communication, Justice Stevens opined that in the "labor context," "the conduct element" (the picketing itself), more so than the force of the idea expressed, is what persuades customers to decline to patronize an

establishment. *Id.* at 619 (Stevens, J., concurring). Here, there is no conduct which could trigger a "speech plus" analysis. This reasoning has now been effectively rejected when picketing is involved. *Snyder v. Phelps, supra.*

Eight years after *Safeco*, in *DeBartolo* the Court abandoned the *Safeco* plurality's "unlawful objective" rationale. In *DeBartolo*, the Court held that secondary boycott speech directed towards consumers was not an "unlawful purpose." 485 U.S. at 578.

The brief in opposition retreats to the "delicate balance" analysis: Br. in Opp. 14. The delicate balance doctrine has been rejected by this Court. Under *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015) (*Reed*), laws that treat speech differently based on content must be considered content-based restrictions regardless of the government's interest or motivations in enacting such laws. See *Reed*, 576 U.S at 165-166. "[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 166. Thus, traditional government interest-based justifications for section 8(b)(4)(ii)(B), no longer justify insulating its provisions from strict scrutiny. Unless the regulation is content neutral, the quality of the justification is irrelevant. The government concedes that this regulation is far from content neutral.

In *International Longshoremen's Ass'n* v. *Allied International, Inc.*, 456 U.S. 212, 226-227 & n.25 (1982), the Court rejected the claim that "secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment," because it was "conduct." 456 U.S. at 226. This Court relied upon now rejected analysis that "[t]he labor laws reflect a careful balancing of interests," *ibid.*, which *Reed* rejected.

The brief in opposition's reliance upon dicta in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), referring to secondary boycotts is not helpful to the Board's position. Br. in Opp. 13-14. This case stands for the proposition that boycotts are entitled to constitutional protection. Almost 40 years later, the content based scrutiny reaffirmed in *Reed* rejects the assertion that a labor boycott lacks such protection. In today's political climate of boycotts (and counter boycotts) over so many issues, there can be no basis to carve out one type of boycott which is not subject to strict scrutiny.

The brief in opposition's discussion of *Sorrell* and *Barr* (at 14-15) relies upon this mistaken view that the government can offer an explanation for content based regulation without having to confront the strict scrutiny analysis of *Reed* most recently, in *Barr*.

The Board finally brushes off strict scrutiny by repeating the refrain that this is commercial activity or regulation of commerce. See Br. in Opp. 15-16. The brief in opposition concludes that *IBEW* "is a 'restriction [] directed at commerce or conduct," 'not speech.'" Br. in Opp. 16. The Board's attempt to rely upon the commercial speech doctrine which it has never asserted before has to be rejected on *Chenery* grounds. More importantly, the reliance demonstrates the inability of the Board to justify *IBEW* 70 years later.

The Board does not attempt to engage in any strict scrutiny analysis. The brief in opposition does not advance any argument that the Board's regulation of this speech would survive strict scrutiny. The Board realizes *IBEW* is no longer supportable because strict scrutiny renders it plainly unconstitutional. The Court should take the brief in opposition's failure to address strict scrutiny and rebut the dissent's explanation and analysis as a concession that *IBEW* must be overruled on strict scrutiny grounds as applied in this case, which deals with speech alone.

In summary, the brief in opposition's argument leads to the unavoidable conclusion that *IBEW* cannot survive current First Amendment jurisprudence. The Board's desperate grasp for a rationale undermines *IBEW* and confirms that it is invalid.

6. This is self-evident regulation on speech. The case represents regulation imposed upon an effort by a union business agent to aid workers who were underpaid by asking other workers to leave work in support of the union's dispute over other unpaid workers. Had there been no union involved, the request would have been perfectly lawful. Had the workers themselves organized such a protest, it would not have been illegal. Had a community group encouraged the workers to leave the job, it would not have been illegal. This singular focus on a labor organization makes the regulation even more questionable. See *Communications Workers* v. *NLRB*, No. 20-1044, 2021 WL 1437212 (D.C. Cir. Apr. 16, 2021) (conflicting definitions of informal labor organizations).

As the brief in opposition concedes, those workers had a right to leave their job, and the law permitted them to do so and even protects their right to leave work to protest the low wages being paid to other workers. This is classic First Amendment speech. Asking others to do something which they can lawfully do and which is morally supportable must be protected. The NLRA, 29 U.S.C. 158(b)(4)(i)(B), only limits the ability of a union agent to publish these words. Any other person could have made the same request, and it would have been protected speech. Any other person could lawfully make the opposite request. The employer could tell

the workers to go home in support of the dispute. The workers could decide among themselves to leave work in support of the effort to raise the wages of other workers. The sole prohibition is against a union, and only a labor organization as defined by the NLRA cannot make that request without running afoul of the NLRA. This is an inarguable form of content regulation. See App. 4a-24a. It cannot survive, and the brief in opposition readily concedes this.

7. There is no straightforward circuit conflict with a case on the specific statutory provision, 29 U.S.C. 158(b)(4)(i)(B). The reason is that no court has considered a situation that only involved speech. Other cases all involved some element of conduct. Those courts have wrongly relied upon this Court's dicta in *IBEW*. The split inarguably exists with every other circuit all of which have rejected regulation which is content based.

The lower courts are also effectively blocked by this Court's holding in *Agostini* v. *Felton*, 521 U.S. 203 (1997), that they not overrule decisions of this Court even where the doctrinal underpinnings have been discarded. The court below applied this doctrine in other cases challenging other provisions in the same secondary boycott laws. See *NLRB* v. *Teamsters Union Local No. 70*, 668 F. App'x 283 (9th Cir. 2016) cert. denied, 137 S. Ct. 2214 (2017) (refusing to modify consent judgements prohibiting

secondary boycotting relying on *Agostini v. Felton, supra*); and *NLRB* v. *Iron Workers Local 433*, 850 F.2d 551 (9th Cir. 1988) (refusing to modify consent decree prohibiting secondary boycotting). *IBEW* will remain in the grasp of *Agostini* v. *Felton, supra,* indefinitely unless this Court takes action and applies current First Amendment jurisprudence.

The Board cites no other area of the law or decisions of this Court, where content-based restrictions on speech have survived. It is only in the labor law area regulated by the NLRA where unions (but not employees or employers) are burdened with these restrictions on speech.

CONCLUSION

For the reasons stated in the petition and in this reply, the petition for writ of certiorari should be granted.

Respectfully Submitted

Weinberg, Roger & Rosenfeld
A Professional Corporation

David A. Rosenfeld

By: David A. Rosenfeld

Attorneys for Petitioner

Dated: April 2021