No. 24-1173

In the
Supreme Court of the United States

EVANS HOTELS, LLC, ET AL.,
Petitioners,
v.
UNITE HERE! LOCAL 30, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Evans' petition for writ of certiorari identifies three circuit splits created by the Ninth Circuit's opinion. In their brief in opposition, the Unions offer no reasons for this Court to decline review. Certiorari should be granted.

ARGUMENT

I. There Is a Circuit Split Between the Ninth Circuit and the Four Circuits That Recognize the First Amendment Does Not Protect Secondary Acts That Violate Section 8(b)(4).

The petition establishes a circuit split between the Ninth Circuit's opinion and decisions of the Second, Third, Eleventh, and D.C. Circuits that have held secondary acts prohibited by Section 8(b)(4) are not protected by the First Amendment. Pet. 13-18. When speech or conduct is impermissible secondary activity, the First Amendment does not apply. *Id.* As this Court has long recognized, "[t]he prohibition of inducement or encouragement of secondary pressure by [Section] 8(b)(4)[ ] carries no unconstitutional abridgement of free speech." *Int'l Bhd. of Elec. Workers v. NLRB* ("*IBEW*"), 341 U.S. 694, 705 & n.9 (1951).

The Unions do not deny that the four circuit opinions hold the First Amendment does not protect secondary boycotts. Instead, they make unsustainable artificial distinctions.

A. Neither *DeBartolo* nor the statutory language limits Section 8(b)(4)(ii) to picketing.

The Unions' first argument is that *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), held Section 8(b)(4)(ii) applies only to picketing. Consequently, they claim there is no circuit split between the Ninth Circuit's holding that the Unions' threats to secondary employers Evans and SeaWorld are protected by the First Amendment and the Third and Eleventh Circuit decisions in the petition that hold the First Amendment does not protect picketing in violation of Section 8(b)(4)(ii).[1] The Unions are wrong.

Applying the doctrine of constitutional avoidance, *DeBartolo* held that if the speech or conduct alleged to violate the secondary boycott prohibitions is non-threatening or non-coercive, it does not violate Section 8(b)(4)(ii). Thus, peaceful handbilling was not prohibited by Section 8(b)(4)(ii), because Section 8(b)(4)(ii) "requires a showing of threats, coercion, or restraints." 485 U.S. at 578. The unions' handbilling in *DeBartolo* was none of these.

The same cannot be said about the Unions' threats here. They threatened Evans with financial harm, bragging about creating objections out of "thin air" to block projects unless Evans agreed to their demands.

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[1] *See* Pet. 14-17 (citing inter alia *Kentov v. Sheet Metal Workers' Int'l Ass'n Loc. 15*, 418 F.3d 1259 (11th Cir. 2005), and *Metro. Reg'l Council of Phila. & Vicinity v. NLRB*, 50 F. App'x 88, 91-92 (3d Cir. 2002)). The petition also identified conflicting Second and D.C. Circuit cases, which are the subject of a different argument from the Unions that is addressed, *infra*, section I.B.

They threatened to block SeaWorld's future attractions unless it stopped doing business with Evans. These were undeniably threats and coercion against secondary employers under Section 8(b)(4)(ii).

The Unions maintain that *DeBartolo* holds the First Amendment protects any speech other than picketing, otherwise this Court would have had no need to "avoid" the constitutional questions. *DeBartolo* merely held that peaceful handbilling is not a secondary boycott. Nothing in *DeBartolo* suggests that undeniably coercive speech or direct threats of economic harm are not prohibited by Section 8(b)(4)(ii).

The pre-*DeBartolo* cases the Unions cite are consistent with this. In *NLRB v. Fruit & Vegetable Packers, Local 760* ("*Tree Fruits*"), 377 U.S. 58 (1964), the Court distinguished between picketing "to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer" and "picketing which only persuades his customers not to buy the struck product." *Id.* at 70. The former embroils the secondary employer in a dispute with the union; the latter, though it might have some economic impact on the secondary employer, "is closely confined to the primary dispute" and not coercive or threatening. *Id*. at 72. Accordingly, the Court held the *Tree Fruits* union's picketing at grocery stores was not barred by Section 8(b)(4)(ii) because it merely sought

to persuade customers not to buy apples, the product of the primary employer.[2] *Id.*

NLRB v. Retail Store Employees Union, Local 1001 ("*Safeco*"), 447 U.S. 607 (1980), also involved secondary picketing, but held it violated Section 8(b)(4)(ii). The picketing was not directed at a struck product, but was "reasonably calculated to induce customers not to patronize the neutral parties at all." *Id.* at 614 (citation omitted). Prohibiting "'picketing in furtherance of [such] unlawful objectives' did not offend the First Amendment." *Id.* at 616 (quoting *IBEW*, 341 U.S. at 705).

These cases stand for the rule that the First Amendment does not protect union actions that violate Section 8(b)(4)(ii). Though they involved picketing, that rule is not so limited. It applies when unions threaten secondary employers directly with economic harm that is not incidental to permissible union activity. The plain language of the statute prohibits "threat[s], coerc[ion], or restrain[ts]." If Congress had only intended for that provision to apply to picketing, it would have said so.

The Unions' argument also cannot be squared with the courts' treatment of employer unfair labor practices under Section 8(a)(1), which states it is "an unfair labor practice for an employer" "to interfere with, restrain, or *coerce* employees in the exercise" of rights

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[2] The Unions also claim *DeBartolo* forecloses Section 8(b)(4)(ii)(B) claims based on "economic impact" on the neutral. Opp. 11 n.5. *DeBartolo* makes no such pronouncement. It merely restates *Tree Fruits*' holding that peaceful picketing of a neutral employer may not violate Section 8(b)(4)(ii) even if it has some economic impact on the neutral. *Tree Fruits*, 377 U.S. at 579-80.

under section 157 of the National Labor Relations Act. 29 U.S.C. § 158(a)(1) (emphasis added). This Court and lower courts have held that provision prohibits coercive *speech*, which is not protected by the First Amendment. *See, e.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (while employer is free to communicate views on unions to employees, if there is "any implication" that employer will carry out "a threat of retaliation based on misrepresentation and coercion, . . . such [is] without the protection of the First Amendment"); *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (noting that the Court has "recogniz[ed] the First Amendment right of employers to engage in *noncoercive* speech about unionization" (emphasis added)).[3]

Because statements that "coerce" under Section 8(a)(1) are not protected by the First Amendment, the same is true of statements that "coerce" under Section 8(b)(4)(ii). To hold otherwise departs from the "normal rule of statutory construction that words repeated in different parts of the same statute generally have the same meaning." *Law v. Siegel*, 571 U.S. 415, 422 (2014) (citation modified).

Holding unions accountable for threats and coercive speech also is consistent with this Court's recognition that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress'

[3] The NLRB also has consistently held that coercive statements by employers are not protected by the First Amendment. *See, e.g.*, *U.S. Postal Serv. & Bobby Cline*, 351 NLRB 205 (2007) (where employer's threat to sue "is coercive under Section 7, the threat is not speech that is protected by the First Amendment").

striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring in part and in the result)); *see also Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.* ("*Allied*"), 456 U.S. 212, 226 (1982) ("The labor laws reflect a careful balancing of interests.").

Because Section 8(b)(4)(ii) is not restricted to picketing, the Unions cannot distinguish *Kentov* or *Metro. Reg'l Council* to avoid the conflict they pose with the opinion below. *See supra* note 1. Those cases squarely hold that coercive speech directed at secondary employers with the objective of forcing them to cease doing business with another party is not protected by the First Amendment. The Ninth Circuit held the opposite. This Court should resolve that conflict.

B. The Unions' artificial distinction between Section 8(b)(4)(i) and (ii) should be rejected.

Attempting to dismiss the circuit split between the Ninth Circuit's opinion and the D.C. and Second Circuit secondary boycott cases discussed in the petition,[4] the Unions argue those cases involved violations of Section 8(b)(4)(i), which states unions may not "induce or encourage" employees to engage in secondary strikes. The Unions contend that, because the un-

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[4] *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 951-54 (D.C. Cir. 1999); *NLRB v. Loc. Union No. 3*, 477 F.2d 260, 264, 266 (2d Cir. 1973).

ions in those cases induced "neutral employees to engage in non-expressive conduct," that means handbilling neutral employees is unprotected secondary activity, but directly threatening a neutral employer with financial ruin is protected.

As the petition shows, the Unions' argument cannot be reconciled with the language of Section 8(b)(4). Subsections (i) and (ii) are part of the same sentence, which is directed at prohibiting the "evil condemned by Congress in [Section] 8(b)(4)." *IBEW*, 341 U.S. at 705. And the Unions simply ignore this Court's recognition in *Allied*, 456 U.S. at 226, that "conduct designed not to communicate but to coerce merits still less consideration under the First Amendment" than conduct that merely induces or encourages neutral employees to strike.

The Unions attempt to justify the absence of First Amendment protection for Section 8(b)(4)(i) violations because those violations induce "conduct" by a neutral party. The same is true here because the Unions sought to induce *conduct* by the secondary employers—that Evans cease doing business with non-union contractors and subcontractors and that SeaWorld cease doing business with Evans.

The conflict between *Warshawsky* and *Loc. Union No. 3* and the Ninth Circuit's opinion persists. This Court should grant certiorari to resolve it.

II. The Ninth Circuit's Treatment of the "Sham Exception" to the *Noerr-Pennington* Doctrine Creates a Circuit Split.

First, the Unions do not actually dispute that the Ninth Circuit held Evans had to show that the Unions' sham petitioning "effectively barred . . . meaningful access to adjudicatory tribunals." Pet. App. 4a (citation modified). The Unions argue there can be no circuit split because this language comes from *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("*PRE*"), 508 U.S. 49, 58 (1993), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

Regardless of its source, the circuits are split on its meaning. The Fourth and Second Circuits have held that this language is a figurative, not literal, requirement. *Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27*, 728 F.3d 354, 366 (4th Cir. 2013) (*Cal. Motor*'s "'access-barring' language cannot mean that litigation must reach such a crescendo as to literally incapacitate the legal system and prevent another litigant from receiving their day in court"); *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 809 n.36 (2d Cir. 1983) (explaining that access barring in *Cal. Motor* is "one example of the illegal results that might flow from abuse of the administrative process" but "reject[ing] the suggestion . . . that the applicability of the sham exception turns on whether a competitor is barred from access to administrative agencies or the courts"). Those conclusions are consistent with *City of Columbia v. Omni Outdoor Advertising, Inc.*—a case the Unions ignore—which explained that the sham exception applies when "delay is sought to be achieved only by the lobbying process

itself, and not by the governmental action that the lobbying seeks." 499 U.S. 365, 381 (1991).

That is precisely what Evans alleges here. The Unions use governmental process to delay projects with environmental, land-use, and zoning objections and lawsuits until the developers cave to the Unions' demands—at which point the Unions abandon their objections and lawsuits and often support the project they just opposed. The Unions ultimately want the projects to be approved—but only after the developers capitulate to the Unions' demands.

The Unions attempt to distinguish *Waugh Chapel* and *Litton* on their facts, but their facts are irrelevant.[5] The conflict is in their express holding that a party asserting serial sham does not have to prove they were actually barred from government tribunals. That directly conflicts with the Ninth Circuit's opinion.

Second, the Ninth Circuit held Evans could not rely on the Unions' long history of blocking hotel developments in San Diego through baseless environmental, land-use, and zoning challenges because "Evans was not a party to any of those proceedings." Pet. App. 4a. This squarely conflicts with *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, which involved three prior lawsuits, only one of which was asserted against the plaintiff. 694 F.2d 466, 468 (7th Cir. 1982).

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[5] The Unions argue *Litton* and other serial sham exception cases are inapposite because they were decided before *PRE*. But *PRE* involved allegations of a single sham lawsuit, not serial sham actions. *PRE*, 508 U.S. at 53-54; *see also* Pet. 21 n.15.

The Unions argue that *Grip-Pak* is not good law because it was decided before *PRE*, which appears to reject *Grip-Pak*'s consideration of the defendant's motivations for bringing its sham claims. But *PRE* did not involve allegations of serial sham, and, as Justice Stevens recognized in his *PRE* concurrence, *Grip-Pak*'s consideration of motivation was "neither surprising nor relevant" to *PRE*, a single sham case, but is a valid consideration in sham petitioning cases based on "abuse of judicial process." Pet. 21 n.15 (quoting *PRE*, 508 U.S. at 72 n.8 (Stevens, J., concurring in the judgment)).

Further, the Unions do not address this Court's precedents, *Cal. Motor* and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), which both involved assertions of sham petitioning against multiple parties.

Nor is there any logical reason to limit the serial sham doctrine to cases involving a single victim. The harm from serial sham is that it abuses government process to create delay. It makes no difference that those abusive tactics are directed at multiple parties or a single one—particularly when Evans has alleged the Unions effectively use their sham objections and lawsuits to exercise control over all luxury hotel developments in San Diego.

Finally, the Unions argue that reaching settlements in their previous actions proves they were successful. Not only is that irrelevant to the conflicts presented by the opinion, it ignores Evans' allegations that the settlements only include token concessions to the environmental, land-use, and zoning objections asserted by the Unions. The incongruity between the

claims and the settlements is "probative evidence of sham litigation." *See, e.g.*, *United States v. Koziol*, 993 F.3d 1160, 1172 n.12 (9th Cir. 2021).

The Court should grant certiorari to resolve the conflicts concerning the application of the serial sham exception to the *Noerr-Pennington* doctrine.

III. There Is a Clear Circuit Split over the Applicability of State Anti-SLAPP Statutes in Federal Court.

The circuit split over the applicability of state anti-SLAPP statutes in federal court is well-recognized by the lower courts. *La Liberte v. Reid*, 966 F.3d 79, 86 (2d Cir. 2020) ("Our sister circuits split on whether federal courts may entertain the various state iterations of the anti-SLAPP special motion."); *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1335-36 (D.C. Cir. 2015) (citing decisions of other circuits applying anti-SLAPP statutes, but finding them "not persuasive"); *see also Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1183 (9th Cir. 2016) (Kozinski, J., concurring) (discussing D.C. Circuit's ruling in *Abbas*: "Now we've got a circuit split, and we're standing on the wrong side.").

The Unions argue that there is no circuit split because all of the courts look to whether the anti-SLAPP laws conflict with particular provisions in federal rules. That direct conflict analysis is no longer the law after *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). The test is whether the state law and Federal Rules of Civil Procedure "answer the same question." *Id.* at 398-99.

That is the issue on which federal courts considering anti-SLAPP motions are split. Pet. 22-26.

The Unions also cite purported intra-circuit splits to suggest that the circuits apply the law consistently. They are mistaken.

In the Fifth Circuit, *Klocke v. Watson*, 936 F.3d 240, 244-49 (5th Cir. 2019), refused to apply Texas's anti-SLAPP statute in an analysis heavily reliant on *Shady Grove*. The purportedly conflicting case, *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009), was decided before *Shady Grove*.

Adelson v. Harris, 774 F.3d 803 (2d Cir. 2014), was decided after *Shady Grove*, but did not mention that case. Moreover, as *La Liberte* recognized, the *Adelson* court was concerned with substantive provisions of the state law and not its procedural aspects. *La Liberte*, 966 F.3d at 86 n.3.

Equally misguided is the Unions' argument that the Court should not consider this issue because it was not raised in the district court.[6] Whether the anti-SLAPP statute applies is a pure issue of law that courts may review on appeal. *Harrington v. Dep't of Veterans Affs.*, 981 F.3d 1356, 1359 (Fed. Cir. 2020); *Blue Martini Kendall, LLC v. Miami Dade County*, 816 F.3d 1343, 1349 (11th Cir. 2016); *Hazzard v. Chase Manhattan Corp.*, 275 F.3d 1078 (5th Cir. 2001) (per curiam).

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[6] The Ninth Circuit had held the anti-SLAPP statute applies in its courts. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-35 (9th Cir. 2018). Therefore, Evans could not argue that the district court should not apply it.

The Unions also contend this Court should not grant certiorari because the Ninth Circuit is considering the issue in *Gopher Media, LLC v. Melone*, No. 24-2626 (9th Cir. argued June 24, 2025) (en banc). The circuit split will remain regardless of what the Ninth Circuit en banc decides.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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