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## Labor Protest Under the New First Amendment

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## ARTICLE

### Labor Protest Under the New First Amendment

Catherine Fisk & Jessica Rutter<sup>†</sup>

*Low-wage workers across the country have recently gripped the nation's attention with public demonstrations calling for workplace fairness. But as these workers and the unions supporting them employ new and innovative strategies to organize their workplaces and improve their working conditions, employers and the National Labor Relations Board have charged them with violating section 8(b)(7) of the National Labor Relations Act, which prohibits peaceful picketing to organize workers or gain employer recognition of a union. This article analyzes the history and impact of labor picketing restrictions in light of the Supreme Court's recent First Amendment jurisprudence. We demonstrate that the National Labor Relations Board, its enforcement officials, and the courts can no longer apply old law prohibiting picketing for recognitional and organizational objects. The NLRA's prohibitions on labor unions picketing to obtain recognition or get workers to join them are unconstitutional speaker-based and content-based discrimination. We describe how the Board and the courts can adopt narrower interpretations of labor picketing that accord with the Supreme Court's recent First Amendment cases. Specifically, we advance three proposals to bring the Board's interpretation and enforcement practices into*

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*compliance with the Constitution, and a fourth approach that might at least partially address the constitutional infirmities of the Board's current approach. All of these proposals aim to ensure that section 8(b)(7) will be violated only by conduct that actually or imminently coerces employees or companies in the selection of a bargaining representative through methods other than peaceful persuasion of consumers or employees to cease doing business with the firm.*

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## INTRODUCTION

Low-wage workers in a variety of service and transport jobs across the United States have for the last three years engaged in historic strikes, marches, picketing, and other protest demanding improved wages and working conditions. In the fall of 2012, Walmart workers in one hundred cities across forty-six states participated in short strikes and peaceful protest supported by the Organization United for Respect (“OUR”) Walmart, the United Food and Commercial Workers Union (“UFCW”), community groups, students, and clergy. Protesters carried signs that said, “Stand Up, Live Better,” “UNITY,” “Walmart, respeta a los trabajadores” (Walmart, respect the workers), and “Let Walmart Associates Speak Out,” among other things.<sup>1</sup> Workers have been striking and picketing at fast-food outlets in major cities across the country since 2012 demanding \$15 an hour and predictable work schedules.<sup>2</sup> In May 2014, picketing at the McDonald’s corporation annual shareholder meeting prompted the company to tell most of its 3,200 headquarters employees to stay home for the day to avoid having to encounter the protest.<sup>3</sup> For over a year in 2013 and 2014, truck drivers serving the Los Angeles and Long Beach ports struck and picketed to protest what they called “sweatshops on wheels”: their employers’ practice of misclassifying them as independent contractors and paying wages so low that some drivers take home no money for a whole week’s work.<sup>4</sup> These protests—like many others involving taxi drivers, hotel maids, carwash workers, students protesting sweatshops, and a host of groups engaging in protest activities now known as “Alternative Labor” or

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1. See *Wal-Mart Workers in 12 States Stage Historic Strikes, Protests Against Workplace Retaliation*, DEMOCRACY NOW! (Oct. 10, 2012), [http://www.democracynow.org/2012/10/10/walmart\\_workers\\_in\\_12\\_states\\_stage](http://www.democracynow.org/2012/10/10/walmart_workers_in_12_states_stage); Josh Eidelson, *The Great Walmart Walkout*, THE NATION, Dec. 19, 2012, available at <http://www.thenation.com/article/171868/great-walmart-walkout#>; Black Friday 2012 Photo Set, FLICKR, <http://www.flickr.com/photos/ourwalmart/sets/72157632079776218/?page=1> (highlighting the various signs carried by Walmart workers in the November 2012 actions) (last visited April 5, 2015).

2. See Steven Greenhouse, *With Day of Protests, Fast Food Workers Seek More Pay*, N.Y. TIMES, Nov. 29, 2012, <http://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html>; Corilyn Shropshire & Naomi Nix, *Retail, Fast-Food Workers Rally for Higher Pay in Chicago*, CHI. TRIB., April 24, 2013, [http://articles.chicagotribune.com/2013-04-24/business/chi-chicago-fast-food-strike-today-20130424\\_1\\_fast-food-workers-retail-workers-wal-mart-workers](http://articles.chicagotribune.com/2013-04-24/business/chi-chicago-fast-food-strike-today-20130424_1_fast-food-workers-retail-workers-wal-mart-workers); Alana Semuels, *Fast Food Workers Walk Out in N.Y. Amid Rising U.S. Labor Unrest*, L.A. TIMES, Nov. 29, 2012, <http://articles.latimes.com/2012/nov/29/business/la-fi-mo-fast-food-strike-20121129>.

3. Leslie Patton, *Workers Say McDonald’s Fired Them for Union Activity*, BLOOMBERG BUSINESS (July 18, 2014, 9:22 AM), <http://www.bloomberg.com/news/articles/2014-07-17/workers-tell-nlr-that-mcdonald-s-fired-them-for-union-activity..>

4. See Scott Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. 939, 1143-44 (2014); Dan Weikel, *Labor Group Claims Port Trucking Companies Treat Drivers Unfairly*, L.A. TIMES, Feb. 19, 2014, <http://articles.latimes.com/2014/feb/19/local/la-me-ln-port-trucker-conditions-20140219>.

Alt-Labor<sup>5</sup>—seek to publicize the problem of low-wage work, mobilize workers and their allies to push for higher pay, better working conditions, and improved public policy, and transform workplaces by transforming public debate.<sup>6</sup>

Although these protests are classic First Amendment activity—peaceful speech in a public forum on a matter of public concern—Walmart, trucking companies, and fast-food companies sought to have the protests enjoined by filing unfair labor practice charges alleging the protesters were picketing in violation of section 8(b)(7)(C) of the National Labor Relations Act (“NLRA” or “Act”).<sup>7</sup> In some cases the National Labor Relations Board General Counsel has concluded that there was reasonable cause to believe unions had indeed violated the Act.<sup>8</sup> Congress added section 8(b)(7)(C) to the NLRA in 1959 to prohibit what was then referred to as “blackmail picketing”: union picketing intended to force unwilling employers or employees to accept a union by shutting down a facility.<sup>9</sup> Though the protests at Walmart, the ports, and fast-food outlets did not prohibit anyone from entering, did not interfere with the operation of the facilities, and had absolutely no potential to force a union on reluctant employers or workers, the Board’s Division of Advice<sup>10</sup> concluded that the peaceful protests at both Walmart and the ports were unlawful.<sup>11</sup> The Walmart case settled with the UFCW and OUR Walmart agreeing to (1) refrain from similar speech at Walmart stores nationwide for sixty days, and

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5. See generally NEW LABOR IN NEW YORK (Ruth Milkman & Ed Ott eds., 2014) (presenting thirteen case studies of community and sector-based organizing to improve the working conditions for taxi drivers, street vendors, domestic workers, and others); WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY (Ruth Milkman et. al. eds., 2010) (analyzing eleven case studies of community and sector-based organizing to better labor conditions for taxi drivers, carwash workers, garment workers, and day laborers); Michael M. Oswalt, *Labor’s New Strike-First Strategy*, CHI. SUN TIMES, Sept. 10, 2013, available at [http://cached.newslookup.com/cached.php?ref\\_id=54&siteid=2043&id=3075443&t=1378872841](http://cached.newslookup.com/cached.php?ref_id=54&siteid=2043&id=3075443&t=1378872841); Josh Eidelson, *Alt-Labor*, THE AMERICAN PROSPECT (Jan. 29, 2013), available at <http://prospect.org/article/alt-labor>; Lizze Widdicombe, *Thin Yellow Line*, THE NEW YORKER (Apr. 18, 2011), available at <http://www.newyorker.com/magazine/2011/04/18/thin-yellow-line> (describing the organizing efforts of New York taxi drivers to improve working conditions).

6. See Michael M. Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. (forthcoming 2016), available at [www.ssrn.com](http://www.ssrn.com) (paper ID no. 2577420).

7. 29 U.S.C. § 157(b)(7)(C) (2014).

8. Steven Greenhouse, *Labor Union to Ease Walmart Picketing*, N.Y. TIMES, Jan. 31, 2013, <http://www.nytimes.com/2013/02/01/business/labor-union-agrees-to-stop-picketing-walmart.html>; Karen Robes Meeks, *Teamsters Excessively Picketed Carson Trucking Firm, NLRB Finds*, DAILY BREEZE, June 27, 2014, <http://www.dailybreeze.com/social-affairs/20140627/teamsters-excessively-picketed-carson-trucking-firm-nlrbs-finds>.

9. See *infra* Part I.A.

10. The Board’s Division of Advice is located within its Office of the General Counsel. See NLRB Organization Chart, available at <http://www.nlr.gov/who-we-are/organization-chart>.

11. The unfair labor practice charges in the Walmart, truckers’ and fast-food workers’ matters settled before issuance of a complaint, but the Board’s preliminary determination that the protest may have violated section 8(b)(7) forced the protesters to change their message and conduct. See *supra* note 8.

(2) publish disavowals of any intent to organize or be recognized in notices, mailings, and on their websites.<sup>12</sup> In addition, the truck drivers at the ports agreed to modify their practices to comply with the government's rules about the content and duration of picketing.<sup>13</sup>

The Board's action is not compelled by the language or legislative history of section 8(b)(7) of the NLRA and is flatly inconsistent with the Supreme Court's recent, broad First Amendment rulings protecting speech rights. Since Congress enacted section 8(b)(7) in 1959, the Court's First Amendment jurisprudence has grown significantly more protective of speech.<sup>14</sup> The Court has struck down restrictions on picketing by civil rights and anti-abortion protesters and restrictions on commercial speech, and has held that laws discriminating among speakers or based on the content or viewpoint of the speech do not survive strict scrutiny.<sup>15</sup> In light of these cases, section 8(b)(7) as currently interpreted by the NLRB is unconstitutional.

In *McCullen v. Coakley*, the Court made clear that content-based restrictions on peaceful speech on public sidewalks are subject to strict scrutiny and struck down as unconstitutional a statute prohibiting sidewalk conversations even though the Court found the statute to be content neutral.<sup>16</sup> The First Amendment protects even deeply offensive and potentially intimidating protests and picketing, as the Court held in *Snyder v. Phelps* (involving picketing at a funeral)<sup>17</sup> and *McCullen* (involving anti-abortion sidewalk "counseling").<sup>18</sup> Moreover, even content-neutral regulations must be narrowly tailored to serve an important government purpose and leave open adequate alternative places for speech.<sup>19</sup> Section 8(b)(7) is unconstitutional viewpoint and speaker discrimination because it prohibits only picketing by certain speakers (labor organizations) expressing particular viewpoints (efforts to persuade employees to join a union or an employer to recognize it).<sup>20</sup> Even if section 8(b)(7) were content neutral, it would be unconstitutionally overbroad because it leaves insufficient alternate channels for communication.<sup>21</sup>

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12. United Food & Commercial Workers Int'l Union (*Wal-Mart Stores, Inc.*) 2013 WL 459631 (N.L.R.B.G.C.) at \*1 (Jan. 30, 2013) [hereinafter *UFCW settlement*].

13. Meeks, *supra* note 8.

14. *See infra* Part II.C.

15. *See infra* Part II.C.

16. 134 S. Ct. 2518 (2014).

17. 131 S. Ct. 1207 (2011).

18. 134 S. Ct. 2518 (2014).

19. *Id.* at 2529.

20. *See infra* Part II.C.

21. We discuss the adequacy of alternative channels of communication, such as handbilling or displaying banners, below in Parts II.C.1 and III.

We are not the first to argue that the NLRA's prohibitions on labor picketing violate the First Amendment. Most of the scholarly criticism has focused on the prohibition on secondary picketing and boycotts in section 8(b)(4); fewer scholars have addressed, as we do, the prohibition on recognitional and organizational picketing in section 8(b)(7).<sup>22</sup> However, in light of the Court's recent First Amendment decisions—which have (1) struck down a wide array of federal and state laws restricting picketing and other forms of speech in public forums, as well as laws regulating corporate, commercial, and political speech, and (2) expanded the First Amendment rights of workers to resist unionization<sup>23</sup>—we must once again push back against prohibitions on labor protest and articulate a vision of jurisprudence that truly protects peaceful persuasion.

Section 8(b)(7)(C) was enacted to prevent obtaining union recognition by blackmail, but labor protest no longer has whatever power it may once have had to force reluctant workers to choose a union or an employer to recognize one. Therefore, the Board's excessively broad reading of the scope of section 8(b)(7)(C) is unconstitutional and no longer justified by the statute. A new approach to labor picketing prohibitions is particularly important today because of the significance of new strategies for publicizing the problems low-wage workers face. As union density has dropped to historically low levels in the private sector,<sup>24</sup> unions, worker centers, community groups, and others are seeking to ameliorate rising economic inequality by experimenting with new models of organizing and mobilization.<sup>25</sup> These new models, like the one used by Walmart workers, involve outreach to the community on a variety of subjects and publicity about a company's record of responsibility (or lack thereof). The Board's application of section 8(b)(7)(C) to this kind of labor speech contravenes

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22. One of the most extensive First Amendment defenses of labor protest is James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997). The most extensive analyses of section 8(b)(7) are Lee Modjeska, *Recognition Picketing Under the NLRA*, 35 U. FLA. L. REV. 633 (1983), and Allen H. Duffy, *Picketing by an Uncertified Union: The New Section 8(b)(7)*, 69 YALE L.J. 1393 (1960). Other analyses of the First Amendment problems with the prohibition of section 8(b)(4) include Zoran Tasic, Note, *The Speaker the Court Forgot: Re-Evaluating Section 8(b)(4)(B)'s Prohibition on Secondary Boycott Restrictions in Light of Citizens United and Sorrell*, 90 WASH. U. L. REV. 237 (2012); Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982); Cynthia Estlund, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982).

23. *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

24. Bureau of Labor Statistics data for 2014 reports union density at 6.6% in the private sector. See Press Release, Bureau of Labor Statistics, Economic News Release: Union Members Summary (Jan. 23, 2015), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

25. See, e.g., Re-Imagining Labor Law Symposium, 4 U.C. IRVINE L. REV. 523 (2014); Oswalt, *Improvvisational Unionism*, *supra* note 6. One of the harms of the NLRB's unconstitutionally broad reading of section 8(b)(7)(C) is that it forces a labor organization that is engaging in what should be constitutionally protected speech activity to disclaim the object of organizing workers or demanding that an employer recognize a union, which are lawful, protected, and encouraged objectives under federal labor policy. OUR Walmart has had to make such disclaimers. See *UFCW Settlement*, *supra* note 12.

the statute's intent and runs afoul of the First Amendment. The First Amendment protects the right of workers, alone or with the support of community groups, to demand improvements in wages and working conditions and to demand recognition of a union.<sup>26</sup> Whether workers have the ability to picket or protest their employers will affect whether workers will be able to improve working conditions at Walmart, fast-food and retail outlets, and other low-wage jobs. It also has significant implications for the public debate about the causes and consequences of economic inequality, the survival of the labor movement, and the vibrancy of our democracy.

The NLRB and reviewing courts could adopt our proposal immediately. The NLRB can change its interpretation of the Act, including by overruling its own prior decisions, subject to its obligation to adhere to binding Supreme Court authority.<sup>27</sup> The Supreme Court has never ruled on the constitutionality of section 8(b)(7).<sup>28</sup> Although several federal courts of appeals have rejected constitutional challenges to section 8(b)(7),<sup>29</sup> these decisions are several decades old, and the Board has long taken the position that it can adhere to or change its own interpretation of the Act in the face of appellate court disagreement unless or until the Supreme Court rejects the Board's interpretation.<sup>30</sup>

This article shows that the Board's current interpretation of section 8(b)(7) is unconstitutional under the Supreme Court's First Amendment jurisprudence and suggests ways in which the NLRB and courts can significantly narrow the prohibition's broad sweep. Part I describes section 8(b)(7) in its original form, how the Board and courts expanded it beyond its original meaning, and the impact it has on contemporary labor activity. Part II analyzes its constitutional infirmities under the Supreme Court's First Amendment jurisprudence governing picketing, content-based and viewpoint-based restrictions, and commercial speech. Part III recommends a reconfiguration of the way that the Board and courts analyze labor picketing under section 8(b)(7)(C).

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26. See *infra* Part II.C.

27. See *infra* Part III.

28. See *infra* Part II.A.

29. See *infra* note 86 and accompanying text.

30. Our analysis of the constitutional infirmities of section 8(b)(7) has obvious implications for the prohibitions on labor picketing under other parts of section 8(b), including section 8(b)(4), which prohibits secondary appeals. (In particular, section 8(b)(4) prohibits work stoppages and "to threaten, coerce, or restrain any person" for certain proscribed purposes, including secondary boycotts, employer recognition, to secure a hot cargo agreement, or to get work assigned to employees belonging to one union rather than another.) However, because the Supreme Court has rejected constitutional challenges to section 8(b)(4), see *infra* notes 153-59 and accompanying text; *NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco)*, 447 U.S. 607 (1980), whether the Board could unilaterally change its interpretation of section 8(b)(4) raises somewhat different issues.



## I. THE HISTORY AND IMPACT OF LABOR PICKETING RESTRICTIONS

### A. *The History and Scope of Section 8(b)(7) Prohibition on Picketing*

As originally enacted in 1935, the NRLA had no restrictions on picketing or other labor protest.<sup>31</sup> Instead, the NRLA recognized the rights of workers to “full freedom of association, self-organization, and designation of representatives of their own choosing” and specifically protected the right to strike.<sup>32</sup> At that time, strikes typically involved picketing.<sup>33</sup> Union density shot up from 6.7% in 1935 to 23.9% in 1947.<sup>34</sup> Workers and their unions gained power in numbers and in the wake of the post-World War II wave of strikes in which more than four million Americans participated.<sup>35</sup> When Republicans gained control of Congress in 1946, business groups pressured Congress to rein in the power of labor.<sup>36</sup> In the Taft-Hartley Act of 1947, Congress restricted labor protest, but business groups believed that the restrictions needed further tightening.<sup>37</sup> In 1959, following a series of congressional hearings on corruption and organized crime in a few unions, President Eisenhower proposed a labor law reform plan to Congress.<sup>38</sup> The plan included a prohibition on “blackmail picketing,” which the President described in the following way:

[A] union official . . . presents the company with a proposed labor contract, and demands that the company either sign or be picketed . . . . The union official carries out the threat and puts a picket line outside the plant to drive away customers, to cut off deliveries. In short, to force the employees into a union they do not want . . . . This could force the company out of business and result in the loss of all the jobs in the plant. I want that sort of thing stopped. So does America.<sup>39</sup>

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31. National Labor Relations Act (“Wagner Act”), Pub. L. No. 74-198, 49 Stat. 49 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

32. *Id.* at § 151.

33. See generally IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1940* (1969) (describing the nature of labor unrest and activism in numerous industries).

34. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *HANDBOOK OF LABOR STATISTICS* 412 (Volume 1979, Dec. 1980).

35. JEREMY BRECHER, *STRIKE!* 237–48 (rev. ed. 1997).

36. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR*, 114–15 (rev. ed. 2013).

37. KENNETH DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 87 (2d ed. 2014).

38. Dwight D. Eisenhower, Special Message to the Congress on Labor-Management Relations (Jan. 28, 1959), available at <http://www.presidency.ucsb.edu/ws/?pid=11512>.

39. Dwight D. Eisenhower, Radio and Television Address to the American People on the Need for an Effective Labor Bill, Delivered from the President’s Office (August 6, 1959) in DWIGHT D. EISENHOWER: 1959: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT, JANUARY 1 TO DECEMBER 31, 1959 (Compiled by University of Michigan Library) (2005), at 568; see also 105 CONG. REC. S. APPX A8488 (daily ed. Sept. 14, 1959).

Eisenhower described the bill as banning coercion: union picketing that threatened to ruin the business unless the employer recognized a union that the workers did not want.<sup>40</sup>

After the House and Senate passed separate bills, a compromise bill emerged from the House-Senate conference. The Senate passed the compromise bill,<sup>41</sup> the House followed suit,<sup>42</sup> and President Eisenhower signed it into law on September 14, 1959.<sup>43</sup>

As finally enacted, section 8(b)(7) prohibits

- “a labor organization or its agents”
- “to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer”
- “where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative.”<sup>44</sup>

40. The provision that ultimately became section 8(b)(7) originated in the President’s bill, which, as he explained in his transmittal letter, would “make it illegal for a union, by picketing, to coerce an employer to recognize it as the bargaining representative of his employees or his employees to accept or designate it as their representative where the employer has recognized in accordance with law another labor organization, or where a representation election has been conducted within the last preceding 12 months, or where it cannot be demonstrated that there is a sufficient showing of interest on the part of the employees in being represented by the picketing union or where the picketing has continued for a reasonable period of time without the desires of the employees being determined by a representation election.” S. Doc. No. 10, 86th Cong., 1st Sess., 2–3 (1959), 1 Leg. Hist. 81-82 *quoted in* NLRB v. Local Union No. 103, Int’l Ass’n of Iron Workers, 434 U.S. 335, 347 n. 9 (1978).

41. 105 CONG. REC. H16435 (daily ed. Sept. 3, 1959).

42. 105 CONG. REC. S16653-16654 (daily ed. Sept. 4, 1959).

43. Labor-Management Reporting and Disclosure Act of 1959 (“Landrum-Griffin Act”), Pub. L. No. 86–257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

44. 29 U.S.C. § 158(b)(7). Section 8(b)(7) reads, in full:

It shall be an unfair labor practice for a labor organization or its agents . . . to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract

In three lettered subsections, 8(b)(7) prohibits such picketing in three alternate situations:

- (A) where the employer has recognized any other labor organization; or
- (B) within 12 months after a valid union representation election; or
- (C) where the picketing occurs for more than “a reasonable” time “not to exceed thirty days from the commencement of such picketing.”

Furthermore, a proviso to subsection (C) allows picketing that exceeds thirty days “for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization.”<sup>45</sup> But that exception applies only if the picketing does not have the effect of inducing “any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.”<sup>46</sup>

In sum, the statute prohibits only speech by certain speakers (labor organizations and their agents) that has a particular purpose: seeking to “forc[e] or require[e]” recognition by the employer or selection by the employees.<sup>47</sup> The exception allows for picketing to truthfully advise the public that an employer does not employ union members or have a contract with a union. But if this type of picketing induces any work stoppage, the picketing becomes illegal.<sup>48</sup>

When an employer files a section 8(b)(7) charge, the NLRB must prioritize the case, investigating the charge and making an initial decision on the merits within seventy-two hours.<sup>49</sup> If the NLRB finds the charge to have merit, it is statutorily required to seek an injunction in district court against such picketing.<sup>50</sup> A section 8(b)(7)(C) violation also allows the employer to file for an expedited election,<sup>51</sup> which can be extremely

with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

45. National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) [hereinafter *the informational proviso* or *proviso*] (“[N]othing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.”).

46. *Id.*

47. 29 U.S.C. § 158(b)(7).

48. *Id.*

49. National Labor Relations Board, Casehandling Manual Part One, Unfair Labor Practice Proceedings, 10200.1 Timeliness Guidelines (Dec. 2009), available at <http://www.nlr.gov/sites/default/files/documents/44/master-2011-ulp.pdf>.

50. National Labor Relations Act § 10(l), 29 U.S.C. § 160.

51. National Labor Relations Board, Casehandling Manual Part Two, Representation Procedures, 11003.1(c) Petition Related to 8(b)(7)(C) Charge (Aug. 2007), available at <http://www.nlr.gov/sites/>

unfavorable to the union.<sup>52</sup> The employer can choose when the election will occur (by choosing when to file a section 8(b)(7) charge) and therefore can force the union into an election after the employer has had ample opportunity to convince employees of the risks of union representation but without the union having had the opportunity to meet with workers and explain the benefits of union representation.<sup>53</sup>

### *B. The Board's Expansive Interpretation of Section 8(b)(7)(C)*

The legislative history and language of section 8(b)(7)(C) could be read to prohibit only picketing that coerces an employer or employees to accept a union under the threat that the union will otherwise drive the employer out of business. It need not be read to prohibit picketing that persuades workers to join a union or an employer to lawfully recognize one, including when the picketing persuades workers to engage in work stoppages in support of their quest for improved working conditions. Nevertheless, in the years since section 8(b)(7)(C)'s enactment, the Board has generally interpreted the prohibition broadly and the exception narrowly.<sup>54</sup> For example, the Board has interpreted picketing with a recognitional or organizational objective to encompass any picketing or the functional equivalent of picketing that has the purpose, either immediately or at any time in the future, to organize employees and gain union recognition. When Walmart filed charges against OUR Walmart in 2012 alleging a violation of section 8(b)(7)(C), OUR Walmart defended itself by arguing that the employees' goals were to protest retaliation and to improve workplace conditions; that OUR Walmart as an entity exists to help workers stand together and is not a union or a bargaining agent; and that OUR Walmart neither asked for nor obtained recognition at any Walmart store.<sup>55</sup>

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default/files/documents/44/chm2.pdf.

52. See GORDON LAFER, AMERICAN RIGHTS AT WORK, FREE AND FAIR? HOW LABOR LAW FAILS U.S. DEMOCRATIC ELECTION STANDARDS (2005), available at <http://www.jwj.org/wp-content/uploads/2014/04/Free-and-Fair.pdf>.

53. *Id.* at 27 (the standard election conducted by the NLRB is characterized by unequal access to voter lists; the absence of financial controls; monopoly control of both media and campaigning within the workplace; the use of economic power to force participation in political meetings; the tolerance of thinly disguised threats; the location of voting booths on partisan grounds; open-ended delays in implementing the results of an election; and the absence of meaningful enforcement measures).

54. Though section 8(b)(7)(C)'s application is generally limited to statutory "labor organizations," at least one worker center has been the target of section 8(b)(7)(C) charges as well. See generally Restaurant Opportunities Center of New York, 2006 WL 5054727 (N.L.R.B.G.C.) (Nov. 6, 2006); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232 (2009) (discussing the risk that section 8(b)(7)(C) poses to worker centers).

55. The UFCW and OUR Walmart insist that that their protests were not picketing, were not the functional equivalent of picketing, and that OUR Walmart's purpose is to create an organization through which Walmart workers can assist each other to persuade Walmart to improve working conditions and to engage in what it terms "nonorganizational concerted activity." Letter from George Wiszynski et al.

Nevertheless, the NLRB process resulted in OUR Walmart agreeing to restrictions on its picketing activity as well as disavowals in a variety of forums.<sup>56</sup> The Board has even left open the question whether picketing to demand a fair process by which employees can choose union representation might constitute a section 8(b)(7)(C) violation.<sup>57</sup>

The only exclusions from this broad prohibition on recognitional or organizational picketing are for picketing against employers that pay less than the wages that are standard in the area (which is known as area standards picketing),<sup>58</sup> picketing to protest an unfair labor practice,<sup>59</sup> and picketing to advise the public as set out in the proviso. However, even when unions have claimed that their picketing was to protest an unfair labor practice, to support area standards, or to advise the public, the Board has sometimes found it to be illegal.<sup>60</sup> The Board has considered the picketers' previous speech, where the picketing is occurring, and to whom the picketing is targeted to determine whether the picketing had a prohibited object.<sup>61</sup>

In one case, the Board obtained an injunction against picketing a construction contractor even though the union insisted that it was engaged in area standards picketing to urge the employer not to unfairly compete against unionized contracts by paying less than the union scale of benefits.<sup>62</sup> The court read the statute to prohibit "any picketing that seeks to establish a union in a continuing relationship with an employer with regard to matters which could substantially affect terms or conditions of employment of his employees and which are or may be subjects of collective bargaining,"<sup>63</sup> including "to attempt to dictate to the employer the distribution of benefits paid to his employees between wage and fringe benefits."<sup>64</sup> The court held

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to Bill Yarbrough, Acting Regional Director, Region 26, NLRB (Nov. 20, 2012) (on file with authors). We do not contend otherwise. Rather, we argue that even if the conduct were picketing or its functional equivalent and even if OUR Walmart had a recognitional or organizational object, it is constitutionally protected and the NLRB should not read section 8(b)(7)(C) to proscribe it.

56. See *UFCW Settlement*, *supra* note 12.

57. *New Otani Hotel and Garden*, 331 N.L.R.B. 1078, 1080 n.6 (2000).

58. *Houston Bldg. & Constr. Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321, 323 (1962) ("the objective of the Respondent's picketing was to induce the Company to raise its wage rates to the union scale prevailing in the area . . . we cannot equate this attempt to maintain area wage standards with . . . the conduct proscribed by Section 8(b)(7)").

59. See *Plumbers & Pipe Fitters Local Union No. 32*, 315 N.L.R.B. 786, 789 (1994) (holding that section 8(b)(7)(C) does not expressly prohibit picketing solely for the object of protesting unfair labor practices).

60. See *infra* notes 62-76 and accompanying text.

61. *Id.*

62. *NLRB v. International Brotherhood of Elec. Workers, Local 265*, 604 F.2d 1091 (8th Cir. 1979).

63. *Id.* at 1097 (8th Cir. 1979) (citing *Bldg. & Constr. Trades Council (Samuel E. Long, Inc.)*, 201 N.L.R.B. 321 (1973), *enforced*, 485 F.2d 680 (3d Cir. 1973)).

64. *International Brotherhood of Elec. Workers, Local 265*, 604 F.2d at 1097.

that the picketing did not fit within the area standards exception because it was not about area standard wages: “a union has no legitimate concern [in maintaining area standards] in demanding that a picketed employer observe non-cost benefits which the union obtained for its own members.”<sup>65</sup> According to that narrow analysis of what constitutes area standards picketing, a union’s protest of nearly any important work-life issue that animates today’s workers—such as an employer’s policies on health and retirement benefits, sickness or family leave, or part-time work—becomes subject to the restrictions of section 8(b)(7)(C).

In another case, the Teamsters union had previously sought to persuade the employees of an auto parts supplier to join the union.<sup>66</sup> The Board found that the union had engaged in orderly and peaceful picketing with signs that read: “Local 239 wants the employees of Stan-Jay (sometimes supplemented with the words ‘is stingy’) to join them to gain union wages, job security and working conditions.”<sup>67</sup> When section 8(b)(7) went into effect, the union changed its signs to mimic the proviso to section 8(b)(7)(C) and read: “To the public. Please be advised Stan-Jay does not employ members of, nor has a contract with any labor union including Local 239, I. B. of T.”<sup>68</sup> The Board issued an unfair labor practice complaint and sought to enjoin the picketing, finding that despite the new language, the union’s objective was the same.<sup>69</sup> The union argued that its object was not to “force or require” recognition or organization, but only to persuade the employees to join.<sup>70</sup> The Board and the reviewing court rejected that contention, reasoning, as the Second Circuit explained, that it was “premised on the notion that the statutory language contemplates physical violence or threats thereof.”<sup>71</sup> Instead, the court explained that “the setting of the language makes it clear that ‘forcing or requiring’ refers to the intended effect of the picketing, not the manner in which the picketing is carried on, to the ‘object,’ not the method, and it is clear that the union’s object was swiftly to compel organization or recognition, not merely to create a climate in the shop favorable to the union.”<sup>72</sup>

The Board’s interpretation of the statute to restrict picketing aimed at persuading either employees or the employer to recognize a union has led the Board to regulate what unions can say in minute detail and to allow picketing only when the picket signs say exactly what the Board permits.

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65. *Id.*

66. *NLRB v. Local 239, International Brotherhood of Teamsters*, 289 F.2d 41, 42–43 (2d Cir. 1961).

67. *Id.* at 43 (internal punctuation omitted).

68. *Id.*

69. *Id.*

70. *Id.* at 44.

71. *Id.*

72. *Id.*

To draw the line between prohibited appeals to employees or employers and permitted consumer appeals or protests of unfair labor practices, the Board focuses on the language used on picket signs or by the picketers or union agents as well as the location of the picketing. The Board sometimes finds that picketing with the alleged purpose of informing the public is in fact aimed at the employer or the workers.<sup>73</sup> For example, in a case in which picket signs declared, “Consuming Public; Employees of Atlantic Maintenance: Please Take One of Our Circulars and Read it, It Tells Our Story,” the Board determined the picketing was unlawful because it occurred at employee entrances rather than at customer entrances.<sup>74</sup> More recently, the NLRB’s Division of Advice found that signs stating “H&M Stinks,” “H&M Exploits Workers,” or “Abuse is in style at H&M” did not comport with the proviso language and therefore were not protected.<sup>75</sup> In another case, the Board found a union to have violated section 8(b)(7)(C) because a union business agent told an employee that the union wished to persuade the employees to unionize, even though the union’s signs complied with the language of the consumer appeal proviso.<sup>76</sup>

In sum, the Board’s test does not focus on whether the picketing is coercive or causes the employees to feel they must join a union that they would rather not join. Rather, the focus is entirely on whether the union is trying to persuade the employees or employer (regardless of peacefulness or effect of the efforts) and whether it has used the Board’s approved consumer-focused messages that the employer is not unionized or does not pay area standard wages. Moreover, even if the language and location of the picketing follow the Board-approved rules, the Board will seek to enjoin any picketing that persuades an employee to not cross a picket line to make a pick-up or delivery or to perform other services.

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73. See, e.g., *Iron Workers Local 10 (R & T Steel Constructors, Inc.)*, 194 N.L.R.B. 971, 973 (1972) (concluding that the purpose of picketing was to force the corporation to bargain with the Union); *Garment Workers, ILGWU (Saturn & Sedran, Inc.)*, 136 N.L.R.B. 524, 536 (1962); *Hoisting & Portable Engineers*, 140 N.L.R.B. 1175, 1179 (where picketing only took place only at access points for entry onto highways from which the public was barred); *Provision Salesmen and Distributions Union*, 163 N.L.R.B. 532, 537 (1967) (Board adopting Trial Examiner’s findings that though the Union’s signs comported with proviso language, the action was actually targeted towards employees because of comments made by Union business agent to an employee).

74. *Philadelphia Window Cleaners & Maintenance (Atlantic Maintenance Co.)* 136 N.L.R.B. 1104, 1113 (1962).

75. *UNITE (H&M)*, 2004 WL 2414083 (N.L.R.B.G.C.), at \*5 (Jan. 21, 2004).

76. *Provision Salesmen and Distributions Union*, 163 N.L.R.B. 532, 537 (1967). On the other hand, in one case the Board has allowed picketing when the signs adhered to the proviso even though leaflets added: “Jumbo Food Stores undermine the living standards of Food Store employees in this community. Their firm does not maintain the fair wages and working conditions which prevail at a number of supermarkets in the Greater Washington Area.” *Retail Clerks Local 400 (Jumbo Food Stores, Inc.)*, 136 N.L.R.B. 414, 417 (1962). A General Counsel advice memo does allow handbills to depart slightly from the language of the proviso. *UNITE HERE, Local 217 (Waterford Venue Services)*, 2007 WL 4233204 (N.L.R.B.G.C.), at \*2, 4 (Jan. 10, 2007).

### C. *The Impact of Section 8(b)(7)*

The NLRB's broad interpretation of the prohibition on picketing has a substantial chilling effect. Unions and employees may be reluctant to use picketing as a way of getting their message across to the public because of the risk of falling under the section 8(b)(7)(C) restriction.

Under the Board's test, an array of protests at a non-union workplace could potentially be found to have an illegal object and to run afoul of section 8(b)(7)(C). Because the primary purpose of unions is to organize, gain recognition, and negotiate contracts, almost any activity that unions engage in could be said to ultimately have a recognitional or organizational objective. Whenever a union pickets demanding improved working conditions, it arguably has the ultimate objective of organizing the workers and gaining union recognition. For example, although OUR Walmart insisted it was neither picketing nor seeking recognition, but only was publicizing Walmart's poor labor practices, Walmart filed a section 8(b)(7)(C) charge and OUR Walmart decided to suspend its protest rather than risk an expensive legal battle.<sup>77</sup> Similarly, the Los Angeles port truck drivers insisted their picketing was a peaceful effort to publicize their poor working conditions, but nevertheless agreed to change their protest tactics when the Board issued a section 8(b)(7)(C) complaint.<sup>78</sup> The threat of section 8(b)(7) litigation therefore chilled both the unions and the community organizations working with them from engaging in activity that, we argue, is constitutionally protected. And, as we noted above, the Board even has suggested that picketing to obtain a fair process for choosing a union might be prohibited by section 8(b)(7)(C) if the organizing objective is too important in the union's strategy.<sup>79</sup> Additionally, section 8(b)(7)(C) restricts not only picketing but also "threats to picket," which can encompass a broad range of communications by unions, such as letters, emails, photos and websites.<sup>80</sup> A lawyer advising worker activists must not only vet the content and location of picket signs, but must also monitor what employees say when they are not picketing.

By requiring that messages on picket signs mirror the language in the section 8(b)(7)(C) proviso, the Board significantly limits what unions and

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77. See *UFCW Settlement*, *supra* note 12.

78. See Karen Robes Meeks, *Teamsters Excessively Picketed Carson Trucking Firm*, *NLRB Finds*, DAILY BREEZE (June 27, 2014, 5:56 PM), <http://www.dailybreeze.com/social-affairs/20140627/teamsters-excessively-picketed-carson-trucking-firm-nlrb-finds>.

79. *New Otani Hotel and Garden*, 331 N.L.R.B. 1078, 1080 n.6 (2000).

80. See *Local Joint Executive Board of Las Vegas (Culinary Workers Union Local 226 and Bartenders Union 165)*, 2012 WL 3230423 (N.L.R.B.G.C.), at \*4 (July 27, 2012) (Employer filed section 8(b)(7)(C) charges against the Union for its communications to the Employer's customers which included photos of allegedly unlawful picketing and references to allegedly unlawful picketing).



workers can communicate to the public.<sup>81</sup> Many union or worker campaigns, especially those involving new and innovative organizing or mobilization tactics, involve messages beyond the proviso's "X Company Does Not Have a Contract with Y Union" or "X Company Does Not Employ Members of Y Union." The OUR Walmart campaign, for example, aims at the creation of dependable and predictable work schedules, making full-time jobs available to workers who want them, the elimination of retaliation against workers who support unionization, and raising wages.<sup>82</sup> OUR Walmart explicitly disclaims any organizing objective, but instead aims only to mobilize Walmart workers to exercise their section 7 and First Amendment rights to ask Walmart to improve as an employer and to cease retaliating against employees who have exercised their rights to engage in concerted activity and to speak out. The Service Employees International Union ("SEIU") has recently spearheaded an effort to support improved wages and the right to organize for fast-food workers, also targeting abuse of part-time work and demanding an hourly wage of \$15.<sup>83</sup> The Teamsters Union has partnered with environmental organizations to address the misclassification of truck drivers as independent contractors and the resulting environmental degradation when drivers cannot maintain low-emission trucks at the Los Angeles and Long Beach ports among others.<sup>84</sup> The campaign has focused on the harms caused by logistics companies outsourcing the cost of maintaining trucks onto low-wage drivers and the resulting poor labor conditions, inability to organize unions, and negative environmental impacts on surrounding communities.<sup>85</sup>

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81. *Jumbo Food Stores, Inc.*, 136 N.L.R.B. at 417-18, 422-23 (Board holding that pamphlets accompanying proviso picketing did not need to mirror the statutory language); cf. Local 275, Laborers International Union (*S. B. Apartments*), 209 N.L.R.B. 279, 284 (1974) (Board holding that a picket sign stating that "Workers on this job . . . do not receive wages and working conditions as good as Local 275" constituted area standards picketing unprotected by the proviso); *H&M*, 2004 WL 2414083, at \*5 (NLRB's Division of Advice found that signs stating "H&M Stinks," "H&M Exploits Workers," or "Abuse is in style at H&M" did not comport with the proviso language and therefore were not protected).

82. See OUR WALMART CAMPAIGN WEBSITE, <http://forrespect.org/> (last visited April 5, 2015). On the nature of contemporary campaigns, see generally Michael Oswalt, *Improvisational Unionism*, *supra* note 6, sources cited *supra* notes 4 and 5, and Brishen Rogers, "Acting Like A Union": *Protecting Workers' Freedom of Choice by Promoting Workers' Collective Action*, 123 HARV. L. REV. 38 (2010).

83. See FAST FOOD FORWARD CAMPAIGN, <http://www.fastfoodforward.org/en/> (last visited April 5, 2015); Steven Greenhouse, *In Drive to Unionize, Fast-Food Workers Walk Off the Job*, N.Y. TIMES, Nov. 29, 2012, at A22, available at [http://www.nytimes.com/2012/11/29/nyregion/drive-to-unionize-fast-food-workers-opens-in-ny.html?\\_r=0](http://www.nytimes.com/2012/11/29/nyregion/drive-to-unionize-fast-food-workers-opens-in-ny.html?_r=0).

84. COALITION FOR CLEAN AND SAFE PORTS CAMPAIGN, <http://cleanandsafeports.org/> (last visited Aug. 5, 2014); see generally Cummings, *supra* note 4.

85. COALITION FOR CLEAN AND SAFE PORTS CAMPAIGN, <http://cleanandsafeports.org/> (last visited Aug. 5, 2014).

All of these campaigns involve the use of picketing to engage workers and the community in long-term fights for improved workplace conditions. Unions (like the SEIU), worker groups (like OUR Walmart), and the community organizations with whom they work have to tailor their picket sign messages to avoid the risk that the NLRB will find the picketing activity to be recognitional or organizational. Under the Board's current interpretation, section 8(b)(7) limits the message that the unions can communicate to the public on picket signs, effectively prohibiting the union and workers from using the language they themselves have chosen to best articulate their concerns.

## II. THE BOARD'S INTERPRETATION OF 8(B)(7) VIOLATES THE FIRST AMENDMENT

### A. *The Supreme Court Has Never Ruled on a Constitutional Challenge to Section 8(b)(7)*

The Supreme Court has never ruled on the constitutionality of section 8(b)(7)(C). Although multiple courts of appeals upheld section 8(b)(7)(C) against First Amendment challenges in the 1960s, 1970s, and 1980s, these rulings pre-date the Court's recent First Amendment jurisprudence.<sup>86</sup> As a consequence, the Board is not compelled by binding precedent to adhere to its current interpretation of section 8(b)(7)(C). It need not wait for the Supreme Court and can change its own unconstitutional practices in enforcing the statute.

We acknowledge, of course, the 1949 Supreme Court decision in *Giboney v. Empire Storage & Ice*, which created broad power for legislatures to regulate picketing.<sup>87</sup> We argue below that the Court's decision in *Giboney* is inconsistent with its earlier and later picketing jurisprudence. We also explain that the Board's determination that the First Amendment allows section 8(b)(7) to prohibit peaceful appeals to employees to join a union is in considerable tension with the 1960 Supreme Court decision in *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*.<sup>88</sup> That case held that a different provision in the federal labor law, section 8(b)(1)(A), did not prohibit peaceful picketing appeals to employees

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86. See *Miller v. United Food and Commercial Workers Union*, 708 F.2d 467, 471–72 (9th Cir. 1983); *NLRB v. International Brotherhood of Elec. Workers Local 265*, 604 F.2d 1091, 1099–1100 (8th Cir. 1979); *International Brotherhood of Teamsters Local 344 v. NLRB*, 568 F.2d 12, 21 (7th Cir. 1977); *NLRB v. Lawrence Typographical Union No. 570*, 376 F.2d 643, 654 (10th Cir. 1967); *NLRB v. Local 3, International Brotherhood of Elec. Workers*, 339 F.2d 600, 601 (2d Cir. 1964) (per curiam); *Dayton Typographical Union No. 57 v. NLRB*, 326 F.2d 634, 646–49 (D.C. Cir. 1963).

87. 336 U.S. 490 (1949).

88. 362 U.S. 274 (1960).

urging them to join a union.<sup>89</sup> We also demonstrate that the Board's approach to section 8(b)(7)(C) cannot be reconciled with the Supreme Court's contemporary cases granting broad protection to picketing on all topics and by all speakers and its contemporary approach to commercial speech. Section 8(b)(7)(C) discriminates on the basis of speaker and viewpoint, is not limited to prohibiting only commercial speech, and is not narrowly (or even reasonably) tailored to serve a legitimate, important, or compelling governmental interest.

The Court came closest to ruling on the permissibility of organizational picketing in *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, which interpreted section 8(b)(1), but not section 8(b)(7) because at the time the events occurred section 8(b)(7) was not yet in force.<sup>90</sup> The case involved a Teamsters local that set up a few pickets, first at the employee entrance to a Curtis Brothers company warehouse and later at the consumer entrance of a Curtis Brothers retail furniture store.<sup>91</sup> As the Court explained,

The pickets were orderly at all times and made no attempt to prevent anyone from entering the store. They simply patrolled before the entrance carrying signs reading on one side, "Curtis Bros. employs nonunion drivers, helpers, warehousemen and etc. Unfair to Teamsters Union No. 639 AFL," and on the other side, "Teamsters Union No. 639 AFL wants employees of Curtis Bros. to join them to gain union wages, hours, and working conditions."<sup>92</sup>

The Court rejected the Board's effort to apply section 8(b)(1) to prohibit the picketing, recognizing "a right in unions to use all lawful propaganda to enlarge their membership."<sup>93</sup> Section 8(b)(1), the Court reasoned, was intended "to insure that strikes and other organizational activities of the employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal."<sup>94</sup> The Court acknowledged that the recently enacted section 8(b)(7) addressed picketing for recognitional and organizational purposes and further observed that upholding the Board's prohibition of picketing under section 8(b)(1) would deprive unions of the safeguards of section 8(b)(7)(C), by which the Court presumably meant the consumer appeal proviso.<sup>95</sup> The case did not address the constitutionality of prohibiting peaceful picketing aimed at persuading employees or an employer to recognize a union, nor did it interpret the scope of section 8(b)(7). But the Court's opinion is an

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89. *Id.* at 291.

90. *Id.* at 277-79.

91. *Id.* at 274-78.

92. *Id.* at 276.

93. *Id.* at 279.

94. *Id.* at 291.

95. *Id.*

encomium to the long history of constitutional protection of “a right in unions to use all lawful propaganda to enlarge their membership.” In holding that the Board could not prohibit picketing aimed at using “all lawful propaganda to enlarge their membership” the Court emphasized that section 8(b)(7) contains safeguards against “interference with legitimate picketing.”<sup>96</sup> It is difficult to read the Board’s more recent assertion of a broad power to prohibit the use of picketing as a form of persuasion to be consistent with these principles.

In sum, the Supreme Court’s precedents do not foreclose the Board and the courts of appeals from reading the prohibitions of section 8(b)(7) more narrowly than they have. Although the Court’s First Amendment cases on other provisions of the NLRA appear to tolerate broad prohibitions of labor picketing, for reasons we explain in the next section, they do not compel the Board’s current interpretation of the statute. And the Court’s cases striking down restrictions on other forms of picketing leave little doubt that the Board’s overly broad reading of section 8(b)(7) is no longer constitutional.

### B. *The History of Labor Picketing in the Supreme Court*

Soon after the NLRA was passed, the Court articulated broad protection for labor picketing and adhered to that position during the early 1940s. In 1940, in *Thornhill v. Alabama*, the Supreme Court recognized labor picketing as protected expression under the First Amendment.<sup>97</sup> In *Thornhill*, the Court invalidated a state anti-picketing statute that had been applied to labor picketers, proclaiming that “discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”<sup>98</sup> The Court therefore held that the dissemination of information about labor disputes “must be regarded as within that area of free discussion that is guaranteed by the Constitution.”<sup>99</sup>

The Court in *Thornhill* acknowledged that picketing could induce some to not enter into advantageous relations with the business being picketed, but stated that “[e]very expression of opinion on matters that are important has the potentiality of inducing action in the interests of one, rather than another, group in society.”<sup>100</sup> The Court therefore held that the state could not impose sanctions “merely on a showing that others may thereby be persuaded to take action inconsistent with [the state’s] interests.”<sup>101</sup> The

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96. *Id.* at 279, 291.

97. 310 U.S. 88 (1940).

98. *Id.* at 103.

99. *Id.* at 102.

100. *Id.* at 104.

101. *Id.*

Court also articulated a standard that we would today call strict scrutiny: any restriction on picketing had to be “narrowly drawn” to the “clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace.”<sup>102</sup>

Two years later, in *Bakery & Pastry Drivers & Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, the Court again articulated broad protection for peaceful labor picketing and vacated a state court injunction prohibiting picketing.<sup>103</sup> The Court relied in part on the fact that the picketing was not coercive and that its repercussions were “slight.”<sup>104</sup> Justice Douglas, in a concurring opinion, protested that the Court’s opinion implied that “a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective.”<sup>105</sup> Justice Douglas emphasized that *Thornhill* had recognized that picketing could induce customers or workers to refuse to do business with an employer, just as “[e]very expression of opinion on matters that are important has the potentiality of inducing action.”<sup>106</sup> He also noted that the expressive symbolic conduct—what he called the “patrol of a particular locality”—is often as significant as the words used on the picket signs “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.”<sup>107</sup> This language soon became the basis for the Court to effectively overrule *Thornhill* and to uphold a wide array of picketing restrictions imposed both under the newly-enacted Taft-Hartley Act and under state law.

In 1949, in the wake of Congress having enacted restrictions on labor picketing as part of the Taft-Hartley amendments, the Court changed its views about the nature of, and First Amendment protection for, labor picketing. In *Giboney v. Empire Storage & Ice*, the Supreme Court relied on Justice Douglas’ quote about picketing being “more than free speech” in part to uphold a state picketing restriction.<sup>108</sup> The Court reasoned that picketing was “an integral part of *conduct*” that was prohibited by the State’s public policy.<sup>109</sup> The theory that picketing “was more than free speech” and therefore could be broadly restricted based on an unlawful purpose or public policy, without scrutiny, was also echoed the following year in *Hughes v. Superior Court*, an early civil rights picketing case.<sup>110</sup> After *Giboney* and *Hughes*, it appeared that picketing was no longer always

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102. *Id.* at 105

103. 315 U.S. 769 (1942).

104. *Id.* at 775.

105. *Id.* (Douglas, J. concurring).

106. *Id.* at 776 (internal citations omitted).

107. *Id.* at 776–77.

108. 336 U.S. 490, 503 (1949).

109. *Id.* at 498 (emphasis added).

110. 339 U.S. 460 (1950).

protected First Amendment activity and picketing restrictions were no longer subject to strict scrutiny. We now assess these two seminal cases in more detail.

*Giboney* upheld an injunction under state antitrust law brought against an association of retail ice peddlers in Kansas City.<sup>111</sup> The peddlers drove their own trucks door to door selling ice purchased from suppliers. The peddlers formed an association and tried to get peddlers who undersold them either to join the association or to go out of business; the peddlers picketed suppliers to get them not to sell to the peddlers who refused to join the association.<sup>112</sup> The picketing of one supplier, Empire, prompted unionized truckers that served Empire not to cross the line, reducing Empire's business by eighty-five percent.<sup>113</sup>

The Court, in an opinion by Justice Black, began with the proposition that the case involved a conspiracy by dealers to restrain trade in ice, and that to uphold the right of the peddlers to get a third-party supplier to boycott peddlers who refused to join the association would be tantamount to a judicial repeal of the state and federal antitrust laws.<sup>114</sup> The peddlers were independent businesses, not employees, and the federal statutory protection to bargain collectively, along with labor exemption from antitrust law, did not allow them to agree to fix the price of their services.<sup>115</sup> After explaining that the labor exemption from federal antitrust law did not apply to state antitrust law, the Court then addressed the First Amendment contention:

[A]ll of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did not more than enjoin an offense against Missouri law, a felony. It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.<sup>116</sup>

Distinguishing *Thornhill*, the Court explained that conspiracies in restraint of trade, like most conspiracies and some other crimes, are accomplished through speech, and “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the

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111. 336 U.S. at 504.

112. *Id.* at 492.

113. *Id.* at 493.

114. *Id.* at 495–96.

115. *Id.*

116. *Id.* at 498.

conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”<sup>117</sup>

The Court reached a similar result the next year in *Hughes v. Superior Court*, involving a state injunction against peaceful civil rights picketers whose objective was that a store hire employees in proportion to the racial identity or ethnic origin of its customers.<sup>118</sup> Conceding that “while picketing is a mode of communication it is inseparably something more and different . . . . [T]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.”<sup>119</sup> Noting that *Thornhill* and other cases had found picketing to be speech protected by the First Amendment,<sup>120</sup> Justice Frankfurter dismissed the “language” of those opinions as “loose” and “general” and insisted that “the specific situations have controlled [the Court’s] decision[s] . . . . Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives grounds for its disallowance.”<sup>121</sup> The Court also found the prohibition on picketing to be justified. The state had an interest in stopping the picketing in order to ensure that employers could hire on the basis of competence or “on an equal right of all, regardless of race, to compete in an open market.”<sup>122</sup> Allowing such picketing, Justice Frankfurter speculated, would encourage a policy of preferences for representative numbers of “Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio.”<sup>123</sup>

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117. *Id.* at 502. As we explain below, the Court later expanded First Amendment protection for picketing in support of a boycott against a state antitrust challenge. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court held that state antitrust law could not constitutionally be used to prevent black community leaders from boycotting white merchants to protest Jim Crow. However, the use of a work stoppage by independent contractors to protest working conditions remains possibly subject to antitrust liability. See generally *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426, 428 (1990) (holding that concerted refusal of lawyers to accept appointments in criminal cases until legislature increased hourly rate for court-appointed counsel was a price fixing agreement prohibited by federal antitrust law and was not protected by First Amendment; distinguishing *Claiborne Hardware* on the grounds that participants in NAACP boycott “sought no special advantage for themselves . . . only equal respect and equal treatment to which they were constitutionally entitled”); Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807 (1993) (arguing that the legal treatment of boycotts depends on whether judges emphasize the harms of coercion and the self-interest of boycotters or the benefits of free expression and the social and political goals of boycott).

118. 339 U.S. 460 (1950).

119. *Id.* at 465.

120. See generally *Thornhill v. Alabama*, 310 U.S. 88 (1940); *American Fed’n of Labor v. Swing*, 312 U.S. 321 (1941); *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769 (1942); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943).

121. *Hughes*, 339 U.S. at 465–66.

122. *Id.* at 463–64.

123. *Id.* at 464.

*Giboney, Hughes* and other cases<sup>124</sup> in the 1950s established “a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.”<sup>125</sup> Applying this analysis, the Court in 1957 rejected a First Amendment challenge to a state court injunction against peaceful picketing by a few men carrying signs that said that “[t]he men on this job [we]re not 100% affiliated with the AFL” because the picketing dissuaded truck drivers from making pick-ups and deliveries at a gravel pit.<sup>126</sup> In essence, so long as the picketing had a purpose that the state deemed unlawful, it could be enjoined.

First Amendment scholars have universally condemned the vagueness and malleability of the “unlawful purpose” test.<sup>127</sup> Even members of the Court have acknowledged its dubious constitutional support.<sup>128</sup> The Court gradually repudiated the unlawful purpose test in cases involving civil rights,<sup>129</sup> anti-war<sup>130</sup> and anti-abortion protests,<sup>131</sup> and the homophobic funeral protests of the Westboro Baptist Church.<sup>132</sup> Later, the Court overruled *Hughes sub silentio* in a case finding that the First Amendment protected civil rights picketing.<sup>133</sup> The unlawful purpose test for First

124. See generally *International Brotherhood of Teamsters Union v. Hanke*, 339 U.S. 470 (1950) (holding that a State was not restrained by the Fourteenth Amendment from enjoining picketing of a business because it was directed against a valid public policy of the State); *Building Service Employees International Union v. Gazzam*, 339 U.S. 532 (1950) (upholding a labor picketing injunction because of the unlawful objective of the picketing); *Local Union No. 10, United Association of Journeymen v. Graham*, 345 U.S. 192 (1953) (upholding a state court injunction against picketing that advertised that nonunion men were being employed on a building job, as a violation of the State’s ‘Right to Work’ law); *International Brotherhood of Teamsters, Local 695 v. Vogt*, 354 U.S. 284 (1957) (upholding a state injunction against peaceful picketing at a jobsite with signs that said simply the workers on the site were not affiliated with the AFL).

125. *Vogt*, 354 U.S. at 293.

126. *Id.*

127. See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation Altering Utterances,” and the Unchartered Zones*, 90 CORNELL L. REV. 1277 (2005); Tasic, *supra* note 22, at 237.

128. See *NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco)*, 447 U.S. 607 (1980).

129. See *infra* notes 160-169 and accompanying text.

130. See *infra* notes 140-41.

131. See generally *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (holding an injunction against picketing and demonstrating in front of an abortion clinic was content neutral but acknowledging that if it was not, it would receive strict scrutiny, and finding parts of the injunction to be overly broad in burdening speech); accord *Hill v. Colorado*, 530 U.S. 703 (2000) (finding a statute regulating speech outside of health care facilities to be content neutral and stating that it “clearly does not prohibit either a particular viewpoint or any subject matter that may be discussed by a speaker”).

132. See *Snyder v. Phelps*, 134 S. Ct. 2518 (2014).

133. See *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (holding that civil rights march, accompanied by signs, speeches, clapping, and singing at state capitol was protected by the First Amendment); see also *Cox v. Louisiana*, 379 U.S. 536, 549-51 (1965) (ruling that civil rights protest—



Amendment protection of peaceful protest appears to survive only within labor picketing cases,<sup>134</sup> and even there the Court has not upheld against First Amendment challenge a statutory prohibition of peaceful picketing since 1980.<sup>135</sup> As explained in the next section, the Court's labor picketing jurisprudence cannot be squared with the rest of its First Amendment jurisprudence.

*C. The Labor Picketing Cases Are Inconsistent With the Court's First Amendment Jurisprudence*

The Board's approach to labor picketing is inconsistent with three separate aspects of the Court's First Amendment jurisprudence concerning picketing and other forms of speech in public fora. First, one of two premises of the unlawful purpose test—that labor picketing is conduct—has long since been rejected. In any event, restrictions on expressive conduct must pass intermediate scrutiny under the rule established in *United States v. O'Brien*,<sup>136</sup> and as we explain below, the Board's interpretation of section 8(b)(7) cannot pass intermediate scrutiny. Second, the other premise of the unlawful purpose test—that labor relations are within the economic realm and therefore subject to laxer First Amendment protection—has also been undermined by later cases. The labor picketing rules are content-based regulations that must be judged by strict scrutiny and, when so judged, they fail. Even if these restrictions were content neutral, they would not meet the test for content-neutral regulation of speech in a public forum. Third, section 8(b)(7) is an impermissible speaker-based restriction on speech that fails under the Court's decisions in *Citizens United v. Federal Election Commission*<sup>137</sup> and *McCutcheon v. Federal Election Commission*.<sup>138</sup> Consequently, the Board should assess the constitutionality of its approach to section 8(b)(7) in light of the whole body of the Court's free speech jurisprudence, not simply its outmoded approach to labor picketing.

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including picketing at state house, songs, speeches, and a call to sit in at lunch counters—was protected by First Amendment, even though it was a very large gathering and was noisy).

134. See, e.g., *United Food and Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1192–94 (D. Ariz. 2013) (stating that governments may constitutionally prohibit picketing “when it is directed toward an illegal purpose” and that “governments may validly prohibit picketing, even peaceful picketing, if the picketing aims to accomplish a purpose that contradicts stated public policy.”); *Federación de Maestros de Puerto Rico v. Acevedo-Vila*, 545 F. Supp. 2d 207, 216 (D.P.R. 2008) (citing to *Hughes* and *Giboney* in a case about labor picketing).

135. *NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco)*, 447 U.S. 607 (1980).

136. 391 U.S. 367, 382 (1968). See *infra* notes 140–41.

137. 558 U.S. 310 (2010).

138. 134 S. Ct. 1434 (2014).

### 1. *The Demise of the Picketing-is-Conduct Rule*

In the 1960s, as the Court extended First Amendment protection to anti-war protests and civil rights protests, the Court began to erode the notion that the picketing and other expressive conduct is not speech.<sup>139</sup> As described below, the Court held in case after case that picketing and other forms of expression that had conduct components—flag and draft card burning, physical gestures, wearing symbols, and cross burning—were entitled to First Amendment protection.

In a 1968 case, *United States v. O'Brien*, the Court upheld a conviction for burning a draft card on the express grounds that the government's interest in requiring draft-age men to have evidence of their status was strong and the restriction on the expressive act of burning the card was both unrelated to suppressing speech and no broader than necessary to serve the government's interest.<sup>140</sup> However, the Court ruled that if the regulation instead targeted the expressive component, it had to be justified like any other content-based regulation on speech.<sup>141</sup>

Labor advocates tried to introduce the new rules for expressive conduct into labor picketing cases, but their efforts resulted only in the Court narrowing the conduct that it would read to be prohibited by the statute rather than finding the prohibitions to be unconstitutional. In a 1964 decision which held the secondary boycott prohibition could not constitutionally be applied to picketing aimed at persuading grocery store shoppers not to purchase apples grown in Washington while Washington fruit packers and warehouse workers were on strike, Justice Black's concurring opinion demolished the notion that the government can prohibit picketing because it is conduct rather than communication.<sup>142</sup> Section 8(b)(4)(B) prohibits coercive activity or picketing as part of a secondary

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139. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that black armbands worn to protest the Vietnam War were expressive conduct and protected); *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (finding that wearing a jacket bearing the words “Fuck the Draft” in a corridor of the Los Angeles Courthouse was expressive conduct and protected); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (ruling that anti-abortion picketing was a core First Amendment activity); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that a ban on burning the flag was regulating the expressive aspects and not the conduct aspect of flag burning because it only prohibited it when conducted by actors with a specific purpose or message); *Virginia v. Black*, 538 U.S. 343, 360–63, 365–66 (2003) (majority holding that cross burning is expressive conduct that communicates both threats of violence and ideology and plurality holding therefore a criminal law that presumes it threatens violence is unconstitutional); *R.A.V. v. St. Paul*, 505 U.S. 377, 391–96 (1991) (finding that a statute that penalizes certain forms of symbolic conduct, including cross burning, more harshly than other forms of speech is a content-based regulation that must be justified by strict scrutiny even if the speech is not protected by the First Amendment, and city's hate speech ordinance does not withstand strict scrutiny).

140. 391 U.S. 367, 382 (1968).

141. *Id.*

142. See *NLRB v. Fruit and Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 76–80 (1964) (Black, J. J., concurring).

boycott, and protects only consumer appeals that involve “publicity, other than picketing.”<sup>143</sup> Because the consumer appeal in the case involved picketing, and because the Court’s prior cases and the Board’s law treated picketing as coercive, the Board believed the statute clearly prohibited it.<sup>144</sup> The majority practiced a bit of extreme constitutional avoidance and held that the legislative history showed that Congress did not intend to prohibit picketing at the premises of secondary employers (like grocery stores) so long as it was aimed only at inducing a consumer boycott of a product produced by a primary employer (such as the Washington apple packers).<sup>145</sup>

Justice Black considered the majority’s reading of the legislative history to be unpersuasive and the statutory language to be clear. However, he found the statute unconstitutional as applied to picketing aimed at consumers. As he explained,

[I]t is difficult to see that the section in question intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment. . . . The statute in no way manifests any government interest against patrolling as such, since the only patrolling it seeks to make unlawful is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with whom the picketers have a dispute. All who do not patrol to publicize this kind of dispute are, so far as this section of the statute is concerned, left wholly free to patrol. Thus the section is aimed at outlawing free discussion of one side of a certain kind of labor dispute and cannot be sustained as a permissible regulation of patrolling.<sup>146</sup>

Several years later, the Court characterized picketing as expressive conduct that was protected by the First Amendment and held that laws prohibiting some picketing while allowing other forms violated the Equal Protection Clause.<sup>147</sup> *Carey v. Brown* struck down a law prohibiting picketing of private residences except when the residence was a workplace involved in a labor dispute,<sup>148</sup> and *Police Department of Chicago v. Mosley* struck down an ordinance that prohibited picketing near schools except when schools were involved in labor disputes.<sup>149</sup> Both of these cases were decided on Equal Protection rather than First Amendment grounds, but both made the crucial point that a legislature cannot ban picketing by some groups or on some topics while allowing picketing by others. In *Mosley* and *Carey*, the Court vigorously tested the government’s asserted interests

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143. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4).

144. Fruit and Vegetable Packers & Warehousemen, Local 760, 132 N.L.R.B. 1172, 1177 (1961).

145. *Tree Fruits*, 377 U.S. at 71.

146. *Id.* at 78–79 (1964) (Black, J., concurring) (citations omitted).

147. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 460–62 (1980).

148. *Carey*, 447 U.S. at 457.

149. *Mosley*, 408 U.S. at 92–93.

and ultimately determined that the subject matter discrimination was strong evidence that the asserted interests in maintaining order were invalid.<sup>150</sup> In essence, the Court adopted Justice Black's reasoning from his concurring opinion in *Tree Fruits* that the prohibition of picketing on only certain topics was evidence that the government had no real interest in regulating the conduct but rather sought to suppress the message.<sup>151</sup> By allowing disruptions about labor disputes or invasions of privacy due to labor disputes, but not other subjects, the government showed that that it did not truly care about disruption or privacy concerns.<sup>152</sup> Rather, it was impermissibly discriminating against one type of speaker and speech on one subject matter.

Nonetheless, the Court was not prepared to invalidate key aspects of the prohibition on secondary boycotts—even though doing so would have been logically consistent with *Mosley* and *Carey*. In *Safeco*, decided the same day as *Carey*, a union leveled a First Amendment challenge at section 8(b)(4)(B).<sup>153</sup> During a strike of the Safeco insurance company, employees picketed at the offices of title insurance companies that sold primarily Safeco title insurance.<sup>154</sup> Even though the picketing was a peaceful consumer appeal that did not aim to coerce the employer or to induce a work stoppage, the Court upheld the Board's finding of an unfair labor practice.<sup>155</sup> Reasoning that the picketing aimed to persuade consumers not to buy Safeco insurance and would harm the title companies that depended on sales of the struck company's product, the Court repeated the old notion that the government can prohibit picketing in furtherance of unlawful objectives.<sup>156</sup>

In his *Safeco* concurring opinion, Justice Stevens acknowledged the problems with a constitutional test that asked only whether the government had an interest in prohibiting speech because of its message: “[T]hat a statute proscribes the otherwise lawful expression of views in a particular manner and at a particular location cannot in itself totally justify the restriction. Otherwise the First Amendment would place no limit on Congress’ power.”<sup>157</sup> Yet Justice Stevens concurred on the grounds that picketing is “a mixture of conduct and communication . . . [that] calls for an automatic response to a signal, rather than a reasoned response to an

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150. *Id.* at 98–99; *Carey*, 447 U.S. at 464–65.

151. *See* 377 U.S. at 78 (Black, J., concurring).

152. *Mosley*, 408 U.S. at 100; *Carey*, 447 U.S. at 462.

153. *NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco)*, 447 U.S. 607 (1980).

154. *Id.* at 609–10.

155. *Id.* at 611.

156. *Id.* at 616 (citing *International Brotherhood of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951); *see also* *American Radio Assn. v. Mobile S.S. Assn.*, 419 U.S. 215, 229–31 (1974); *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957)).

157. *Safeco*, 447 U.S. at 619 (Stevens J., concurring).

idea.”<sup>158</sup> Therefore, in the labor context, picketing could be broadly restricted because it was the conduct element, rather than the expressive element, that was deterring people from entering a business establishment.<sup>159</sup>

Two years after *Safeco*, the Court announced extremely broad protection for picketing in the civil rights context. In *Claiborne*, the Mississippi chapter of the NAACP launched a boycott of white merchants to pressure them to serve and employ African-Americans.<sup>160</sup> To enforce the boycott, they stationed pickets (men wearing black hats who were variously called Deacons or Black Hats) outside each business to discourage African-Americans from patronizing the business. The community shunned anyone who entered the store.<sup>161</sup> As in *Giboney*, the case was a state antitrust action asserting that the NAACP was engaged in a conspiracy in restraint of trade.<sup>162</sup> There was ample evidence from which one could infer that the Black Hats intimidated those who refused to honor their picket lines by shunning, ostracism, and, in a few cases, acts of violence or vandalism.<sup>163</sup> Just as in labor cases, one could find that some people may have been persuaded to observe the boycott not because they agreed with the goals or methods of the NAACP but because they preferred not to provoke the ire of its members or to be shunned in their community. The NAACP boycott called for racial solidarity just as labor unions call for class solidarity, and one cannot know whether people honored the boycott because they were persuaded by the picketers’ arguments or because they were intimidated by their very presence and the social opprobrium that would fall on dissenters from the movement.

To the Court, these concerns did not matter. Citing *Thornhill* for the rule that “peaceful picketing was entitled to constitutional protection,”<sup>164</sup> the Court ruled for the NAACP. The Court further stated that “[t]he claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent’s conduct by their activities; this is not fundamentally different from the *function of a newspaper*.”<sup>165</sup> The Court explained that “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”<sup>166</sup>

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158. *Id.* at 618–19.

159. *Id.*

160. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 899–900 (1982).

161. *Id.* at 903–04.

162. *Id.* at 890–92.

163. *Id.* at 903–04.

164. *Id.* at 909.

165. *Id.* at 911 (emphasis added).

166. *Id.* at 910.

The Court thus held, consistent with *Thornhill*, that picketing and consumer boycotts are protected First Amendment expression even if they function coercively. The Court also directly contradicted the old notion that picketing calls for “an automatic response to a signal, rather than a reasoned response to an idea.”<sup>167</sup> The Black Hats’ presence outside a store operated as a signal to members of the black community that they should boycott the store or risk the opprobrium of their friends and neighbors, yet the Court did not find the boycott to be any less protected just because it was carried out through signals as well as other forms of speech.<sup>168</sup> Nor did the Court mention the notion that picketing is conduct, citing to *Giboney* only to distinguish civil rights picketing from labor picketing.<sup>169</sup>

Several years later, in *Texas v. Johnson*, the Court again rejected the idea that the government can prohibit conduct that is part of an expressive act—this time by striking down a prohibition on flag burning.<sup>170</sup> Noting that the government allows burning of flags as a method of disposing of damaged flags, the Court held that criminal prosecution of flag burning targeted the expressive aspects of the conduct and not the conduct itself.<sup>171</sup>

In 2011 and 2014, the Court again invalidated prohibitions on picketing or other speech in a public forum, in both cases rejecting the arguments that picketing can be prohibited because it is harmful conduct rather than speech. In *Snyder v. Phelps*, decided in 2011, members of the Westboro Baptist Church picketed the funeral of a soldier who was killed in the line of duty in Iraq.<sup>172</sup> During approximately thirty minutes preceding the funeral, the picketers held signs stating, “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You’re Going to Hell.”<sup>173</sup> A jury held that the picketers were liable for tort damages because they had caused the soldier’s father to suffer emotional distress.<sup>174</sup> However, the Court ruled that the activity was protected speech under the First Amendment and that the state did not have a compelling interest in imposing tort liability.<sup>175</sup> Although the American Legion’s *amicus* brief argued that funeral picketing was “qualitatively different from other modes of communication” because it was “a mixture of

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167. *NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco)*, 447 U.S. 607, 619 (Stevens, J., concurring).

168. *See Claiborne*, 458 U.S. at 914.

169. *Id.* at 912.

170. *Texas v. Johnson*, 491 U.S. 397 (1989).

171. *Id.* at 410–11, 416.

172. 131 S. Ct. 1207 (2011).

173. *Id.* at 1210–11.

174. *Id.*

175. *Id.* at 1220.

conduct and communication,<sup>176</sup> the Court rejected this invitation to reason that picketing was conduct, and instead focused only on the question of whether the speech was of “public concern.”<sup>177</sup>

In 2014, in *McCullen v. Coakley*, the Court invalidated a Massachusetts law that prohibited all speech on public property within thirty-five feet of a clinic that performs abortions.<sup>178</sup> The law was challenged by sidewalk “counselors” (not picketers) who wished to approach women entering the clinic to persuade them not to have an abortion.<sup>179</sup> Noting the constraints on the government’s power to limit speech in public forums such as streets and sidewalks, the Court held that “in such a forum the government may not selectively . . . shield the public from some kinds of speech on the grounds that they are more offensive than others.”<sup>180</sup> The Court found the law to be a content-neutral time, place, and manner regulation (because it prohibited all persons from remaining within thirty-five feet of a clinic entrance except those entering the clinic for work or treatment), and therefore the statute did not warrant strict scrutiny.<sup>181</sup> The Court still found it unconstitutional under the laxer standard it uses to judge content-neutral time, place, and manner restrictions because it was not sufficiently narrowly tailored to serve the government’s important interest in protecting the right to access clinics.<sup>182</sup> The statute at issue regulated conduct (remaining within the thirty-five-foot buffer zone) as well as speech (persuading women not to enter the clinic).<sup>183</sup> Both Justice Scalia and Justice Alito in concurring opinions strenuously insisted that the Massachusetts law was unconstitutional because it discriminated based on the content and viewpoint of speech: it allowed clinic employees to speak to prospective patients in the buffer zone but prohibited others from doing so.<sup>184</sup>

The Court’s holdings in *McCullen* and *Snyder* are in line with its holdings in *Claiborne* and *O’Brien*. Picketing cannot be restricted or punished based on its expressive qualities, even where it causes emotional or economic harm. Both opinions rejected the idea that the prohibition on picketing could be upheld because the speakers had alternative methods of conveying their message: presence at that place, the Court reasoned, was essential to the message, and the availability of other less assaultive forms

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176. Brief for The American Legion as Amicus Curiae in Support of Petitioner, *Snyder v. Phelps*, 2010 WL 2224730, at \*1 (U.S. 2010).

177. *Snyder*, 131 S. Ct. at 1215.

178. 134 S. Ct. 2518 (2014).

179. *Id.* at 2527.

180. *Id.* at 2529 (internal citation omitted).

181. *Id.* at 2534.

182. *Id.* at 2538–39.

183. *Id.* at 2526.

184. *Id.* at 2545–46 (Scalia, J., concurring); *Id.* at 2549 (Alito, J., concurring).

of communication (especially in *Snyder*) was not sufficient to protect the speaker's interest.<sup>185</sup>

The Court's case law has severely undermined the picketing-is-conduct rationale first articulated as a justification for restriction in *Giboney*. In the context of government picketing restrictions, the Court has treated picketing as expressive conduct, applied heightened scrutiny and refused to allow restrictions targeted at speakers or content.<sup>186</sup> In the context of tort, the Court has treated the First Amendment as an absolute defense to picketing when it relates to an issue of "public concern," whether it causes economic or other kinds of harm.<sup>187</sup> The Board and courts can no longer adhere to the idea that when unions are picketing, they are engaged in conduct that can be prohibited.

These cases also undermine the old "unlawful purpose" test that allowed government to restrict expressive activity because of its object. In *Snyder*, the Westboro Baptist Church's apparent object was to condemn homosexuality, a purpose that has no legitimate relationship to its strategy of upsetting or offending people attending soldiers' funerals.<sup>188</sup> In *McCullen*, the sidewalk counselors' object was to prevent women from exercising their constitutional right to reproductive choice.<sup>189</sup> Yet in both cases, the Court rejected the argument that the government can legitimately silence the speech because the object is offensive to a government policy.<sup>190</sup>

The Court's recent jurisprudence also undermines an argument in defense of the constitutionality of sections 8(b)(7) and 8(b)(4): that they prohibit only picketing—or, in the case of section 8(b)(4), conduct that threatens, restrains or coerces—and allow other forms of protest. Under the Board's current reading of section 8(b)(4), workers may make secondary appeals through distribution of leaflets and display of banners.<sup>191</sup> The

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185. *Id.* at 2539–40; *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

186. *See, e.g., McCullen*, 134 S. Ct. at 2534–36, 2541; *United States v. Grace*, 461 U.S. 171, 177 (1983) (striking down statute prohibiting parading, standing, or moving around as an assemblage or displaying flag, banner, or other device to publicize a party, organization, or movement on Supreme Court property); *see generally* *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (striking down state rule prohibiting distribution of literature on state fairgrounds except from a fixed location).

187. *Snyder*, 131 S. Ct. at 1219.

188. *See id.* at 1217.

189. *See* 134 S. Ct. at 2535.

190. *See Snyder*, 131 S. Ct. at 1220–21; *McCullen*, 134 S. Ct. at 2541.

191. *See generally* *United Brotherhood of Carpenters, Local 1506 (Eliaison & Knuth)*, 355 N.L.R.B. 797 (2010) (ruling that display of banners and distribution of leaflets was not coercive within the meaning of section 8(B)(4)); *Sheet Metal Workers Local 15 (Brandon Regional Med. Ctr.)*, 356 N.L.R.B. No. 162 (2011) (finding that distribution of leaflets and performance of mock funeral were not coercive); *see also* *Overstreet v. United Brotherhood of Carpenters*, 409 F.3d 1199 (9th Cir. 2005) (holding that distribution of leaflets and display of banners were not coercive); *Sheet Metal Workers' International Association, Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007) (ruling that distribution of leaflets and holding of mock funeral were not coercive).



Board has never extended that reasoning to section 8(b)(7) and has not addressed what kinds of communicative conduct counts as “picketing.” Even if the restriction encompassed in section 8(b)(7) were made content neutral, and were limited to the display of signs on sticks or to patrolling (the hallmarks of picketing), the statute would not be constitutional under *McCullen v. Coakley*. There, the Court rejected the argument that a buffer zone was narrowly tailored, finding that the remaining forms of communication (holding up signs from the periphery of the zone) were not, in the speakers’ view, adequate substitutes.<sup>192</sup> Chief Justice Roberts noted that “the First Amendment does not guarantee a speaker the right to any particular form of expression,” but also emphasized that the buffer zone made it harder for the anti-abortion advocates to convey their message in the way they wanted to convey it (a one-on-one conversation) and in the way they considered most effective; Roberts specifically noted that the anti-abortion advocates said they had been less effective in dissuading women from entering the clinics after adoption of the new law than they had been before.<sup>193</sup>

As this section has demonstrated, the Court has, in its nonlabor case law, eviscerated the contention that picketing is more than speech, or that the state has the right to regulate speech for purposes that are not in line with its policy preferences. The Court’s justifications for regulating labor picketing that rely on the power of picketing to more insistently dissuade people from entering or patronizing an establishment than does the display of a banner or the distribution of leaflets are entirely inconsistent with First Amendment principles. But these same justifications also explain why section 8(b)(7) regulates both the conduct and the message, and why other forms of speech are inadequate substitutes for labor picketing. Even if picket signs no longer have the capacity to induce a boycott (except to the extent that the language on the sign is persuasive or consistent with a worker’s or consumer’s views on the justice of the workers cause), they still convey to workers and consumers that the picketers really want a show of solidarity for their workplace struggles. And as discussed below, the justifications for regulation that rely on this activity being part of the economic sphere have also been eroded in the Court’s non-labor case law.

## 2. *Heightened Scrutiny for Economic Speech by Economic Actors*

Restrictions on labor picketing have sometimes been justified on a separate ground: that labor picketing is “economic” rather than “political” speech and that the state has greater power to regulate economic activity

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192. *McCullen*, 134 S. Ct. at 2535.

193. *Id.* at 2536.

than to regulate political activity.<sup>194</sup> Courts sometimes assess the content of labor speech under the laxer constitutional standard used to assess the content of commercial speech, based upon the supposition that the two forms of speech are analogous. For example, in *Claiborne*, the Court recognized “the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association.”<sup>195</sup> The Court explained that labor picketing restrictions represented “Congress’ 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.”<sup>196</sup>

Even in the 1960s, the *Claiborne* Court’s characterization of labor picketing and boycotts as economic but civil rights picketing and boycotts as political was not terribly persuasive. Indeed, the NAACP was specifically trying to induce private employers to hire African-American workers, and to “force governmental and economic change.”<sup>197</sup> But whatever merit there may have been in the 1960s to the idea that labor picketing and boycotts were primarily about economic rights, it is no longer true today. The campaigns against Walmart and fast-food outlets today are not just about wages, but about work-life balance, respect for workers, and the rights of workers to act collectively to improve working conditions and to participate collectively with management in setting the terms of employment.<sup>198</sup> Contemporary labor protest is, as the Court said of the civil rights protests in *Claiborne*, “a nonviolent, *politically motivated* boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”<sup>199</sup>

Moreover, section 8(b)(7)’s prohibition on picketing cannot be characterized as regulation of economic speech and activity. In *International Longshoremen’s Association v. Allied International*, unionized longshoremen protested the Russian invasion of Afghanistan by refusing to handle cargoes arriving from or destined for the Soviet Union.<sup>200</sup> Although the district court characterized the boycott as a protected “purely political, primary boycott of Russian goods,”<sup>201</sup> the Supreme Court rejected the notion “that ‘political’ boycotts are exempt” from section 8(b)(4)’s prohibition, and explained that “[t]he distinction between labor and political

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194. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 497 (1949).

195. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

196. *Id.* at 912 (quoting *NLRB v. Retail Store Employees*, 447 U.S. 607, 615 (Blackmun, J., concurring) (1980)).

197. *Id.* at 900.

198. *See supra* notes 1-6 and accompanying text.

199. *Claiborne*, 458 U.S. at 914 (emphasis added).

200. 456 U.S. 212, 226–27 (1982).

201. *Id.* at 217.

objectives would be difficult to draw in many cases.”<sup>202</sup> The Court then stated without reasoning that secondary activity prohibited by the NLRA is not protected under the First Amendment.<sup>203</sup>

Boycotts that involve work stoppages may be distinguishable from picketing that does not result in such stoppages on relevant First Amendment grounds, such as the strength of the government’s interest in regulation and the fit between the regulation and the interest. In *International Longshoremen’s Association*, the prohibited activity was a refusal to work, not just picketing, and the interest that the government has in prohibiting politically-motivated refusals to work—especially when the picketing causes disruption in a busy port—may be different than the interest in prohibiting speech.<sup>204</sup> Nevertheless, the case demonstrates that the prohibitions on labor picketing or boycotts cannot be upheld simply as regulations of commercial activity or speech.

Moreover, with some exceptions, the Court has largely rejected the contention that regulation of speech in the economic arena can be upheld as part of a comprehensive regime of regulating business activity.<sup>205</sup> The Court has recently invalidated a number of regulations of corporate speech beyond just political spending.<sup>206</sup> Whatever the current contours of commercial speech, the regulation of which is judged under a laxer standard than other forms of speech, most labor picketing in the current period is not commercial speech. And section 8(b)(7) fails to pass muster even under the Court’s intermediate scrutiny test for core commercial speech.

Commercial speech is “speech proposing a commercial transaction.”<sup>207</sup> The Court has reasoned that commercial speech is accorded less First Amendment protection because it is a “hardy breed of expression not particularly susceptible to being crushed by overbroad regulation” and is “in an area traditionally subject to governmental regulation.”<sup>208</sup> In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Court articulated a form of intermediate scrutiny requiring states

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202. *Id.* at 225.

203. *Id.* at 226.

204. *Id.*

205. See generally G. Edward White, *The Evolution of First Amendment Protection for Compelled Commercial Speech*, 29 J. L. & POL. 481 (2014); Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343 (2014); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

206. See, e.g., *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). See generally ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1121–46 (4th ed. 2011) (discussing the Supreme Court cases on the First Amendment and commercial speech).

207. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562 (1980) (internal citations omitted).

208. *Id.* at 564 n.6; see also Alex Kozinski and Stuart Banner, *Who’s Afraid of Commercial Speech?* 76 VA. L. REV. 627 (1990) (thoroughly discussing the history of commercial speech regulation).

to show that regulations on commercial speech advance a substantial governmental interest, that they directly advance the governmental interest asserted, and that they are no more extensive than is necessary to serve that interest.<sup>209</sup>

In 2011, the Court struck down a Vermont law that prohibited the sale of information identifying which pharmaceuticals were being prescribed by doctors for the purpose of marketing by pharmaceutical companies.<sup>210</sup> In *Sorrell v. IMS Health, Inc.*, the Court held that the law imposed a “specific, content- and speaker-based burden on protected expression,”<sup>211</sup> and allowed “prescriber-identifying information to be purchased, acquired, and used for other types of speech and by other speakers.”<sup>212</sup> The Court held that the state’s interest in “protect[ing] medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship” was not sufficient to justify the content-specific burden on pharmaceutical companies.<sup>213</sup> Specifically, the Court suggested that the state could have created a more “coherent policy . . . such as allowing the information’s sale or disclosure in only a few narrow and well-justified circumstances.”<sup>214</sup>

*Sorrell*’s holding and the scrutiny that it applies to commercial regulation compels a re-examination of labor picketing restrictions.<sup>215</sup> Like the prohibition on the sale of pharmaceutical information, section 8(b)(7) regulates economic actors and does so in a way that discriminates on the basis of speakers and viewpoint. Section 8(b)(7) discriminates on the basis of speakers by prohibiting only labor unions from picketing, while permitting all other speakers to picket with the same message. Moreover, section 8(b)(7) discriminates on the basis of viewpoint by prohibiting only calls for employer recognition or employees to join the union, while permitting speakers to object to employer recognition, urge employees not to join the union, or to protest that wages are below the area standard.

Under the commercial/non-commercial distinction, labor picketing speech would almost always be non-commercial speech and its restrictions would be subject to strict scrutiny. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Court stated that “the handbills involved here . . . do not appear to be typical commercial speech such as advertising the price of a product or arguing its

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209. *Cent. Hudson Gas*, 447 U.S. at 566.

210. *Sorrell*, 131 S. Ct. at 2656.

211. *Id.* at 2664.

212. *Id.* at 2657.

213. *Id.* at 2668.

214. *Id.* (internal citation omitted).

215. See Tasic, *supra* note 22, at 273 (arguing that *Sorrell* compels a change in the way the Court should address labor picketing restrictions).

merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace.”<sup>216</sup>

Labor speech hardly ever “proposes a commercial transaction” and instead commonly urges patrons not to engage in a commercial transaction as a form of protest of the employer’s labor practices. Thus, labor speech cannot be purchased like commercial advertising or the data at issue in *Sorrell*. Labor speech addresses a mix of economic and political concerns (but of course, so does core political speech). Further, *Sorrell* explicitly rejected the justification that picketing can be prohibited because it will cause those who hear the message to be swayed in an inappropriate way and to make harmful decisions based on the information.<sup>217</sup> The Court rejected the idea that the Vermont law was justified to prevent the sale of information that would persuade doctors to make bad decisions about which drugs to prescribe and thereby would influence treatment decisions.<sup>218</sup> Justice Kennedy wrote that the “fear that speech might persuade provides no lawful basis for quieting it.”<sup>219</sup> Of course, the longstanding justification for regulating picketing under section 8(b)(7) is that the pickets will lead employers to recognize the picketing union or the employees to join it where they otherwise would not. Fears that picketing might persuade Walmart to recognize a union or Walmart workers to join one is not a legitimate basis for prohibiting the picketing.

Moreover, the Court has also rejected the argument that laws can restrict speech in the name of regulating markets or commercial actors. For example, the Court’s longstanding *Noerr-Pennington* doctrine provides First Amendment exceptions to antitrust law to ensure that economic actors have the right to petition the government by lobbying for legislation or engaging in litigation—even when there is an underlying economic purpose that is prohibited by antitrust law.<sup>220</sup>

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216. 485 U.S. 568, 576 (1988).

217. 131 S. Ct. 2670–71.

218. *Id.*

219. *Id.* at 2670.

220. *Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137–38 (1961) (“[S]uch a construction of the Sherman Act would raise important constitutional questions. . . . [W]e cannot, of course, lightly impute to Congress an intent to invade these freedoms.”); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); Volokh, *supra* note 127, at 6 n.57 (“*Noerr* and *Pennington* reached speech-protective results by interpreting the Sherman Act as not applying to anticompetitive lobbying or public advocacy, but it’s clear that the Court was influenced by a desire to avoid a First Amendment violation”); *see, e.g.*, *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 424 (1990) (noting the *Noerr* Court’s interpretation of the Sherman Act “in light of the First Amendment[ ]”); *see also* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 363–66 (1994) (arguing that *Noerr-Pennington* immunity makes sense only as a First Amendment exception to antitrust law, and not as a faithful interpretation of antitrust law standing alone).

More recently, in *Citizens United*, the Court completely rejected the idea that because a corporation had an economic or profit motive, its speech on political matters was subject to anything less than strict scrutiny.<sup>221</sup> Instead, the Court made clear that even in situations involving economic actors with economic motives, political speech is still fully protected under the First Amendment.<sup>222</sup> Accordingly, the Court struck down regulation on political spending by corporations and unions.<sup>223</sup>

Most recently, in *Harris v. Quinn*, the Court held that in the public sector (or at least for quasi-public employees paid with Medicaid funds), a union's speech relating to wages, benefits, and all other subjects of bargaining is a matter of public concern.<sup>224</sup> Therefore, a contract term requiring employees to pay fees to support such speech must be judged under strict scrutiny and, when so judged, it violates the First Amendment. Admittedly, the Court elsewhere in *Harris* suggested that private sector union speech over wages is of less public concern and, therefore, the First Amendment is not violated by a statute allowing private employers and unions to agree to a contract requiring payment of agency fees.<sup>225</sup> Nevertheless, the Court's other First Amendment cases upholding the rights of nonmembers to refuse to pay unions for the cost of speech not germane to collective bargaining have treated the compulsory payment of fees to support the "political" speech of private sector unions as raising First Amendment issues.<sup>226</sup>

In sum, because section 8(b)(7) discriminates on the basis of speaker, content, and viewpoint, it cannot be upheld on the basis that it regulates economic activity by economic actors. Rather, under the Court's recent First Amendment cases, section 8(b)(7) is unconstitutional.

### 3. *Speaker-Based Discrimination*

In *Citizens United*, the Court stated that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others" because "speech restrictions based on the identity of the speaker are all too often simply a means to control content."<sup>227</sup> The Court explained, "Quite apart from the purpose or effect of regulating

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221. 558 U.S. 310, 342 (2010) ("political speech does not lose First Amendment protection 'simply because its source is a corporation.'") (internal citations omitted).

222. *Id.*

223. *Id.* at 362.

224. 134 S. Ct. 2618, 2643 (2014).

225. *Id.* at 2632.

226. *See, e.g.,* Ry. Emps. Dep't v. Hanson, 351 U.S. 225 (1956); *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012). The First Amendment issues in this line of cases is discussed at length in Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU Local 1000*, 98 CORNELL L. REV. 1023 (2013).

227. 558 U.S. at 340.

content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers . . . The First Amendment protects speech and speaker, and the ideas that flow from each.”<sup>228</sup>

Notwithstanding the criticism of the result and reasoning of *Citizens United*, a majority of the Court went even further in 2014, holding in *McCutcheon v. FEC* that the First Amendment barred limits on not only corporate expenditures but also on individual aggregate contributions.<sup>229</sup> Chief Justice Roberts’ plurality opinion noted the argument that unlimited contributions cause harm, but insisted that “the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause.”<sup>230</sup>

*Citizens United* and *McCutcheon*’s constitutional rejection of speaker-based distinctions, even where they are related in some sense to economic regulation, cast constitutional doubt on picketing restrictions that target specific speakers, even though labor picketing restrictions are likewise related in some sense to economic regulation.<sup>231</sup> Additionally, the Court’s willingness to draw the line between the political and economic, despite the economic motive of the corporate speaker, suggests the Board needs to take a different approach to labor picketing.

Like the speech the Court protected in *Citizens United* and *McCutcheon*, labor picketing should be categorized as political. Employment, labor regulation, and good jobs are national political issues that are often at the forefront of presidential and congressional political campaigns.<sup>232</sup> The terms and conditions under which workers in a community are employed affect the community’s wellbeing and overall economic health. Similarly, the record of an employer’s actions in the community and the world are fundamentally political in their relation to how that community or the nation decides to subsidize or regulate business. How a corporation chooses to divide its expenditures between labor and management, the compensation of its officers, its environmental practices, its international operations, whether it pays federal, state, and local taxes—

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228. *Id.* at 340–41.

229. 134 S. Ct. 1434 (2014).

230. *Id.* at 1441.

231. See Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 27 (2011) (“the Court [in *Citizens United*] was adamant that neither the fact that a speaker is a corporation nor the fact that non-MCFL [(nonprofit advocacy organizations that do not accept contributions from corporations or unions)] corporations are profit-driven operations was a sufficient basis upon which to burden corporate political speech. Given all this, if nothing except economic motivation distinguishes labor expression from other groups’ expression, then surely it would violate *Citizens United* to continue to treat them differently.”).

232. See, e.g., Lydia Saad, *Economy Is Dominant Issue for Americans as Election Nears*, GALLUP POLITICS, (Oct. 22, 2012), <http://www.gallup.com/poll/158267/economy-dominant-issue-americans-election-nears.aspx>.

all of these are matters of interest to labor and to shareholders. Finally, the right to organize and the freedom of assembly are fundamental rights protected not only by the NLRA, but by the First Amendment itself.<sup>233</sup>

*D. The Demise of the Other Traditional Justifications for Prohibiting Labor Picketing*

For the three reasons detailed above, labor picketing prohibitions cannot withstand scrutiny under the Supreme Court's recent First Amendment jurisprudence. Moreover, the restrictions cannot be sustained under the three traditional justifications that courts and the Board have asserted for them: the Court no longer upholds speech-restrictive laws simply because they are part of a delicate legislative balance of competing concerns; picketing no longer has whatever power the Court may once thought it had to "blackmail" hapless employers; and the fact that picketing may occasionally disrupt commerce is not a sufficient reason to prohibit expressive conduct because the disruptions are simply the result of the persuasive force of the speech.

*1. The Delicate Balance Argument*

The prohibitions on secondary labor picketing under section 8(b)(4) have been upheld against First Amendment challenge in part with the justification that the picketing restrictions are part of Congress's "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."<sup>234</sup> The argument that once persuaded the Supreme Court with respect to section 8(b)(4) was that Congress had carefully weighed the interests of workers in using protest and solidarity to improve their working conditions, the interests of employers in operating their business unimpeded by protest, and the interests of the public in uninterrupted commerce. Congress had drafted a statute accommodating those competing concerns, and the Court should defer to Congress's expertise in labor relations and not upset the balance by striking down some provisions of it.<sup>235</sup>

Whatever merit deferential judicial review of complex economic regulations crafted to strike a delicate balance once had, it no longer accurately describes the Supreme Court's or the lower courts' approach to constitutional challenges to complicated regulatory statutes. As described

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233. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

234. *NLRB v. Retail Store Emp. Union, Local No. 1001 (Safeco)*, 447 U.S. 607, 617–18 (Blackmun, J., concurring); see also *International Longshoremen's Association v. Allied Int'l, Inc.*, 456 U.S. 212, 222–23 (1982).

235. See *International Longshoremen's Association*, 456 U.S. at 222–24.



above, the Court invalidated on First Amendment grounds parts of complicated, carefully considered regulatory statutes that reflected legislative compromises among different interests in *Citizens United*, *McCutcheon*, and *Sorrell*.<sup>236</sup> The McCain-Feingold Campaign Finance Reform Act, invalidated in part in *Citizens United* and *McCutcheon*, was a delicate balance if ever there was one, reflecting a complex legislative compromise among the interests of corporations, political parties, nonprofit organizations, political action groups, voters, consumers, and many other people with interests in campaign finance.<sup>237</sup> *Sorrell* invalidated part of a complex state law regulating data mining that balanced the interests of patients, doctors, healthcare business, and pharmaceutical companies.<sup>238</sup> Moreover, *Sorrell* makes clear that content-based restrictions on commercial speech are subject to heightened scrutiny even if they are part of a complex regulatory scheme aimed at protecting the interests of third parties and solving what the legislature perceives to be a market problem. Finally, the Court demonstrated a similar willingness to invalidate statutes produced by complex and delicate legislative compromises by striking down two portions of the Affordable Care Act while leaving the rest of the statute untouched—albeit on different constitutional grounds than the others cases discussed here.<sup>239</sup> Together these cases show that the Court has not recently given much deference to statutes that regulate speech as part of a complex regulatory regime balancing multiple interests. Rather, if the statutes restrict speech in part, the Court has subjected them to exacting First Amendment scrutiny and has invalidated them.

## 2. *Blackmail, Coercion, and Picketing*

Another traditional justification of the picketing prohibitions is that they were necessary to protect workers, businesses, and consumers from coercion. As noted above, President Eisenhower and the statute's congressional supporters originally described section 8(b)(7)(C) as necessary to prevent “blackmail” picketing: where a union uses picket lines to stop all deliveries to a certain employer and consequently to either coerce the employer to recognize the union against the preference of its employees or to coerce the employees to join the union against their will.<sup>240</sup> For example, in the classic 1957 case, *Teamsters v. Vogt*, the Court upheld a

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236. See *supra* notes 210-14, 222-23, 227-30 and accompanying text.

237. The history of the complex and evolving federal regulation of corporate and organizational campaign fundraising and spending is detailed in Justice Stevens' opinion in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 433-46 (2010) (Stevens, J., concurring in part and dissenting in part).

238. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2656 (2011).

239. *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605-07 (2012); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

240. See *supra* notes 38-40 and accompanying text.

Wisconsin state injunction against several men who had peacefully picketed on a public road adjacent to a gravel pit by carrying a sign that stated, “The men on this job are not 100% affiliated with the AFL.”<sup>241</sup> Although the picketers did not use or threaten to use force, unionized truck drivers refused to cross the picket line, which was the basis for the argument that the picketing was coercive.<sup>242</sup> Picketing that stopped deliveries would cause an employer to recognize a union, whether or not employees actually wanted it, because the employer’s business would be harmed. Thus, a union could “blackmail” an employer to recognize it by invoking the solidarity of truck drivers as leverage.<sup>243</sup>

However, this is a loose and legally inaccurate use of the term blackmail. What the *Vogt* Court actually meant was that the labor-picketing speech would be so persuasive to the employer or the employees that they would take actions that they otherwise would not have taken.<sup>244</sup> The crime of blackmail involves a threat to release confidential information or take other morally wrongful actions that force the victim to give money or a thing of value in exchange for the perpetrator’s silence.<sup>245</sup> In contrast, peaceful picketing prohibited by section 8(b)(7) and by the Wisconsin law upheld in *Vogt* aims at producing a collective bargaining relationship between employees and their employers by calling on the solidarity of workers of other employers. An employer distressed by the refusal of truck drivers to make deliveries can, of course, ask the shipping company to discipline the drivers, or hire a nonunion trucking company. Picketing will inflict economic harm on a company only when workers or customers who would deal with the employer are persuaded that its labor practices are sufficiently wrongful as to warrant a strike or boycott or when their

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241. 354 U.S. 284, 285 (1957).

242. *Id.* As the Wisconsin Supreme Court had explained below in its initial finding that the injunction unconstitutional, “[t]here was no violence, no force and no threat of force, no disorder or physical obstruction to plaintiff’s property. There was no evidence that defendants’ representatives had coerced or intimidated any of plaintiff’s employees in their right to join or refuse to join either of defendant unions. There was only peaceful persuasion exercised by the carrying of a banner bearing a truthful legend.” *Vogt, Inc. v. International Brotherhood of Teamsters, Local 695*, 71 N.W.2d 359, 361 (Wis. 1955), *vacated*, 74 N.W.2d 749 (Wis. 1956).

243. Justice Frankfurter’s opinion for the Court in *Vogt* did not explain whether or why the picketing, which the court below had found to be entirely peaceful, would actually coerce anyone, but simply deferred to “the opinion of the Wisconsin Supreme Court, which justified it on the ground that the picketing was for the purpose of coercing the employer to coerce his employees.” 354 U.S. at 295.

244. *Cf.* Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (deconstructing use of the “blackmail” label in the context of class action lawsuits to explain why the filing or certification of a class action does not blackmail a defendant).

245. *See, e.g.*, 18 U.S.C. § 873 (2000) (“Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both.”).

commitment to labor solidarity is so great that they refuse to cross a picket line regardless of their views on the target employer's labor practices.

In the *Vogt* Court's implicit but never actually defended view, peaceful picketers had the power to shut down a business only because employees believed so strongly in the rights of labor that they religiously honored them regardless of whether they knew the facts of the underlying labor dispute or had a well-informed view about whether the labor demands that prompted the picketing were reasonable. Thus, the Court thought of pickets as a signal rather than as a reasoned argument. But even if employees honored the picket line primarily to avoid union discipline, this would still be a form of persuasion, not coercion. The power of the message and the social sanctions a community may impose for flouting norms do not make a message less communicative. When a religious leader insists that congregants abstain from using an IUD or Plan B because doing so is allegedly sinful and equivalent to having an abortion, the leader has engaged in speech, not coercion—even if the faithful are motivated by fear of excommunication, social ostracism, or eternal damnation rather than their own views about the science of contraception or the nature of human life. So, too, do workers engage in persuasion and not coercion when they ask other workers and consumers to refrain from patronizing a business.

The premise that peaceful picketing will somehow deprive employees of a choice of whether or not to have union representation is unrealistic given the state of the labor movement today.<sup>246</sup> Unions today have very little ability to shut down facilities and force employees or employers to accept a union using picket lines. Walmart continued selling discount goods during the Black Friday strikes, and McDonald's and other fast food restaurants kept selling hamburgers.<sup>247</sup> None of the extensive news coverage of the Walmart and fast food campaigns suggests that the employers are coercing employees to accept the union or that employees feel they must accept union representation in order to keep their job. The Los Angeles port trucking companies justified their unfair labor practice charges against the drivers' picketing because the picketing was "bullying"

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246. For example, in almost all recent section 8(b)(7)(C) cases, the employees themselves, along with community members, are engaging in the picketing in question—not an "outside" union coming in to shut down a facility. See *infra* Part I.B. Additionally, the context of recognition and organizational picketing has changed dramatically as union density has declined. Further, union elections and strikes have decreased dramatically since the 1950s. See Mike Elk, *Sad, Startling Stats: Number of Union Elections, Strikes Continue Steady Decline*, IN THESE TIMES (Jul. 7, 2010, 12:15 PM), [http://inthesetimes.com/working/entry/6200/new\\_statistics\\_show\\_how\\_much\\_power\\_the\\_labor\\_movement\\_has\\_lost/](http://inthesetimes.com/working/entry/6200/new_statistics_show_how_much_power_the_labor_movement_has_lost/) ("In 1952, at the peak of labor's power, there were 470 'major strikes' (defined by the BLS as involving 1,000 workers or more). In 2009, there were only five major strikes, the smallest amount since the BLS began recording strike data in 1947.")

247. See, e.g., Steven Greenhouse, *Wal-Mart Plays Down Labor Protests at Its Stores*, N.Y. TIMES, Nov. 24, 2012, at B5, available at [http://www.nytimes.com/2012/11/24/business/wal-mart-dismisses-labor-protests-at-its-stores.html?\\_r=0](http://www.nytimes.com/2012/11/24/business/wal-mart-dismisses-labor-protests-at-its-stores.html?_r=0).

and “intimidating” drivers to join the union, but there was no evidence of bullying or intimidation.<sup>248</sup> More important, even if there were some evidence of actual coercion of workers, Walmart, McDonalds, or any of the other fast food companies in particular instances, section 8(b)(7) still could not be upheld as necessary to prevent coercion. Section 8(b)(7) by its terms does not prohibit only bullying, coercion, or intimidation; it prohibits *all* picketing, no matter how peaceful or unthreatening and regardless of whether it persuades a single employee not to work, or driver not to cross a picket line. As we explain below, absent evidence of force or coercion, section 8(b)(7) should not be read to prohibit picketing.

Even if a union were able to coerce an employer or employees to accept a union by shutting down a facility by peaceful picketing, the persuasiveness of the speech itself would cause the result. Laws that regulate specific kinds of speech because the speech is particularly powerful or persuasive are not permissible, even in the context of economic regulation. As the Court wrote in *Sorrell*, “[t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.”<sup>249</sup> The Court in *McCullen* likewise rejected the argument that the Massachusetts buffer zone could be justified as necessary to prevent intimidation of women seeking reproductive health services, finding that a statute specifically prohibiting intimidation rather than persuasion would better serve the state’s interest.<sup>250</sup> Accordingly, saving nonunion employers and employees from having to endure picketers is not a sufficient interest to justify section 8(b)(7)(C).

While the government can legitimately prevent threats, bullying, intimidation, or the physical blocking of ingress and egress from a property, section 8(b)(7)(C) prohibits far more speech than is necessary to prevent the coercion of nonunion workers or their employers. Section 8(b)(7)(C) does not just prohibit threatening or coercive speech or physical violence; it prohibits *all* picketing with the object of obtaining recognition or organization. Moreover, the restrictions on the language of picket signs and on the union’s object are not reasonably (let alone narrowly) tailored to advance the state’s interest in preventing the coercion of workers and their employers. Whether a picket sign says “Whatever it Takes: \$15 and Union Rights” (prohibited), “Strike for \$15” (perhaps protected), “Walmart does not have a labor contract with the UFCW” (a permissible consumer appeal, although not an appeal that OUR Walmart is actually making) is not indicative of whether the protest is coercive or threatening. Nor does the Board’s focus on whether a picket sign is located at an employee entrance (probably an illegal effort to persuade workers to join a union) or a

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248. See Meeks, *supra* note 78.

249. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011).

250. *McCullen v. Coakley*, 134 S. Ct. 2418, 2538 (2014).

customer entrance (a permissible effort to persuade consumers not to shop) draw a constitutionally permissible line between prohibited threats and First Amendment-protected persuasion. Similarly, there is no reasonable relation between the state's interest in preventing the coercion of employers and workers and the question of whether OUR Walmart has the object of obtaining recognition or persuading workers to join, as opposed to informing consumers that Walmart is nonunion, or pays less than the area standard for retail workers. In sum, section 8(b)(7) does not withstand constitutional scrutiny as an effort to protect threats or coercion.

### 3. *Uninterrupted Commerce and Workers' Freedom of Speech*

Prohibitions on labor picketing were most commonly justified by a governmental interest in excessive or unjustified interruptions of commerce. The particular contours of the section 8(b)(7) prohibition may be understood as allowing some interruptions of commerce, but not too many: recognitional or organizational picketing not covered by the consumer appeal proviso can occur for “a reasonable period of time not to exceed 30 days.”<sup>251</sup> But no recognitional or organizational picketing—even a peaceful appeal to consumers—is permissible if another union has been lawfully recognized by the employer or if a valid union election has occurred within the preceding 12 months.<sup>252</sup> Similarly, section 8(b)(4) allows picketing to interrupt commerce to the extent that it targets only a primary employer (not a secondary one),<sup>253</sup> or persuades consumers not to buy a struck product, but even then picketing is prohibited if the seller of the product depends on the struck product and successful picketing “reasonably can be expected to threaten neutral parties with ruin or substantial loss.”<sup>254</sup> These contours of the prohibitions on picketing recognize that some picketing, if it persuades consumers or workers not to patronize a business, will cause economic harm that Congress or the Board or the courts consider acceptable or justifiable, whereas other picketing will cause excessive harm.

Many First Amendment cases—especially the Court's most recent ones striking down restrictions on campaign finance in *Citizens United* and *McCutcheon*, on data mining in *Sorrell*, and on sidewalk abortion counseling in *McCullen*—explicitly reject the notion that a government interest in preventing some people from being persuaded by others is sufficient to justify a restriction on speech. These suggest that the labor picketing jurisprudence cannot be justified on the grounds of protecting unimpeded commerce.

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251. 29 U.S.C. § 158(b)(7)(C).

252. *Id.* § 158(b)(7)(A), (B).

253. *Id.* § 158(b)(4).

254. *NLRB v. Retail Store Emp. Union, Local No. 1001 (Safeco)*, 447 U.S. 607, 615 (1980)..

There may be circumstances when the government has a compelling interest in ensuring uninterrupted work that outweighs the interests of employees in persuading each other to stand in solidarity to improve their working conditions. Perhaps the government can prohibit speech directed at persuading an employee hired to deliver blood to a hospital such that it ought to be illegal to ask her to refuse to cross a picket line. But employers and hospital patients do not need a law prohibiting *all* picketing to serve that interest. Moreover, subject to the section 7 rights of employees to make common cause with fellow employees by honoring picket lines, employers can ensure that picket lines do not interrupt service by disciplining employees who refuse to make a pick up or delivery.<sup>255</sup>

One might also argue that Congress can justifiably regulate picketing not to silence the message but to prevent the secondary effects of picketing, such as excessive noise or traffic disruptions, or perhaps even work stoppages that cause some particular harm. In *City of Renton v. Playtime Theaters*, the Court upheld zoning restrictions on sexually explicit speech as a content neutral regulation that promoted the government's interest in preventing the secondary effects of X-rated theaters and bookstores (i.e., making a neighborhood seedy).<sup>256</sup> But here, too, section 8(b)(7) sweeps far more broadly than just preventing the secondary effects of speech. The primary effect of a successful picket line is persuading employees and consumers to form common cause with the workers whose working conditions are at issue. Thus, work disruptions are not a secondary effect; they are the primary and legitimate purpose of a picket line. State law already deals with the truly secondary effects—traffic and noise. And while noise enjoys some First Amendment protection (after all, speech makes some noise), the regulation of traffic and noise and how to reconcile that regulation with the First Amendment right to protest are not what section 8(b)(7) addresses.<sup>257</sup> Thus, the blanket prohibition of peaceful picketing is not justified in the name of preventing secondary effects of speech. Another approach is therefore needed.

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255. If Walmart or McDonalds' employees honor a picket line at their own workplace, they are engaged in concerted activity protected by section 7 and the employer has no legitimate interest in firing them. DAU-SCHMIDT, *supra* note 37, at 736 ("ordinarily, employees who refuse to cross a picket line at their own employer's place of business are treated as engaged in the same kind of strike as the picketing employees. If the picketers are engaged in a protected strike, so is the employee who refuses to cross.") If a truck driver employed by a third party honors a picket line at a workplace where the employees are protesting, the driver is also engaged in section 7 activity, but the NLRB has held that third-party employers can discipline employees for doing so if the employer's interest in providing uninterrupted service outweighs the employee's interest in making common cause with workers. *See id.* at 737–39; *Electronic Data Sys. Corp.*, 331 N.L.R.B. 343 (2000).

256. 475 U.S. 41, 51–52 (1986).

257. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 538 (1965) (holding that the First Amendment protected a large civil rights protest even though the protest caused some noise and disrupted traffic).

### III. A NEW APPROACH TO LABOR PICKETING

Section 8(b)(7)(C) as currently interpreted by the NLRB violates the First Amendment rights of unions and workers. The NLRB can address these constitutional problems by adopting a narrow interpretation of section 8(b)(7)(C) that prohibits picketing only when it is violent, threatening, or actually coercive (a term that will be difficult to define but that must be drawn with sufficient specificity to comport with the First Amendment), or when the picketing physically obstructs ingress and egress to a property. The statute cannot constitutionally restrict picketing aimed simply at persuading workers or customers to withhold their services or patronage from a company because of its labor practices. This more precise construction would be consistent with Supreme Court decisions reading the prohibitions on picketing narrowly to avoid First Amendment problems.<sup>258</sup> And it would be consistent with the Board's own recent decision that new forms of labor protest—banners, rats, and mock funerals—are not coercive and therefore not prohibited by section 8(b)(4)(B)(ii).<sup>259</sup> As the Court declared when it adopted a narrow reading of section 8(b)(4), “[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>260</sup>

The NLRB is not the only government actor that could change the status quo. In the absence of NLRB action, the courts should refuse to enforce NLRB decisions that infringe the constitutional rights of workers and their labor organizations. District courts should decline to issue injunctions when the Board seeks them under section 10(l), and the appellate courts should decline to enforce Board orders finding violations of section 8(b)(7)(C). Moreover, labor organizations that are still under the effect of permanent injunctions in prior section 8(b)(7) cases should seek to have those injunctions dissolved so that they and their members can engage in constitutionally-protected protest activity without fear of contempt sanctions. Courts can grant relief from a final order or judgment under Federal Rule of Civil Procedure 60(b)(5) when it is no longer equitable that the judgment should have prospective effect, such as when “one or more of the obligations placed upon the parties has become impermissible under

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258. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988); *NLRB v. Fruit and Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 71 (1964).

259. *United Brotherhood of Carpenters, Local 1506 (Eliason & Knuth)*, 355 N.L.R.B. 797 (2010).

260. *DeBartolo*, 485 U.S. at 575 (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)).

federal law” or “statutory or decisional law has changed to make legal what the decree was designed to prevent.”<sup>261</sup>

We make three specific proposals to bring the Board’s interpretation and enforcement practices into compliance with the Constitution, and we note that a fourth approach might address the problem, at least in part. All of these proposals are aimed at ensuring that section 8(b)(7) will be violated only by conduct that actually or imminently coerces employees or companies in the selection of a bargaining representative through methods other than peaceful persuasion of consumers or employees to cease doing business with the firm. Each proposal could be adopted independently of the others, but all of them should be adopted to bring the statute into compliance with the First Amendment.

#### A. *Narrowing the Prohibited Objects of Picketing*

The first way the Board can read section 8(b)(7) to prohibit only coercion or threats of coercion is by focusing on the statutory language that prohibits picketing or threats to picket “where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization . . . or forcing or requiring the employees” to join the union.<sup>262</sup> The Board’s reading has focused on whether the union’s object is to secure recognition or to organize the workers, neglecting the other crucial statutory requirement that picketing be prohibited only if the object is “forcing or requiring” the employer or the employees to choose the union. If the picketing is simply aimed at persuading employees or employers but lacks the power to threaten or coerce, it does not violate the plain language of section 8(b)(7).

As we have shown in Part II, peaceful picketing with the goal of persuading an employer to recognize a union or employees to join one is constitutionally protected, just as is peaceful picketing with the object of persuading women not to have abortions. Section 8(b)(7)(C) is not violated by union or worker advocacy, speech, or peaceful picketing attempting to

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261. *Rufo v. Inmates of Suffolk Jail*, 502 U.S. 367, 388 (1992). Significant changes in constitutional law have been found sufficient to warrant modification or dissolution of injunctions. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (ruling that petitioners were entitled to relief from an injunction that the Eastern District of New York had issued based on the Court’s decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) because that decision had been undermined by the Court’s more recent cases and “Establishment Clause law [had] significantly changed”); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424 (1976) (finding that injunction should have been vacated in light of the Court’s intervening decision placing constitutional limits on efforts to dismantle dual school systems); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994) (holding that the Court’s decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) “sufficiently altered the legal landscape to warrant modifications to the present decrees” regarding affirmative action programs); *Doe v. Briley*, 562 F.3d 777, 783 (6th Cir. 2009) (finding that prospective enforcement was no longer equitable due to intervening decisional law that swept away decree’s putative due-process foundation).

262. 29 U.S.C. § 158(b)(7).



persuade Walmart employees to join OUR Walmart or Walmart managers to agree to neutrality and a card check as a method of determining employee support for unionization—even if Walmart or the employees agree to this demand because workers or consumers refuse to cross a picket line. If Walmart or its employees choose unionization because the picketing, consumer boycott, and work stoppages are affecting Walmart’s business, they are acceding to the wishes of consumers and workers that the company change its labor practices. Peaceful persuasion that changes someone’s mind is, as Chief Justice Roberts observed in *McCullen*, exactly what the First Amendment protects.<sup>263</sup>

Our reading of the constitutionally permissible scope of picketing prohibitions would apply equally to section 8(b)(4), which also sets out prohibited objectives using the term “force or require,” and has been interpreted by the NLRB to encompass peaceful picketing.<sup>264</sup> And, as noted above, the Supreme Court has rejected First Amendment challenges to section 8(b)(4)’s prohibition on peaceful picketing, which suggests that the Court that decided those section 8(b)(4) cases would have rejected our constitutional challenge to section 8(b)(7). In our view, section 8(b)(4) is unconstitutional as applied to picketing unaccompanied by threats or coercion, and if the Supreme Court were to rule on a First Amendment challenge to sections 8(b)(4) or 8(b)(7) today, its First Amendment jurisprudence on picketing and expressive conduct would compel it to strike down both statutes in substantial part. But since the Court has never ruled on the constitutionality of section 8(b)(7), the Board is not constrained by controlling Supreme Court precedent and the is free to interpret section 8(b)(7) in light of current First Amendment law.

### *B. Expanding the Informational Proviso to Its Intended Scope*

The second way the NLRB can bring its enforcement practice into line with the First Amendment is to read the informational proviso to shelter all picketing that is protected by the First Amendment. This alternative offers the Board a choice. To read the proviso as broadly as the First Amendment now requires would render the statute inapplicable to most contemporary picketing because most picketing does not involve actual or threatened coercion, force, or violence. And it is possible to read most of the language

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263. Although *NLRB v. Local 239, International Brotherhood of Teamsters*, 289 F.2d 41 (2d Cir. 1961) rejected that this reading was compelled from the language, the court seemed to leave open the interpretation as reasonable. See also Kate Racokzy, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionality Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1646–49 (2007) (proposing a new coercion test that would only prohibit labor picketing that inflicts or threatens to inflict a harm that is so substantial that no reasonable person would be able to resist the union’s demands and that the allegedly coerced individual has a right to avoid).

264. 29 U.S.C. § 158(b)(4)(ii).

of the proviso that broadly because it protects “any picketing or other publicity for the purpose of truthfully advising the public (including consumers).”<sup>265</sup>

Subject to state defamation laws, the First Amendment requires that workers and their unions be free to include language criticizing the employer’s labor practices, calling for solidarity among workers, or asking for legal or other reforms aimed at improving working conditions. In other words, the informational proviso should be read as broadly as the Supreme Court now reads the First Amendment, which is consistent with the original purpose of the publicity proviso of section 8(b)(7)(C).

The language of the proviso, however, suggests it does not shelter appeals to workers to join a union, although picketers might still be able to urge their co-workers to join OUR Walmart or Fast Food Forward, if neither is a “labor organization” that seeks to “deal with” the employer over conditions of employment.<sup>266</sup> Similarly, the proviso might be read not to shelter any appeal that has “an effect” of inducing a work stoppage by any employee. These readings are not compelled by the proviso and would render section 8(b)(7) unconstitutional. Appeals to workers to join a union, or that persuades an employee to refuse to perform services in solidarity with others for the reasons given above, are sheltered by the First Amendment and the proviso should be so read even though its language refers only to publicity addressed to the public and consumers. Workers are, after all, members of the public and consumers.

At a minimum, the Board should abandon rules dictating the precise language on picket signs. As we have explained above, the Board has read the publicity proviso to shelter picketing or other publicity only if it uses the Board’s preferred wording that an employer does not have a contract with a labor organization. The First Amendment, as we have explained, does not allow the government to require speech to adhere to a certain script, and the statute does not compel it. Thus, the NLRB cannot constitutionally insist that workers can only inform consumers that a workforce is not unionized and not that the employer should pay higher wages or modify its part-time work policies.

### *C. Narrowing the Prohibited Effect Rule*

Third, the Board must change its test for when picketing becomes illegal because it has the effect of stopping deliveries. When an otherwise protected consumer appeal has “an effect” of inducing “any individual employed by any other person . . . not to pick up, deliver, or transport any goods or not to perform any services,” section 8(b)(7) deems it to be outside

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265. *Id.* § 158(b)(7)(C).

266. *See id.* § 152(5) (defining a labor organization).

the scope of the proviso.<sup>267</sup> The presumable purpose of this exception was to empower the Board to find recognitional or organizational picketing to be coercive whenever it has the effect of causing a work stoppage even if it was nominally directed at consumers rather than at workers. The Board can achieve the legislative goal of preventing coercion and still respect the First Amendment by narrowing the circumstances in which a limited work stoppage causes picketing to become illegal. For a section 8(b)(7)(C) violation to be found, the NLRB should have to show that the union intentionally “induced an individual” not to deliver goods or perform services. Where the union makes clear that this is not its intention, and there is not clear and convincing evidence otherwise, it should be immunized.

Some courts did read the inducement language of the proviso to section 8(b)(7)(C) narrowly in the years after its passage. For example, in *Lebus v. Building and Construction Trades Council of New Orleans*, a district court refused to issue an injunction against informational picketing where there had been only isolated refusals on the part of delivery trucks to deliver at the job site.<sup>268</sup> Relying on that decision and scholarly commentary, the Board created a specific test for when informational picketing loses protection under section 8(b)(7)(C) because it has the effect of interrupting deliveries or services.<sup>269</sup> The Board held that one delivery refused would not automatically convert informational picketing into an unfair labor practice.<sup>270</sup> Instead “the presence or absence of a violation will depend upon whether the picketing has disrupted, interfered with, or curtailed the employer’s business.”<sup>271</sup> The Board in *Barker Brothers* held that three delivery stoppages, two work delays, and several delivery delays over a twelve-week period did not constitute the prohibited “effect” under section 8(b)(7)(C).<sup>272</sup>

In creating its test, the NLRB reasoned,

To read the effect clause literally would, for all practical purposes, render illusory the very protection which the Congress expressly conferred upon labor’s right to disseminate information to the public by engaging in publicity picketing. It might thereby not only bring into play a serious constitutional question, but also do a disservice to the Congress itself.<sup>273</sup>

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267. *Id.* § 158(b)(7).

268. *Lebus ex rel. NLRB v. Bldg. & Const. Trades Council of New Orleans & Vicinity, AFL-CIO*, 199 F. Supp. 628, 633 (E.D. La. 1961).

269. *Retail Clerks Locals 324 & 770 (Barker Bros. Corp. & Gold’s, Inc.)*, 138 N.L.R.B. 478 (1962).

270. *Id.* at 492.

271. *Id.* at 490–91.

272. *Id.* at 491–92.

273. *Id.* at 490.

The NLRB specifically noted the unfairness of otherwise protected picketing losing its protection because of one “strong-willed deliveryman with an antipathy to crossing any picket line.”<sup>274</sup>

In our view, the *Barker Brothers* test is a good start, although it does not go far enough. Picketing will not even pose a threat of coercion, let alone actually coerce Walmart or its employees to unionize, unless it stops a substantial number of deliveries or causes a number of work stoppages for an extended period of time such that a Walmart store or the company as a whole faces a significant drop in profits. Even then, as we have explained above, the loss of sales would only be a response to what consumers and workers want, which is for Walmart to change its business practices. In our view, workers and unions are constitutionally entitled to try to persuade workers and consumers to refuse to shop or work at Walmart until it does change. And, as the Board and courts have recognized since the early days of the National Labor Relations Act, a successful primary strike does cause economic harm on both the primary employer and the companies and consumers doing business with it. But that alone does not justify prohibiting all strikes. Regardless, even if persuasion of consumers and workers somehow becomes illicit by producing economic effects, the First Amendment requires that the economic harm be substantial for the government to have a sufficiently important interest in silencing speech on a matter of public concern.

*D. A Partial Solution: Focus on the Immediate Object Rather than the Long-Term Goal*

A final approach that the Board could use to narrow the scope of section 8(b)(7) is to find that it regulates picketing only when the union has an immediate object of obtaining recognition, and not when the union’s longer-term objective is to represent the workers. In *New Otani Hotel & Garden*, a union had called for a boycott of the hotel for four years and had picketed off and on during that time (always adhering to the language demanded by the Board’s reading of the consumer appeal proviso).<sup>275</sup> The employer petitioned for an election, which is allowed under section 9(c)(1)(B) only if the union has made a demand for recognition.<sup>276</sup> An employer cannot otherwise request an election lest the employer’s premature election petition, coming before the union has had a chance to speak with employees about unionizing, defeats the employees’ statutory right to choose union representation based on a fair and informed process.<sup>277</sup>

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274. *Id.*

275. 331 N.L.R.B. 1078, 1080 (2000).

276. 29 U.S.C. § 159(c)(1)(B).

277. *Albuquerque Insulation*, 256 N.L.R.B. 61, 63 (1981); *Windee’s Metal Indus., Inc.*, 309 N.L.R.B. 1074 (1992).

The Board declined to conduct the election, reasoning that the union did not have a present objective of obtaining recognition.<sup>278</sup> By analogy, the Board could read section 8(b)(7) to prohibit only picketing with a clear, immediate objective of forcing recognition or compelling employees to join the union. Picketing for other purposes—such as engaging employees in efforts to improve their working conditions; gaining publicity for their cause among workers, the media, and consumers; or demanding a certain kind of process by which employees can choose a union—would not qualify as immediate. This reading would allow the Board to continue to regulate picketing that risks coercing employers or employees in the selection of a union, but not picketing to mobilize workers, consumers, and the public in efforts to change employer policies (other than with respect to union representation) or to achieve legislative goals like regulating minimum wages or part-time work.

### CONCLUSION

The Board and courts can no longer regulate picketing that simply attempts to convince workers and employers to unionize or that aims to engage the public with struggles for improved labor conditions. They should return to the Supreme Court's approach in *Thornhill*<sup>279</sup> and recognize that the NLRA's prohibitions on labor organizations picketing for the purpose of obtaining recognition or getting workers to join their cause are unconstitutional speaker-based and content-based discrimination. The question of whether picketing is carried out by a labor union, anti-abortion protestors, Westboro Baptist Church congregants, students, or civil rights activists can no longer determine whether the picketing is unlawful. Further, the Board and the courts can no longer prohibit labor picketing on the grounds that it is economic rather than political speech. *Citizens United*, *McCutcheon*, and *Sorrell* clearly hold that the First Amendment protects speech by economic actors, that strict scrutiny applies to content and speaker discrimination, and that workers and unions enjoy at least the same speech rights as corporations. The Supreme Court's current First Amendment framework requires that the lower courts and the Board adopt a new approach that adequately protects labor speech and that recognizes the severe constitutional infirmities of section 8(b)(7)(C) and other labor picketing restrictions. The Board must abandon its efforts to regulate the content of picket signs or the message conveyed by workers, unions, and their allies. It should not prohibit picketing even where a union is picketing

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278. *New Otani Hotel*, 331 N.L.R.B. at 1080 n.6 (leaving open the issue of whether picketing for a neutrality/card check agreement would violate section 8(b)(7) where the object is ultimately recognitional).

279. *Thornhill v. Alabama*, 301 U.S. 88 (1940).

with the object of persuading employees to support the union or the employer to abandon its opposition to unionization. Instead, the Board should issue a complaint and seek to enjoin labor picketing only where there is evidence of actual threats or coercion.

