United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 *and* Eliason & Knuth of Arizona, Inc.

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 *and* Northwest Medical Center

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 *and* Ra Tempe Corporation. Cases 28–CC–955, 28–CC–956, and 28–CC–957

August 27, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER, BECKER, PEARCE, AND HAYES

Introduction

This case presents an issue of first impression for the Board: does a union violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act when, at a secondary employer's business, its agents display a large stationary banner announcing a "labor dispute" and seeking to elicit "shame on" the employer or persuade customers not to patronize the employer. Here, the Union peaceably displayed banners bearing a message directed to the public. The banners were held stationary on a public sidewalk or right-of-way, no one patrolled or carried picket signs, and no one interfered with persons seeking to enter or exit from any workplace or business. On those undisputed facts, we find that the Union's conduct did not violate the Act.

The language of the Act and its legislative history do not suggest that Congress intended Section 8(b)(4)(ii)(B) to prohibit the peaceful stationary display of a banner. Furthermore, a review of Board and court precedent demonstrates that the nonconfrontational display of stationary banners at issue here is not comparable to the types of conduct found to "threaten, coerce, or restrain" a neutral employer under Section 8(b)(4)(ii)(B)—picketing and disruptive or otherwise coercive nonpicketing conduct.

Our conclusion about the reach of the prohibition contained in Section 8(b)(4)(ii)(B) is strongly supported, if not compelled, by our obligation to seek to avoid construing the Act in a manner that would create a serious constitutional question.[1] Governmental regulation of nonviolent speech—such as the display of stationary banners—implicates the core protections of the First Amendment. The crucial question here, therefore, is whether the display of a stationary banner *must* be held to violate Section 8(b)(4)(ii)(B) or, instead, "whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to" the statutory provision. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, supra.

As we indicated above, the answer to the question posed by the Supreme Court in *DeBartolo* is clear in this case. Nothing in the language of the Act or its legislative history requires the Board to find a violation and thus present for judicial review the constitutionality of Section 8(b)(4)(ii)(B) as applied to the peaceful display of a stationary banner. Rather, the display of a stationary banner, like handbilling and even certain types of picketing,[2] is noncoercive conduct falling outside the proscription in Section 8(b)(4)(ii)(B).[3]

For both of those reasons, we dismiss the allegations.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION[4]

[1] See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 575, 577 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

[2] See *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*) (applying canon of constitutional avoidance to hold that Sec. 8(b)(4)(ii)(B) does not bar all forms of peaceful consumer picketing); *NLRB v. Drivers Local Union No. 639*, 362 U.S. 274 (1960) (*Curtis Bros.*) (applying canon to hold that peaceful picketing for recognition by minority union did not violate the pre-Landrum-Griffin Sec. 8(b)(1)(A)). In both *Tree Fruits* and *Curtis Bros.*, as well as in *DeBartolo*, supra, the Supreme Court rejected the Board's view that unions had committed unfair labor practices.

[3] The General Counsel has sought injunctive relief in Federal district court under Sec. 10(l) of the Act in four cases involving display of banners. Despite the deferential standard applied to applications for such relief, the district court in each of those cases rejected the contention that display of banners violated the Act. In the one case where the decision was tested on appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. See *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2005), affirming *Overstreet v. Carpenters Local 1506*, 2003 WL 23845186, U.S. Dist. Lexis 19854 (S.D. Cal. 2003); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005); *Benson v. Carpenters Locals 184 & 1498*, 337 F.Supp.2d 1275 (D. Utah 2004); *Kohn v. Carpenters Southwest Regional Council*, 289 F.Supp.2d 1155 (C.D. Cal. 2003).

[4] On November 12, 2003, Eliason & Knuth of Arizona, Inc. filed a charge in Case 28-CC-955. On December 3, 2003, Northwest Hospital, LLC filed a charge in Case 28–CC–956. On December 17, 2003, RA Tempe Corporation filed a charge in Case 28–CC–957. Pursuant to these charges, the General Counsel of the National Labor Relations Board issued an order consolidating cases, a consolidated complaint, and a notice of hearing on January 23, 2004. The consolidated complaint alleges that the Respondent-Union, the United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 (the Union), engaged in and was engaging in unfair labor practices in violation of Sec. 8(b)(4)(ii)(B) of the Act. Copies of the charges, the consolidated complaint and notice of hearing were served on the Union. Thereafter,

The parties have stipulated to the status of all relevant companies as persons and/or employers engaged in commerce and in industries affecting commerce within the meaning of Sections 2(1), (2), (6), and (7) and 8(b)(4) of the Act.[5] The parties also stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act. Based on these stipulations, we find that the Board possesses jurisdiction over this matter.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

At all material times, the Union has been involved in primary labor disputes with four employers engaged in construction: Eliason & Knuth (E&K), Delta/United Specialties (Delta), Enterprise Interiors, Inc. (Enterprise), and Hardrock Concrete Placement Co. Inc. (Hardrock). The Union asserts that those companies (the primary employers or "primaries") do not pay their employees wages and benefits that accord with area standards.

In furtherance of its labor disputes with the primary employers, the Union engaged in peaceful protest activities at three locations: the Thunderbird Medical Center in Phoenix, Arizona; the Northwest Medical Center in Tucson, Arizona; and the RA Tempe restaurant in Tempe, Arizona. The stipulation does not indicate whether the Union also had labor disputes with Banner Medical, Northwest Hospital, or RA Tempe (the companies operating at the sites of the union activities and to which the primaries were providing services) regarding the treatment of their employees or with Bovis Lend Lease, Layton Construction Company of Arizona, or R.D. Olsen Construction (the general contractors who directly retained the primaries to perform work for the secondaries). For purposes of this opinion, therefore, we assume that no such disputes existed.[6] These companies (the secondary employers or "secondaries") had no collective-bargaining relationship with the Union, and the Union was not seeking to organize their employees. As described in Appendix B, one location of the protest activities was the facility of a secondary employer where a primary was performing construction work (Banner Medical). Another location was the facility of secondary employer Northwest Medical Center. The primary employer was not present when the banner was displayed there, but was performing work at a facility owned by Northwest's parent company. The third location was a restaurant operated by secondary employer RA Tempe. As at Northwest, the primary employer was not present when the banner was displayed, but was performing work at a facility owned by RA Tempe's parent company.

At each of those locations, as described in detail in appendix B, the Union placed and maintained a banner on a public sidewalk or public right-of-way outside of the secondary Employer's facility, facing away from the facility such that the banner's message could be seen by passing motorists. The banners were held parallel to the sidewalk at the edge of the street so they in no way blocked the sidewalks. The banners were 3 or 4 feet high and from 15 to 20 feet long and, at the Thunderbird and Northwest Medical Centers, read: "SHAME ON [secondary employer]" in large letters, flanked on either side by "Labor Dispute" in smaller letters. At RA Tempe, the middle section of the banner read, "DON'T EAT 'RA' SUSHI." The banners were placed between 15 and 1,050 feet from the nearest entrance to the secondaries' establishments.[7] At each location, several union representatives (normally two or three) held the banner in place. The parties stipulated that the number of union representatives accompanying the banner (a maximum of four) was limited to the number needed to hold it up with staggered breaks. The parties also stipulated that at all material times the banners were held stationary.

In addition to displaying the banners at those locations, the union representatives offered flyers to interested members of the public. The handbills explained the na-

the Union filed a timely answer denying the commission of any unfair labor practices.

On March 1, 2004, the parties filed with the Board a joint motion to transfer the proceeding to the Board and for approval of the parties' stipulation of facts. The joint motion stated in relevant part that the parties agreed that the unfair labor practice charge, the complaint and consolidated complaint, the answer, the statement of issues presented, the stipulation of facts, and the parties' position statements constituted the entire record in the case. The parties further stipulated that they waived a hearing before an administrative law judge and the issuance of findings of fact, conclusions of law, and recommended order by an administrative law judge and that they desired to submit the case for findings of fact, conclusions of law, and recommended Order by the Board. On June 30, 2004, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. Thereafter, the General Counsel, the Union, and Charging Parties Eliason & Knuth and RA Tempe Corporation filed briefs. (Charging Party Northwest Hospital, LLC did not file a brief, but stated in the stipulation of facts that it adopts the position taken by the General Counsel).

[5] Appendix A provides the relevant locations and incorporations of the companies at issue.

[6] The relationships between the facilities' owners and their general contractors are set out in appendix A.

[7] At the Thunderbird Medical Center, the banner was 80 feet from an entrance to a parking lot and 510 feet from an entrance to the facility. At Northwest Medical Center, the banners were 1550 and 450 feet from roads entering the facility. At Northwest, the banners were 1550 and 450 feet from roads entering the facility. In light of these stipulated facts, it is misleading for the dissent to state that the banners were "in close proximity to main entrances" to these facilities and "at the entrance to the neutral premises." Finally, at RA Tempe restaurant, the banner was 15 feet from the door of the restaurant.

ture of the labor dispute referred to on the banners. Specifically, the handbills explained that the Union's underlying complaint was with (depending upon the location) E&K, Delta, Hardrock, or Enterprise, and that the Union believed that, by using the services of one of those contractors, Banner Medical, Northwest Hospital, or RA Tempe was contributing to the undermining of area labor standards.[8]

The parties stipulated that the union representatives did not chant, yell, march, or engage in any "similar conduct." The parties stipulated that the representatives did not block persons seeking to enter or exit any of the secondaries' facilities. The parties stipulated that the representatives "did no more than hold up the banner and give flyers to any interested member of the public" and, apart from the unresolved question of whether the display of a banner is confrontational, "did not engage in any other activity that is considered confrontational within the context of this matter."[9]

B. Contentions of the Parties

The General Counsel and Charging Parties argue that the Union's banner displays violated Section 8(b)(4)(ii)(B) because they constituted coercive conduct that had an object of forcing the neutral employers to cease doing business with the primary employers. They contend, first, that posting individuals at or near the entrances of the secondaries' facilities to hold banners declaring a labor dispute constituted picketing, and was therefore coercive. Second, the General Counsel and Charging Parties contend that the banners were coercive because they contained "fraudulent" wording that misled the public into believing that the Union had a primary labor dispute with the secondaries regarding the treatment of their employees and that the secondaries should be boycotted. This alleged deception purportedly constituted "economic retaliation" against the secondaries, which the General Counsel asks us to deem coercive and proscribed.

The Union argues that the secondary boycott provisions of Section 8(b)(4) are not intended to reach the display of a stationary banner. Relying on the Supreme Court's decision in *DeBartolo*, the Union argues that the Court has instructed the Board to avoid, if possible, construing 8(b)(4)'s statutory language, "threaten, coerce, or restrain," in a manner that would raise serious questions under the First Amendment. The Union argues that although picketing has been found to constitute unlawful coercive conduct under Section 8(b)(4), the banner displays here did not constitute picketing, because there was no patrolling or confrontational conduct. To the contrary, the Union argues that the banner displays were peaceful at all times and should be considered a form of pure "speech" similar to handbilling, which the Court in *DeBartolo* found lawful. Accordingly, the Union argues that the complaint should be dismissed.

Discussion

Absent any binding precedent directly on point, analysis of whether Section 8(b)(4)(ii)(B) prohibits the activity involved here must begin with the text of the statute and must consider its legislative history, the policies underlying the prohibition, and cases involving other types of secondary protest activity, i.e., picketing, handbilling, and similar expressive activity. As explained below, none of the foregoing authority leads to the conclusion that the holding of a stationary banner "threaten[s], coerce[s], or restrain[s]" and that conclusion is reinforced by our duty to avoid creating serious constitutional questions.

A. Application of Section 8(b)(4)(ii)(B) to the Present Case

Section 8(b)(4)(ii)(B) of the Act states, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—
>
> (B) forcing or requiring any person to . . . cease doing business with any other person.

Congress adopted this provision and the other provisions of Section 8(b)(4) with the objective of "shielding unoffending employers" from improper pressure intended to induce them to stop doing business with another employer with which a union has a dispute. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). Congress did not, however, intend to prohibit all conduct of labor organizations that might influence or persuade such "unoffending employers" to support the unions' cause. The Supreme Court explained:

> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in § 8 (b)(4)(A). The

[8] The text of the handbill distributed by the Union's representatives at the RA Tempe restaurant is attached as appendix C. The handbills distributed at the facilities of other secondaries named other primary and secondary employers, but otherwise varied only minimally in their wording.

[9] The dissent asserts facts not in the record when it states that the activity at issue was part of the Union's "long-running campaign to enmesh property owners in its labor dispute."

> section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives.

Carpenters Local 1976 v. NLRB (Sand Door), 357 U.S. 93, 98 (1958).[10] Thus, the Court made clear that "a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion" specified in Section 8(b)(4). Id. at 99. Congress did not go so far as to "protect these other persons or the general public by any wholesale condemnation of secondary boycotts," the Court continued, "since if the secondary employer agrees to the boycott, or it is brought about by means other than those proscribed in § 8 (b)(4)(A), there is no unfair labor practice." Id.

Since the recodification of Section 8(b)(4) and the addition of Subsection 8(b)(4)(ii) in 1959, the Supreme Court has continued to construe the scope of the expanded statutory prohibition in a manner consistent with its approach in *Sand Door*.[11] Most importantly for our purposes here, the Supreme Court has held that Congress did not intend to bar all forms of union protest activity directed at a secondary employer even when the object of the activity is to induce the secondary to cease doing business with a primary employer. In *DeBartolo*, the Supreme Court held that "more than mere persuasion is necessary to prove a violation of § 8 (b)(4)(ii)." *DeBartolo*, supra, at 578. Specifically, the Supreme Court held that distribution of handbills urging consumers not to patronize a secondary employer with the object of inducing the secondary to cease doing business with a primary employer is not unlawful. "The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." Id. at 579. Thus, the Supreme Court's construction of Section 8(b)(4) generally, and Section 8(b)(4)(ii)(B) in particular, leaves us to determine whether the display of stationary banners on public sidewalks or rights of way is intimidation or persuasion.

1. The text of the Act and its legislative history establish that Congress did not intend to bar display of stationary banners

In answering the question before us, we turn first to the text of the Act. In order for conduct to violate Section 8(b)(4)(ii)(B), the conduct must "threaten, coerce, or restrain."[12] There is no contention that the Respondent threatened the secondary employers or anyone else. Nor is there any contention that the Respondent coerced or restrained the secondaries as those words are ordinarily understood, i.e., through violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business. A reading of the statutory words "coerce" or "restrain" to require "more than mere persuasion" of consumers is compelled by the Supreme Court's holding in *DeBartolo*. 485 U.S. at 578. Here, however, there is nothing more.

Turning to the legislative history, we find no indication that Congress intended to give the words of the Act anything but their ordinary meaning. Nothing in the legislative history suggests that Congress intended to prohibit the peaceful, stationary display of a banner on a public sidewalk. Had Congress intended the prohibition to apply so broadly—"to bar any and all nonpicketing appeals, through newspapers, radio, television, handbills, or otherwise," the Supreme Court reasoned in *DeBartolo*—"the debates and discussions would surely have reflected this intention." Id. at 584. Yet not only do the debates not reflect such an intention, the indications of congressional intent that exist in the legislative history suggest the opposite. The Supreme Court found no "clear indica-

[10] The Court's opinion refers to Sec. 8(b)(4)(A), not 8(b)(4)(B), because in 1958 the former paragraph was the location of the statutory language addressed by the Court. The language was moved, with modifications immaterial to this discussion, to Sec. 8(b)(4)(B) as part of the Landrum-Griffin amendments of 1959. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 704(a), 73 Stat. 519, 543 (hereinafter cited as LMRDA), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1, 24–25.

[11] Thus, while the dissent is correct that Congress overturned the precise holding in *Sand Door* in the Landrum-Griffin amendments by making the execution of "hot cargo" agreements (agreements between a union and an employer not to handle nonunion goods) unlawful, Congress did not in any way reject the Court's logic. Congress outlawed the specific practice found lawful in *Sand Door*, but it did not adopt a sweeping prohibition of all secondary boycotts in 1959 any more than it had in 1947. If that is what Congress had intended, as the dissent suggests, Congress would have so provided in either 1947 or 1959, but it did not do so. In subsequent cases, therefore, the Supreme Court continues to follow the logic of *Sand Door* by holding that Sec. 8(b)(4) does not bar actions that fall outside its precise prohibitions even if they aim to induce a secondary employer to cease doing business with a primary employer. See, e.g., *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385–390 (1969);*Tree Fruits*, supra, 377 U.S. at 62–63, 71–73; *NLRB v. Servette, Inc.*, 377 U.S. 46, 55–57 (1964).

[12] An 8(b)(4)(ii)(B) violation has two elements. First, a labor organization must "threaten, coerce, or restrain" a person engaged in commerce. Second, the labor organization must do so with "an object" of "forcing or requiring any person to . . . cease doing business with any other person." *NLRB v. Retail Store Employees*, 447 U.S. 607, 611 (1980) (*Safeco*). Both elements must be proven to establish a violation. For the reasons discussed below, we find that the peaceful display of a stationary banner does not threaten, coerce, or restrain a secondary employer within the meaning of Sec. 8(b)(4)(ii), and therefore does not violate that section of the Act. Accordingly, we need not decide whether the Union's banner displays had an unlawful object.

tion . . . that Congress intended . . . to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer." Id. at 583–584. The focus of Congress was picketing, not "peaceful persuasion of customers by means other than picketing," the Court found. Id. at 584. The Court cited the explanation of the cosponsor of the House bill, Representative Griffin, "that the bill covered boycotts carried out by picketing [the premises of] neutrals but would not interfere with the constitutional right of free speech. 105 Cong. Rec. 15673, 2 Leg. Hist. 1615." Id. Indeed, in 1959, as part of the Landrum-Griffin amendments to the Act, Congress adopted the so-called publicity proviso to Section 8(b)(4), which (as explained by Senator John Kennedy, the chairman of the conference committee) authorized unions to "carry on all publicity short of having ambulatory picketing in front of a secondary site." Id. at 587, quoting 105 Cong. Rec. 17898–17899 (Sept. 3, 1959) (reprinted in II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 1432 (1959) (Leg. Hist.)).[13] The *DeBartolo* Court specifically cited Senator Kennedy's remark as an important indication of the meaning of Section 8(b)(4)(ii)(B). Id. at 587. Equally important is an analysis of the language in the conference bill presented to the House by Representative Griffin and in the Senate by Senator Goldwater which explained that the conference had adopted the House version of the provision at issue "prohibiting secondary consumer picketing . . . 'with clarification that other forms of publicity are not prohibited.'" Id. at 586.[14]

The terms of the Act and its legislative history thus make clear that Congress did not generally intend to bar display of a stationary banner. We could reach a different conclusion in this case only if we were to determine that the banner displays here were picketing of the form Congress intended to bar through Section 8(b)(4)(ii)(B) or were otherwise directly disruptive of the secondary employers' operations in a manner that should be classified as coercion. As discussed below, the display of stationary banners was neither proscribed picketing nor was it otherwise coercive.[15]

2. Holding a stationary banner is not proscribed picketing

The General Counsel argues that the display of the stationary banners is equivalent to conduct that the Board has found to constitute unlawful picketing. We disagree**.**

The Act does not define "picketing,"[16] and the legislative history does not suggest that Congress understood the term to encompass the mere display of a stationary banner. Further, we must evaluate the sweep of the suggestion in the legislative history that Congress intended to bar picketing in light of both the express statutory terms that bar only actions that "threaten, coerce, or restrain"[17] and, as we discuss below, the protections of the First Amendment. Under our jurisprudence, categorizing peaceful, expressive activity at a purely secondary site as picketing renders it unlawful without any showing of actual threats, coercion or restraint, unless it falls into the narrow exception for consumer product picketing defined in *Tree Fruits*. Moreover, the consequences of categorizing peaceful expressive activity as proscribed picketing are severe. The activity is stripped of protection and employees participating in it can be fired. See, e.g., *Motor Freight Drivers Local 707 (Claremont Polychem. Corp.)*, 196 NLRB 613, 614 (1972) (strikers who picketed in violation of Sec. 8(b)(7)(B) not entitled to reinstatement); *Hardee's Food Systems, Inc.*, 294 NLRB 642, 646 (1989) ("Actions that violate Section 8(b) are not protected by the Act even if those actions would otherwise be protected by Sections 7 and 8(a)."), review denied sub nom. *Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990). The activity becomes an unfair labor practice and the Board is required, upon a finding of "reasonable cause" to believe such activity has occurred, to go into Federal district court and seek a prior

[13] The publicity proviso of Sec. 8(b)(4) states in relevant part that nothing contained in [Sec. 8(b)] shall be construed to prohibit *publicity, other than picketing*, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . .

29 U.S.C. §158(b)(4) (emphasis added). In DeBartolo, following the principles set forth in earlier decisions, the Court explained that the proviso did not create an exception to the prohibition in Sec. 8(b)(4) that would otherwise have proscribed non-picketing forms of persuasion, but rather added an interpretive gloss to ensure that it was read as "not covering nonpicketing publicity." 485 U.S. at 582–583.

[14] In contrast to the authoritative constructions cited by the Supreme Court, the dissent cites selected comments on the floor, a form of legislative history that the Supreme Court has found to be a highly unreliable indicator of congressional intent. *Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen.")

[15] Our finding that no picketing occurred makes it unnecessary to address Charging Party Eliason & Knuth's argument that the banner displays constituted unlawful secondary activity, even though it occurred on a common situs under the criteria set out by the Board in *Sailor's Union (Moore Dry Dock)*, 92 NLRB 547 (1950).

[16] Sec. 8(b)(4) does not use the term picket or picketing. As the Second Circuit observed in *NLRB v. United Furniture Workers of America*, 337 F.2d 936, 939 (2d Cir. 1964), "[t]he term 'to picket' made its first appearance in the national labor relations act in the 1959 amendments. Although Sec. 8(b)(7)(B) can be invoked only when 'picketing' is present, the legislative history indicates no awareness that the new section presents a threshold definitional problem."

[17] Indeed, in *Tree Fruits*, the Supreme Court made clear that "the prohibition of §8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." 377 U.S. at 68.

restraint against the continuation of the activity. See 29 U.S.C. §10(l). And, finally, a labor organization engaged in such activity is subject to suit in Federal court where damages can be awarded. See 29 U.S.C. §187. For each of these reasons, we must take care not to define the category of proscribed picketing more broadly than clearly intended by Congress.[18]

The Supreme Court has made clear that "picketing is qualitatively 'different from other modes of communication.'" *Babbit v. Farm Workers*, 442 U.S. 289, 311 fn. 17 (1979) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950). Thus, expressive activity that bears some resemblance to picketing should not be classified as picketing unless it is qualitatively different from other nonproscribed means of expression and the qualitative differences suggest that the activity's impact owes more to intimidation than persuasion. Precisely for this reason, the term picketing has developed a core meaning in the labor context. The Board and courts have made clear that picketing generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite. See, e.g., *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Building Maintenance)*, 312 NLRB 715, 743 (1993), enfd. 103 F.3d 139 (9th Cir. 1996); see also *NLRB v. Retail Store Union Local 1001*, 447 U.S. 607 (1980) (*Safeco*) (Justice Stevens, concurring) (picketing "involves patrol of a particular locality") (quoting *Bakery Drivers v. Wohl*, 315 U.S. 769, 776–777 (1942) (Justice Douglas, concurring)); *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1213 (9th Cir. 2005) ("Classically, picketers *walk* in a line and, in so doing, create a symbolic barrier.") (Emphasis supplied.)

The core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is not simply the holding of signs (in contrast to the distribution of handbills), but the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite. This element of confrontation has long been central to our conception of picketing for purposes of the Act's prohibitions. In *NLRB v. Furniture Workers*, 337 F.2d 936 (2d Cir. 1964), the Board had found that the union had engaged in unlawful recognitional picketing by affixing picket signs to poles and trees in front of the plant, while designated union members sat in their cars nearby. The court remanded, finding it unclear whether the Board had "considered the extent of confrontation necessary to constitute picketing." Id. at 940. A year later, in *Alden Press, Inc.*, 151 NLRB 1666, 1668 (1965), the Board adopted the Second Circuit's view in *Furniture Workers* that "[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises." (Quoting 337 F.2d at 940). See also *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007) ("mock funeral" procession outside a hospital did not constitute picketing, because the participants did not "physically or verbally interfere with or confront Hospital patrons" or create a "symbolic barrier"). To fall within the prohibition of Section 8(b)(4)(ii)(B), picketing must entail an element of confrontation.

The banner displays here did not constitute such proscribed picketing because they did not create a confrontation. Banners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling. Nor did the union representatives hold the banner in front of any entrance to a secondary site in a manner such that anyone entering the site had to pass between the union representatives. The banners were located at a sufficient distance from the entrances so that anyone wishing to enter or exit the sites could to do so without confronting the banner holders in any way.[19] Nor can it be said that the Union "posted" the individuals holding the banners at the "approach" to a secondary's place of business in a manner that could have been perceived as threatening to those entering the sites. The message side of the banner was directed at passing vehicular traffic, rather than at persons entering or leaving the secondaries' premises, and the union representatives faced in the same direction. There is no evi-

[18] The dissent's suggestion that we are "motivated in part by the consequences of finding an 8(b)(4) violation, which [we] view as too 'severe,'" is a distortion of our reasoning. In construing ambiguous terms in a statute proscribing a category of activity, it is entirely appropriate for an administrative agency or court to consider the sanctions that Congress has attached to the proscribed conduct to be relevant to the breadth of the proscription intended by Congress. See, e.g., *U. S. v. 221 Dana Avenue*, 261 F.3d 65, 74 (1st Cir. 2001) ("federal forfeiture statutes must be narrowly construed because of their potentially draconian effect"); *Martin's Herend Imports v. Diamond & Gem Trading USA*, 112 F.3d 1296 (5th Cir. 1997) ("Given the draconian nature of this ex parte remedy, . . . we believe that it should be narrowly construed.") We suggest no more above.

[19] The RA Tempe banner, while closer to the secondary's entrance than the other banners, was nevertheless placed on the sidewalk, facing the street, *i.e.*, parallel to the sidewalk rather than running across the sidewalk, and as close to the street as possible without being in it. The sidewalk remained completely clear for anyone wishing to enter the restaurant, which could be done without ever seeing the front of the banner or confronting the union agents, who were facing the street and separated from the portion of the sidewalk that would be used to enter the restaurant by a bench, several trees, a street light, or newspaper dispensers (depending on the precise placement of the banner that day).

dence that the banner holders kept any form of lists of employees or others entering the site or even interacted with passersby, other than to offer a handbill—an undisputably noncoercive act. Thus, members of the public and employees wishing to enter the secondaries' sites did not confront any actual or symbolic barrier and, "[j]ust as members of the public [and employees] can 'avert [their] eyes' from billboards or movie screen visible from a public street, they could ignore the [union representatives] and the union's banners." *Overstreet*, 409 F.3d at 1214. Like the mock funeral at issue in *Sheet Metal Workers*, the display of stationary banners here "was not the functional equivalent of picketing as a means of persuasion because it had none of the coercive character of picketing." *Sheet Metal Workers*, supra at 438. In short, the holding of stationary banners lacked the confrontational aspect necessary to a finding of picketing proscribed as coercion or restraint within the meaning of Section 8(b)(4)(ii)(B).

In order to sweep the display of stationary banners into the prohibition contained in Section 8(b)(4)(ii)(B), the General Counsel proposes a broad definition of picketing that strips it of its unique character and is at odds with the Supreme Court's decision in *DeBartolo*. The General Counsel argues that "picketing exists where a union posts individuals at or near the entrance to a place of business for the purpose of influencing customers, suppliers, and employees to support the union's position in a labor dispute." The General Counsel adds, "the posting of individuals in this fashion is inherently confrontational within the meaning of the Act." Yet shortly after *DeBartolo* was decided, the Board explained that the decision held "that Section 8(b)(4)(ii)(B) of the Act does not proscribe peaceful handbilling and other nonpicketing publicity urging a total consumer boycott of neutral employers." *Service Employees (Delta Air Lines*), 293 NLRB 602, 602 (1989). The Board has thus already rejected the General Counsel's overbroad definition of picketing.

Accepting the General Counsel's broad definitions of picketing and confrontation, as not requiring either the use of traditional picket signs or any form of patrolling,[20] would bar distribution of handbills to consumers and would thus defy the holding in *DeBartolo*. In proposing this clearly overbroad definition of picketing, the General Counsel ignores the imperative, created by the words of the Act as well as the principle of constitutional avoidance, to distinguish between actions the impact of which rests on persuasion and actions whose influence depend on coercion. The General Counsel argues that the holding of stationary banners "amounts to a call to action on the part of the public against the neutral entities named on the banners, sufficient to trigger the type of response by the public that is typically elicited by traditional picket signs." But *DeBartolo* and the Board's decision in *Delta Air Lines* permit just such a call to action so long as it is not reinforced with intimidation. The stipulated facts in this case suggest no such intimidation.[21]

We acknowledge that prior Board decisions have used broader language to define picketing. In *Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965), cited prominently by the dissent, the Trial Examiner, in a decision affirmed by the Board, stated, "The important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business." Despite that broad language, however, in *Stoltze Land*, the activity in question was immediately preceded at the same location by traditional, ambulatory picketing (which was lawful prior to the union being decertified);[22]

[20] The dissent incorrectly suggests that our holding is inconsistent with those in *Mine Workers District 2 (Jeddo Coal)*, 334 NLRB 677 (2001), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199 (2006), enf. denied 491 F.3d 429 (D.C. Cir. 2007), but concedes that the activity in the former case involved carrying traditional picket signs and in the latter, patrolling (although the D.C. Circuit disagreed with the latter finding). In response to the dissent's arguments about the Board's "recent unanimous holding" in *Brandon,* Chairman Liebman points out that she joined that decision in a separate concurrence, emphasizing that she found the mock funeral procession to be unlawful expressly because it involved ambulatory patrolling.

[21] Our rejection of the General Counsel's argument that the conduct at issue here constituted picketing makes it unnecessary for us to reach one of his two arguments concerning the truthfulness of the words "LABOR DISPUTE" on the banners. The General Counsel argues that those words, combined with the location of the banners at the secondary sites, misleadingly suggested to consumers that the Union had a primary labor dispute with the secondaries and thus called on consumers to boycott the secondaries entirely. But the General Counsel makes this argument only to demonstrate that the conduct did not fit within the product picketing exception to the prohibition of secondary picketing created by *Tree Fruits*. Because we hold that the conduct was not picketing, this argument is inapposite. Moreover, the General Counsel's citation of pre-*DeBartolo* cases to suggest that this alleged misrepresentation took the banner displays outside the safe haven created by the publicity proviso is beside the point after *DeBartolo*, which made clear that conduct falling outside the proviso is not therefore proscribed. Even assuming the phrase was misleading (incorrectly, for reasons explained below), the General Counsel presents no colorable argument that misleading speech is coercive.

[22] The case was decided under Sec. 8(b)(7)(B), which proscribes recognitional picketing by a union which has lost a valid election in the preceding 12 months. Contrary to the dissent's suggestion, we do not propose that a different definition of picketing be used under Sec. 8(b)(4) and (7). Rather, we point out that many of the cases cited in the dissent were decided under Sec. 8(b)(7) in order to explain how the

union representatives continued the practice they had begun during the traditional picketing of taking down the license numbers of vehicles entering the premises even after the picketing ended and was replaced with distribution of handbills; and the union disciplined members who worked for Stoltze for "crossing a picket line" even after the traditional picketing had been ostensibly replaced by distribution of handbills. *See* id. at 389–392. Moreover, *Stoltze* preceded *DeBartolo* and, taken literally and out of context, its definition of picketing, as well as its holding that "handbilling . . . was . . . picketing" is flatly inconsistent with the Supreme Court's later holding. 156 NLRB at 393.[23]

We also acknowledge that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation. However, each of the prior cases is distinguishable from the banner displays at issue here. In many of the prior cases, the display of stationary signs or distribution of handbills was preceded at the same location or accompanied at other locations by traditional, ambulatory picketing. See, e.g., *Woodward Motors*, 135 NLRB 851, 856 (1962) (an 8(b)(7) case where traditional picketing ended 2 weeks before stationary display of picket signs began); *Lawrence Typographical Union 570 (Kansas Color Press)*, 169 NLRB 279, 282 (1968) (an 8(b)(7) case where strikers ceased traditional picketing and immediately began distributing handbills bearing the same message as prior picket signs); *Laborers Local 304 (Athejen Corp.)*, 260 NLRB 1311 (1982) (picketers would "drift" from gate to gate and sometimes place signs they had previously carried on cones, barricades or fence); *Mine Workers Local 1329 (Alpine Construction)*, 276 NLRB 415, 431 (1985) (Sec. 8(b)(7) case where, after traditional picketing ceased, union assigned "security guards" to picket shacks outside entrances to mines); *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 fn. 2 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990) (group of union members "gathered around a [picket] sign" near a neutral gate while ambulatory picketing took place simultaneously at the primary gate); *United Mine Workers District 2 (Jeddo Coal)*, 334 NLRB 677, 679–681 (2001) (traditional picketing at other sites and picket signs referred to crossing "picket lines"); cf. *NLRB v. Furniture Workers*, 337 F.2d 936, 937 (2d Cir. 1964) (8(b)(7) case where fixed picket signs were preceded by traditional picketing). The Board pointed out the relevance of this distinguishing fact in *Kansas City Color Press,* supra, 169 NLRB at 284*,* observing: "[f]ollowing in the footsteps of the conventional picketing which had preceded it, this conduct was intended to have, and could reasonably be regarded as having had, substantially the same significance for persons entering the Company's premises."[24] In many of the prior cases, the display was of traditional picket signs of the same type used in ambulatory picketing. *Athejen*, supra at 1316, 1319; *Woodward*, supra at 851 fn. 1, 856; *Jeddo*, supra at 679*; Hoffman,* supra at 571, 583 fn. 18; *Calcon*, supra at 570–571. And in many of the prior cases, union representatives were stationed near the stationary picket signs conspicuously to observe and, in some cases, record who entered the facility. *Teamster Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 530, 541 (1982); *Kansas Color Press*, supra at 282.[25] Finally, in many of the prior cases, there was evidence that the stationary signs or posted union representatives had the effect of inducing employees to refuse to make deliveries to the target site. See, e.g., *Woodward*, 135 NLRB at 857. The prior cases are thus distinguishable.[26]

The General Counsel nevertheless contends that, even if the banners did not constitute proscribed picketing, they constituted "signal picketing," that is, "activity short of a true picket line, which acts as a signal that sympathetic action" should be taken by unionized employees of

activity at issue in those cases could have been preceded at the same location (as it was in many of them) by lawful primary picketing as we describe further below.

[23] Other Board decisions (many of which are relied on by the dissent) have cited the *Stoltze* "posting" definition. See, e.g., *Kansas Color Press*, 169 NLRB 279, 283 (1968); *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 540 (1982); *Laborers (Calcon Constuction Co.)*, 287 NLRB 570, 573 (1987); *Mine Workers District 2 (Jeddo Coal)*, 334 NLRB 677, 686 (2001). Those decisions, however, either preceded *DeBartolo* or made no attempt to reconcile the "posting" definition with *DeBartolo*. Furthermore, the cases, like *Stoltze* itself, are factually distinguishable, as we explain above.

[24] Significantly, many of these cases, like *Stoltze*, were brought under Sec. 8(b)(7) rather than 8(b)(4) and thus the unions were attempting to continue the intended effects of their prior, lawful, primary picketing—inducing members working inside the subject establishment to cease work—by other means. Thus, these cases are properly understood as involving signal picketing, which we discuss below.

[25] Here, in contrast, the orientation of both the banners and the union representatives toward busy streets, rendered such observation highly impractical.

[26] In *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 71 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992), the Board found that a mass early morning gathering of 50–140 people at a motel housing an agent retained to supply striker replacements and the replacements themselves, accompanied by shouting and name calling, constituted "a form of picketing" and therefore violated Sec. 8(b)(4)(ii)(B). We question whether that activity was properly characterized as "picketing." Regardless, as observed in sec. A.3 below, the sheer number of participants, together with the confrontational nature of their conduct, rendered it coercive, and therefore unlawful, when coupled with a forbidden objective. *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638 (1999), enfd. 52 Fed.Appx. 357 (9th Cir. 2002) (unpub.), cited by the dissent, also involved a massed assembly of 40 to 50 individuals and is similarly inapposite.

the secondary or its business partners. *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 fn. 3 (1999).

Signal picketing is activity short of picketing through which a union intentionally, if implicitly, directs members not to work at the targeted premises.[27] "It is the mutual understanding among union employees of the meaning of these signals and bonds, based on either affinity or the potential for retribution, that makes these signals" potentially unlawful. *Overstree*t, supra at 1215. Thus, "[t]he entire concept of signal picketing . . . depends on union employees talking to *each other*, not to the public." Id. (emphasis in the original); see also *Kohn v. Carpenters Southwest Regional Council*, 289 F.Supp.2d 1155, 1165 fn. 5 (C.D. Cal. 2003) ("'signal picketing' generally refers to activity designed to induce employees to strike, not activity designed to inspire a consumer boycott").

Here, nothing about the banner displays themselves or any extrinsic evidence indicates any prearranged or generally understood signal by union representatives to employees of the secondary employers or any other employees to cease work. The only banner that was held within 75 feet of any form of entrance to a facility or to a facility parking lot bore a message clearly directed only to the public: "DON"T EAT 'RA' SUSHI." None of the banners called for or declared any form of job action (in contrast to typical picket signs declaring "on strike"). In addition, the handbills distributed by the union representatives holding the banners expressly stated, "WE ARE NOT URGING ANY WORKER TO REFUSE TO WORK NOR ARE WE URGING ANY SUPPLIER TO REFUSE TO DELIVER GOODS."

Signal picketing does not and cannot include all activity conveying a "do not patronize" message directed at the public simply because the message might reach, and send a signal to, unionized employees. Such a broad definition of the proscribed category of nonpicketing activity would be inconsistent with *DeBartolo, Tree Fruits*, and many other prior decisions. As the Ninth Circuit observed in *Overstreet*, "To broaden the definition of 'signal picketing' to include 'signals' to any passerby would turn the specialized concept of 'signal picketing' into a category synonymous with any communication requesting support in a labor dispute." *Oversteet*, supra at 1215.

[27] Consistent with the core danger of signal picketing, the typical signal picketing case includes an allegation that the union violated Sec. 8(b)(4)(i)(B), which prohibits a union from inducing or encouraging *employees* of a neutral employer to engage in a refusal to work. See, e.g., *Jeddo Coal*, *Telephone Man, Hoffman*, and *Calcon*, supra. There is no 8(b)(4)(i) allegation here.

Moreover, the notion that the banners operated not as ordinary speech, but rather as a signal automatically obeyed by union members must be subject to a dose of reality. The General Counsel asks us to simply and categorically assume, even in the absence of additional evidence of intent or effect, that when agents of a labor organization display the term "labor dispute" on a banner proximate to a workplace, it operates as such a signal. Our experience with labor relations in the early 21st century does not suggest such a categorical assumption is warranted. Here, moreover, the record is devoid even of evidence that any union members worked for any of the secondary employers or otherwise regularly entered the premises in the course of their employment. In these circumstances, we decline to place labor organizations' speech into such a special and disfavored category.

In the absence of evidence that the Union did anything other than seek to communicate the existence of its labor dispute to members of the general public[28]—which could, of course, as in *DeBartolo* and *Tree Fruits*, include employees of the secondaries and of others doing business with them—we find that the expressive activity did not constitute proscribed signal picketing merely because it involved the use of banners.

3. The banner displays were not disruptive or otherwise coercive

The Board has found nonpicketing conduct to be coercive only when the conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations. Blocking ingress or egress is

[28] The Board's prior decisions finding signal picketing each involved such additional evidence of the union's effort to induce or encourage a work stoppage or refusal to handle goods or perform services. See, e.g., *Hoffman Construction,* supra at 562 fn. 2 (agents posted around a stationary sign near a neutral gate while ambulatory picketing occurred at the primary gate "constitute[d] a 'signal' to the employees of secondary and neutral employers;" at some locations, union representatives talked to employees approaching the gates, and employees turned around and left); *Teamsters Local 182 (Woodward Motors)*, 135 NLRB 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (8(b)(7)(B) violation found where, following an extended period of ambulatory picketing, the union placed picket signs in a snow bank while union representatives sat in nearby cars; the representatives stopped approaching delivery trucks to speak to the drivers, after which the drivers left without making deliveries); *Teamsters Local 282 (General Contractors Assn.. of New York)*, 262 NLRB 528, 530, 541 (1982) (union representatives stationed themselves at the delivery entrances to construction sites and approached trucks making deliveries and explained that union was engaged in a job action and trucks turned back); *Calcon Construction*, 287 NLRB 570, 572–574 (1987) (picket signs laid on the ground "at or near" jobsite entrances were designed "to induce employees of [secondary] subcontractors . . . to withhold their labor from the site," because the alleged "pickets" were present at the commencement of the workday); *Jeddo Coal*, supra at 686–687 (conduct was part of a multisite campaign that included ambulatory picketing and the use of traditional picket signs at other sites).

one obvious example of such coercive conduct. In a variety of other instances, the Board and the courts have recognized that disruptive, non-picketing activity directed against secondaries can constitute coercion. For example, a union that engaged in otherwise lawful area-standards publicity violated Section 8(b)(4)(ii)(B) by broadcasting its message at extremely high volume through loudspeakers facing a condominium building that had hired the primary employer as a subcontractor. *Carpenters* (*Society Hill Towers Owners' Assn.),* 335 NLRB 814, 820–823 (2001), enfd. mem. 50 Fed.Appx. 88 (3d Cir. 2002).[29] The common link among all of these cases is that the union's conduct was or threatened to be the direct cause of disruption to the secondary's operations. There was no such disruption or threatened disruption here. The banner holders did not move, shout, impede access, or otherwise interfere with the secondary's operations.[30]

In sum, we find that the peaceful, stationary holding of banners announcing a "labor dispute" fell far short of "threatening, coercing, or restraining" the secondary employers.

4. The dissent's position is untenable

Our colleagues' position rests on three clearly erroneous foundations. First, the dissent suggests that all "secondary boycotts" are unlawful. But the plain text of Section 8(b)(4) says nothing of the kind and the Supreme Court as well as the Board have repeatedly held to the contrary.[31] Most clearly, in *DeBartolo*, the Court held that the Act did not bar the distribution of handbills urging a consumer boycott of a secondary employer. Had Congress intended the broad prohibition suggested in the dissent—"to bar any and all non-picketing appeals, through newspapers, radio, television, handbills, or otherwise," the Supreme Court reasoned in *DeBartolo*—"the debates and discussions would surely have reflected this intention." 485 U.S. at 584. Yet the Court found no "clear indication . . . that Congress intended . . . to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer," i.e., a secondary boycott. Id. at 583–584. See also *Delta Air Lines*, supra. Thus, as we explained above, a consumer boycott of a secondary employer is unlawful only if it is induced by picketing or coercion.

Second, the dissent asserts that the banner displays were coercive, but one searches the dissent in vain for any explanation of why American consumers would be coerced by this common form of expressive activity. The dissent asserts that the banners "sought to invoke 'convictions or emotions sympathetic to the union activity.'" But that is persuasion, not coercion. The dissent further asserts that the banner "sought to invoke . . . 'fear or retaliation if the picket is defied,'" but can point to no evidence whatsoever suggesting such a coercive intent or effect.[32] The dissent cites the size of the banners and the presence of union agents. Union agents, of course, are also present during what the Supreme Court has held to be the noncoercive distribution of handbills. Thus, the dissent's finding of coercion is based solely on the size of the message. But the banners were no larger than necessary to be seen by passing motorists and, in any event, there is no reason why a large banner would intimidate anyone passing by in a car or even on foot.

[29] See also *General Maintenance,* supra*,* 329 NLRB at 664–665, 680 (hurling filled trash bags into the building's lobby); *Service Employees Local 87 (Trinity Maintenance*), 312 NLRB 715, 746–748 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (use of bullhorns directed at building's tenants); *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 71–72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (mass early morning gathering of 50–140 people at motel housing agent providing striker replacements, with shouting and namecalling); *Service Employees Local 399 (William J. Burns Agency*), 136 NLRB 431, 436–437 (1962) (mass gathering and marching without signs at entrance to exhibit hall impeded access and was therefore coercive, whether or not it constituted "picketing").

[30] Our colleagues knock down a strawman when they suggest that in cases not involving picketing we would require the General Counsel to prove that conduct "directly caused, or could reasonably be expected to cause, significant disruption of the secondary's operations" before we would find it coercive within the meaning of Sec. 8(b)(4)(ii)(B). Of course, the General Counsel need not wait for harm to be inflicted. The Act clearly proscribes forms of coercion other than picketing that threaten such harm. But the common thread running through the Board cases finding such coercion is that it is exerted directly against the secondary employer or its agents. In other words, if union agents block ingress or egress, they directly interfere with the employer's operations. Unless the direct interference is not significant, i.e., it is de minimis, the Board will find it coercive. Cf. *Carpenters Metropolitan Regional Council (Society Hill Towers Owners' Assn.)*, 335 NLRB 814 fn. 1 (2001) (brief picketing at reserve gate not unlawful). Similarly, mass assemblies accompanied by shouting and name calling around the home or other lodging of employer agents that cause the agents to fear for their safety directly exert a coercive force against the employer. As Senator Dirksen, a member of the Conference Committee that approved the language in Sec. 8(b)(4)(ii)(B) explained the distinction, the amendment "makes it an unfair labor practice for a union to try to coerce or threaten an employer directly (but not to ask him) in order . . . [t]o get him to stop doing business with another firm." 105 Cong. Rec. 19849 (Sept. 14, 1959), II Leg. Hist 1823 (quoted in *NLRB v. Servette, Inc.*, supra, 377 U.S. at 54 fn. 12). Our point above is merely that the peaceful, stationary holding of banners announcing a labor dispute, even if such conduct is intended to and does in fact cause consumers freely to choose not to patronize the secondary employer, does not constitute such direct, coercive interference with the employer's operations or a threat thereof.

[31] See sec. A, supra.

[32] Indeed, the dissent here quotes language in *United Furniture Workers*, supra, 337 F.2d at 940, from a passage in which the court is not stating its holding, but rather describing a party's *contention* that *picketing* necessarily involves an element of confrontation.

Display of banners is not a novel form of public expression. See cases cited below, sec. B. Anyone who walks down the sidewalks of our cities, opens a newspaper, watches the news, or surfs the web is likely to have encountered this form of public expression.[33] Indeed, banners are a commonplace at Fourth of July parades and ordinarily precede high school marching bands. The very ordinariness of banners in our open society undermines the dissent's contention that they are coercive.

Finally, unable to advance any reason why the peaceful display of stationary banners would coerce consumers, the dissent posits that holding a stationary banner is picketing, but does so only by expanding the category of picketing far beyond its ordinary meaning and existing precedent and in a manner sharply at odds with *DeBartolo*. While the dissent quotes bits and pieces from our prior precedents, often from dicta,[34] it does not establish that the Board has adopted a clear and consistent definition of picketing that encompasses the peaceful display of stationary banners and, certainly, not the definition proposed in his dissent today. We address and distinguish each of the prior precedents cited by the dissent above.

Resting on these erroneous foundations, the proposition advanced in the dissent could not be more stark or more in tension with the express terms and fundamental purposes of the Act, Supreme Court precedent, and the core protections of the First Amendment. In the dissent's view, it would be unlawful for a single union supporter to stand alone outside a store, restaurant, or other establishment that the union seeks to encourage to cease doing business with a business that the union believes is undermining labor standards and politely ask consumers, "Please don't shop here." The dissent posits that "the posting of union agents at the site of a neutral employer is coercive within the meaning of Section 8(b)(4)(ii)(B)." There is no basis for concluding that the United States Congress intended such a broad reading of Section 8(b)(4). Indeed, the dissent's position flies in the face of any reasonable understanding of the term "coercion," is at war with the Supreme Court's holdings in *DeBartolo*, and would cut to the heart of the First Amendment in a manner that we believe it is our constitutional duty as members of the Executive Branch to avoid, as we now explain.

B. Application of the "Constitutiona Avoidance" Doctrine

Our conclusion that the holding of a stationary banner does not violate Section 8(b)(4)(ii)(B) is supported, if not mandated, by the constitutional concerns that animated the Supreme Court's decision in *DeBartolo* and its precursors. To prohibit the holding of a stationary banner would raise serious constitutional questions under the First Amendment, as the Federal courts (notably, the Ninth Circuit in *Overstreet*, supra) have concluded. Under the framework established in the series of decisions culminating in *DeBartolo*, supra, we cannot so hold unless it is unavoidable, which it clearly is not in this case.[35]

In *DeBartolo*, the primary labor dispute was between an alliance of construction unions and a builder engaged in the construction of a new store at an existing shopping mall; the mall itself and the other mall stores were secondaries. The unions distributed handbills at each of the mall's entrances calling for a consumer boycott of the entire mall. The Board construed Section 8(b)(4)(ii)(B) to prohibit that conduct, holding that the unions' handbilling was coercion or restraint within the meaning of that provision.[36] The Supreme Court rejected that interpretation, applying the canon of constitutional avoidance, in which the Court will construe a statute in order to avoid constitutional questions arising from an otherwise acceptable construction of the statute, if an alternative

[33] See,,e.g., http://www.umc.org/atf/cf/%7BDB6A45E4-C446-4248-82C8-E131B6424741%7D/umns_237_080516_468.jpg, retrieved 05-17-10; http://farm4.static.flickr.com/3572/3362798476_dffd19e0ae.jpg, retrieved05-17-10; http://www.electjarrod.com/sitebuildercontent/sitebuilderpictures/Tea-PartyBanner_0026.jpg, retrieved 05/17/10.

[34] To support their overbroad construction, our colleagues repeatedly cite broad language, but from cases whose actual holdings applied only to picketing or forms of coercion not at issue here. See, e.g., infra at sec. I.B.1. (quoting *Soft Drink Workers Local 812 v. NLRB*, 657 F.2d 1252, 1267 fn. 27 (D.C. Cir. 1980) (picketing), and *Kentucky Carpenters District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 fn. 2 (1992) (disciplinary charges against union member); sec. I.B.2. (citing *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251, 1253 fn. 5 (2006) (patrolling back and forth in front of entrances)); sec. II.A. (citing *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 667, 686 (2001) ("six individuals stood at the entrance to the . . . facility, three of them carrying picket signs"); secs. I.B.2, and II.A. (citing *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 746–753 (1993) (multiple instance of traditional picketing combined with large groups of people marching in circular motion at entrances, blocking doors, making excessive noise, and entering the secondaries' buildings).

[35] Member Schaumber suggests that as members of the Executive Branch, state actors bound to uphold and abide by the Constitution, it is not our duty to avoid trenching on the First Amendment by defining peaceful, expressive activity to be unlawful. We disagree and believe that the Board has the authority, indeed, that the Board has a duty, to construe the Act, if possible, so as not to violate the Constitution. However, inasmuch as both the majority and the dissent analyze the constitutional implications of our respective positions, as was also the case in *Handy Andy, Inc.*, 228 NLRB 447 (1977) (cited by Member Schaumber), we need not address the specifics of Member Schaumber's argument against application of the constitutional avoidance doctrine.

[36] *Florida Building Trades Council*, 273 NLRB 1431 (1985), enf. denied 796 F.2d 1328 (11th Cir. 1986).

interpretation is possible and not contrary to the intent of Congress.[37]

The Court began by explaining why the canon of constitutional avoidance came into play:

> [T]he Board's construction of the statute . . . poses serious questions of the validity of §8(b)(4) under the First Amendment. The handbills involved here truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall. The handbilling was peaceful. No picketing or patrolling was involved. On its face, this was expressive activity.

DeBartolo, supra, 485 U.S. at 575–576. The Court then went on to examine the language of Section 8(b)(4)(ii)(B), describing the key terms of the provision—"threaten, coerce, or restrain"—as "nonspecific, indeed vague" and observing that they "should be interpreted with 'caution' and not given a 'broad sweep.'" 485 U.S. at 578, quoting *Curtis Bros*., supra, 362 U.S. at 290. The Court found no "necessity to construe such language to reach the handbills involved." Id. Because neither the language of Section 8(b)(4) nor its legislative history "foreclosed" an interpretation of the statute as *not* reaching the handbilling at issue, the *DeBartolo* Court rejected the Board's contrary construction and so avoided the "serious constitutional questions" it raised. 485 U.S. at 588.

Even in the application of the prohibition of Section 8(b)(4)(ii)(B) to picketing, the Court stated in its earlier *Tree Fruits* decision, it has "not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history' . . . that Congress intended to do so." *Tree Fruits*, supra at 63 (quoting *Curtis Bros.*, supra, 362 U.S. at 284). The Court explained that its "adherence to this principle of interpretation reflect[s] concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." Id.[38]

1. Holding a banner is speech

The banners in this case conveyed the message that the named entities merited "shame" or should be shunned because of their connection to a labor dispute. Thus, the banners plainly constituted actual speech or, at the very least, symbolic or expressive conduct. The First Amendment protects both. See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (holding that cross-burning was symbolic expression protected by the First Amendment).[39]

There is no basis for treating a banner display differently from the other forms of expressive activity that the Supreme Court has concluded implicate the First Amendment. In upholding the freedom of unions to engage in picketing asking consumers not to purchase a particular product from a secondary, the *Tree Fruits* Court, for example, observed that a "broad ban against peaceful picketing might collide with the guarantees of the First Amendment." 377 U.S. at 63. The Court expressly rejected the argument that no type of picketing could be permitted under Section 8(b)(4) "because, it is urged, all picketing automatically provokes the public to stay away from the picketed establishment" and members of the public will not "read the [picket] signs and handbills." Id. at 71.[40]

It is beyond dispute that media such as signs and banners are forms of speech. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (striking down municipal ban on residential signs and observing that "signs are a form of expression protected by the Free Speech Clause"

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[37] See also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that Board lacked jurisdiction over lay faculty members at Catholic high school).

[38] In *Tree Fruits*, supra, the court reached the conclusion that Sec. 8(b)(4) did not reach "product picketing," i.e., picketing directed at consumers with the ultimate aim of persuading secondary merchants not to sell the product of an employer with whom the union has a primary dispute. In order to avoid the constitutional question presented by the Board's interpretation of Sec. 8(b)(4), the Court declined to read the publicity proviso to imply that, because it expressly protected "publicity[] other than picketing," Congress intended that *all* consumer picketing at a secondary site was unprotected. *Tree Fruits*, 377 U.S. at 71–72. The Court rejected the idea "that such picketing *necessarily* threatened, coerced or restrained the secondary employer." Id. at 71 (emphasis added); see also *Servette,* supra, 377 U.S. at 554 ("The publicity proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded.").

[39] See also *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that flag burning is protected by First Amendment, and observing that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments'"); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students wearing black armbands to protest Vietnam War were engaged in protected symbolic speech). Although the Supreme Court has held that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it may not "proscribe particular conduct *because* it has expressive elements . . . . A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Texas v. Johnson*, supra, 491 U.S. at 406 (internal citation omitted, emphasis in the original).

[40] In *Curtis Bros.*, similarly, the Court pointed to the "sensitive area of peaceful picketing" in which Congress carefully targeted "isolated evils." 362 U.S. at 284. Upholding the right of unions to engage in peaceful recognitional picketing, the Court recognized such picketing as a legitimate method of persuasion. Id. at 287 (legislative history of pre-Landrum-Griffin Sec. 8(b)(1)(A) "negat[es] an intention to restrict the use by unions of methods of peaceful persuasion, including peaceful picketing").

of the First Amendment); *Brown v. California Dep't of Transp*, 321 F.3d 1217, 1226 (9th Cir. 2003) (preliminary injunction granted on First Amendment grounds against policy prohibiting anti-war "expressive banners" on highway overpasses); *Stewart v. District of Columbia Armory Bd*., 863 F.2d 1013, 1019 (D.C. Cir. 1988) (district court erred in dismissing First Amendment complaint alleging the removal of a 3-by-15 foot religious banner displayed by football patrons during a game). Here, therefore, neither the character nor size of the banners stripped them of their status as speech or expression.

Similarly, the spareness of the message conveyed by the banners in no way removed them from the First Amendment's protection. Although the banners in this case may have conveyed less information than a typical handbill, they clearly communicated ideas.[41] Here, moreover, union representatives also distributed handbills while displaying the banners.[42] In any event, as the Ninth Circuit pointed out in *Overstreet*, on essentially identical facts, the use of "catchy shorthand, not discursive speech does not remove the banners from the scope of First Amendment protections, as cases regarding well known short slogans demonstrate." 409 F.3d at 1211, citing *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (applying ordinary First Amendment principles to the slogan "F— the draft" on a jacket), and *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), vacated and remanded on other grounds sub nom. *Johanns v. Cochran*, 544 U.S. 1058 (2005) (applying same principles to billboard phrase "Got Milk?").[43]

In short, the Court has found that the First Amendment protects conduct or statements as repugnant as cross-burning and as crude as "F— the draft." Surely a union banner bearing the message "Shame on [ ]" or "Don't Eat" implicates similar constitutional concerns.

Yet our dissenting colleagues assert that prohibiting banner displays would raise no First Amendment concerns for two reasons. First, observing that the Supreme Court has upheld proscriptions on traditional secondary picketing, they assert that the differences between a banner display and traditional picketing are "legally insignificant." We disagree for the reason explained above—picketing involves conduct that creates a confrontation. The Supreme Court has recognized that that distinction between picketing and other forms of communication is indeed significant under the First Amendment:

> While picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."

Hughes v. Superior Ct. of Cal., 339 U.S. 460, 464–465 (1950) (quoting *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 775, 776 (1943) (Douglas, J., concurring); see also *Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 326 (1968) (Douglas, J., concurring) ("Picketing is free speech plus, the plus being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated."), overruled on other grounds, *Hudgens v. NLRB*, 424 U.S. 507 (1976). Like the distribution of handbills at issue in *DeBartolo*, therefore, the stationary display of a banner is different from picketing and its prohibition would raise serious constitutional questions.

Second, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982), our colleagues contend that a substantial governmental interest in "economic regulation" justifies the "incidental" constraint on First Amendment freedoms that would result from reading Section 8(b)(4) to prohibit stationary banner displays. While overturning a State court verdict against the organizers of a consumer boycott involving picketing in *Claiborne*, the Court, in dictum, cited as an example of permitted constraints those on "[s]econdary boycotts and picketing by labor unions." As we have demonstrated, however, the banner displays here were not picketing. And read in isolation and too broadly, the reference to "[s]econdary boycotts" in the *Claiborne* dictum would remove the foundation from the Court's subsequent decision in *DeBartolo*. In any event, *Claiborne* also cautioned that "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance" of the government's interest. Id. at 912 fn. 47 (quoting *U.S. v. O'Brien*, 391 U.S. 367 (1965)). Thus, the *Claiborne* dictum cannot be read to suggest that a prohibition of the peaceful display of stationary banners would not "pose . . . serious questions

[41] See *City of Ladue*, supra at 55 ("They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression."). In the present case, insofar as the banners were large enough to be read by persons not entering the employer facilities (passing drivers, for example), they functioned as billboards, obviously a form of protected speech. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

[42] At the very least, therefore, the banners served as a means of attracting attention to the handbillers and to their effort to communicate the Union's message in more detail.

[43] In *Cohen*, supra, the Supreme Court rejected the view that "the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated." 403 U.S. at 26.

under the First Amendment" when Congress did not clearly state that it is "essential to the furtherance" of the purpose of Section 8(b)(4)(ii)(B) and we therefore follow the Court's approach in *DeBartolo*. Id., 485 U.S. at 575; *Claiborne*, 458 U.S. at 912 fn. 47.

2. Section 8(b)(4)(ii)(B) need not be read to prohibit banners

Because the Union's display of banners was expressive activity, the canon of constitutional avoidance applies here in interpreting Section 8(b)(4)(ii)(B). The question, then, is whether that section "is open to a construction that obviates deciding whether a congressional prohibition on [banners] on the facts of this case would violate the First Amendment." *DeBartolo*, supra, 485 U.S. at 578. Such a construction *is* possible, just as it was possible in *DeBartolo* to construe the Act as permitting handbilling and in *Tree Fruits* to construe it as permitting product picketing. Nothing in the crucial words of Section 8(b)(4)(ii)(B)—"threaten, coerce, or restrain"—*compels* the conclusion that they reach the display of a banner, either as picketing or as otherwise coercive conduct.

In the absence of textual support, Section 8(b)(4)(ii)(B) can be read as *necessarily* prohibiting the display of a stationary banner only if the legislative history indicates a clear intention by Congress to do so. But the legislative history indicates no such intention. As we have shown, the object of Congress' concern was confrontational, "ambulatory picketing"—in Senator Kennedy's phrase—not the stationary display of banners. The Ninth Circuit's decision in *Overstreet* explains the obvious difference:

> Classically, picketers *walk* in a line and, in so doing, create a symbolic barrier. . . . In contrast, bannering involves no walking, in line or otherwise, of union members.

409 F.3d at 1213 (emphasis in original).

The Federal courts have explained persuasively why it is reasonable to construe Section 8(b)(4)(ii)(B) as *not* reaching the display of a stationary banner. The Ninth Circuit in *Overstreet*, citing *DeBartolo* and emphasizing "the need to avoid creating a 'significant risk' to the First Amendment," considered whether the conduct involved any of the following: (1) the creation of "a symbolic barrier" through patrolling or other conduct in front of the entrances to the neutrals' premises; (2) the creation of a "physical barrier" blocking those entrances; or (3) other behavior that was threatening or coercive, such as taunting of passersby, the massing of a large group of people, or following patrons or would-be patrons away from a neutral's premises. 409 F.3d at 1209, 1211. Similarly, the court in *Kohn* noted that the individuals holding the banner did not "patrol, shout, block entrances, or otherwise act aggressively." 289 F. Supp.2d at 1168; see also *Benson*, 337 F. Supp.2d at 1278 fn. 16 (same). Each of the actions cited by the Ninth Circuit might well constitute coercion and thereby trigger the statutory prohibition, but none of them occurred here.[44]

In addition to the Ninth Circuit's decision in Overstreet, the decision of the United States Court of Appeals for the District of Columbia Circuit in *Sheet Metal Workers' Local 15*, supra, strongly supports our construing Section 8(b)(4)(ii)(B) in order to avoid serious constitutional questions. In that case, the court—applying the doctrine of constitutional avoidance, pursuant to *DeBartolo*–held that a union's mock funeral procession did not violate Sec. 8(b)(4)(ii)(B). Citing the Ninth Circuit's *Overstreet* decision with approval, the court explained that the funeral was "not the functional equivalent of picketing . . . because it had none of the coercive character of picketing." 491 F.3d at 438. Union members "did not physically or verbally interfere with or confront . . . patrons coming and going," nor did they "'patrol' the area in the sense of creating a symbolic barrier." Id.[45]

Finally, we find no merit in the General Counsel's and Member Schaumber's contention that the Union, by naming only the secondary Employers on the banners proclaiming a "labor dispute," fraudulently misrepresented to the public that it had a primary labor dispute

[44] Compare *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251 (2006) (demonstrators walking back and forth in front of entrance were engaged in picketing).

[45] In reversing the Board's finding of a violation, the court noted that the mock funeral did not take place in front of hospital entrances or even "immediately adjacent" to them, but rather 100 feet away from the main entrance. Id.

To support their argument that the display of banners was coercive and outside the First Amendment's protection, our colleagues cite the 11th Circuit's "obvious disagreement" with the D.C. Circuit in *Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259 (11th Cir. 2005), which affirmed a district court's 10(l) injunction against the same "mock funeral procession" involved in *Sheet Metal Workers,* supra. Contrary to the D.C. Circuit, the 11th Circuit found reasonable cause to believe that the mock funeral was "the functional equivalent of picketing." Id. at 1265 (reasonable cause being the less demanding standard applicable under Sec. 10(l)). The dissent's reliance on *Kentov* is misplaced. The court in *Kentov* found that the union "patrolled" for 2 hours accompanied by somber funeral music, and that the procession was a mixture of conduct and communication "like traditional secondary picketing." Id. The court specifically distinguished *Overstreet*, supra, on the basis that it involved stationary banners "*without any accompanying patrolling or picketing*." Id. at 1264 fn. 7 (emphasis added). The court similarly distinguished *DeBartolo*. Id. at 1264 (noting that *DeBartolo* involved "peaceful handbilling in the absence of any accompanying picketing or patrolling").

with the neutral employers. By making this allegedly false claim, the General Counsel asserts the Union forfeited any First Amendment protection and coerced the secondary employers in violation of Section 8(b)(4)(ii)(B).

We reject the predicate of the argument for two reasons. First, by using the phrase "labor dispute," the Union's banners (and its handbills) did not in any way specify the nature of the labor dispute at issue. The expansive definition of "labor dispute" contained in Section 2(9) of the Act easily encompasses both primary and secondary disputes.[46] Cf. *Burlington Northern R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 443 (1987) (the Norris-LaGuardia Act's nearly identical definition of "labor dispute" covers disputes with secondaries); *Jacksonville Bulk Terminals v. International Longshoremen's Assn.*, 457 U.S. 702, 712 (1982) (the Norris-LaGuardia Act's definition "must not be narrowly construed"). The banners did not state or imply that the "labor dispute" was a primary labor dispute. Thus, the Union banners correctly used a statutory term. Cf. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 46–48 (1998) (union did not breach duty of fair representation by negotiating union-security clause that tracked statutory language). Moreover, as the Ninth Circuit pointed out in *Overstreet*, supra, 409 F.3d at 1217, members of the public viewing the banners were unlikely to be familiar with the technical distinction in labor law between a primary and secondary dispute—and would likely have read the term "labor dispute" as indicating, correctly, that the Union had a dispute with the entity named that related to labor. In other words, the banners did not communicate a false message whether read by a trained labor lawyer or an ordinary member of the public.

There is a second shortcoming in the argument. A false statement does not lose the protection of the First Amendment. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 fn. 26 (1976) ("The mere fact that an alleged defamatory statement is false does not, of course, place it completely beyond the protection of the First Amendment."); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."). Member Schaumber strains to characterize the banners as fraud. But fraud requires a subjective intent to deceive,[47] and here there is no evidence in the stipulated record that the union agents responsible for creating and displaying the banners had any such intent. For each of these reasons, a holding that the banner displays violated Section 8(b)(4)(ii)(B) because of their purported falsity would raise serious constitutional questions of its own.

[46] Sec. 2(9) reads: "The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

[47] See, e.g., *Fleet National Bank v. Anchor Media Television*, 45 F.3d 546, 554 (1st Cir. 1995); *Brown v. Forest Oil Corp.*, 29 F.3d 966, 969 (5th Cir. 1994).

Conclusion

The Union's display of stationary banners did not "threaten, coerce, or restrain" the secondary employers. Accordingly, we find that the Union did not violate Section 8(b)(4)(ii)(B) of the Act.

ORDER

The complaint is dismissed.

MEMBER SCHAUMBER and MEMBER HAYES, dissenting.

Introduction

The National Labor Relations Act protects the right of employees to invoke economic weaponry, including strikes and picketing, to bring pressure to bear on employers with whom they have a primary labor dispute. However, the Act also recognizes the significant disruption and economic harm that can follow when labor disputes embroil neutral parties. Congress addressed these competing interests by enacting and subsequently amending the provisions of Section 8(b)(4),[1] which prohibit a range of coercive secondary boycott activity.[2] The Board has hewed over the years to the legislative purpose underpinning Section 8(b)(4) by applying the statutory language flexibly and pragmatically to prevent often creative attempts to circumvent the scope of the Act's prohibitions.

The Respondent Union in this case, as part of its long-running campaign to enmesh property owners in its labor dispute with certain nonunion contractors, employed a creative variation on classic picketing: the display of large, stationary banners at the premises of the neutrals.

[1] Sec. 8(b)(4)(ii)(B) states, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents—

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—
>
> (B) forcing or requiring any person to . . . cease doing business with any other person.

[2] See *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951) (Sec. 8(b)(4) was adopted to serve "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.").

These banners, held aloft by union agents, misleadingly accuse the neutral employer of having a labor dispute with the union. Whether labeled "stationary picketing," "bannering," or something else, the express terms of the statute and its legislative history, as well as decades of Board precedent, demonstrate that the conduct in this case is a form of secondary coercion that Congress intended to outlaw by its adoption of Section 8(b)(4)(ii).

Settled precedent plainly would prohibit the display by the Respondent of signs affixed to pickets bearing exactly the same message as the banners at the premises of the neutral employers. However, because the Respondent's agents remained stationary and held a banner rather than pickets, our colleagues conclude that the Respondent's conduct was lawful. In so holding, our colleagues rely on a strained definition of statutory language, and selective and ambiguous excerpts from the legislative history. They also unpersuasively attempt to distinguish a substantial body of Board and court precedent defining conduct proscribed by Section 8(b)(4)(ii) as including activity other than traditional ambulatory picketing. Our colleagues admit to being motivated in part by the consequences of finding an 8(b)(4) violation, which they view as too "severe." However, when Congress has determined that certain conduct in support of secondary boycotts should be constrained because it constitutes a threat to the economy and national interest, it is not our role to second guess the means Congress chose to implement that policy determination.

The majority does not limit its holding to the facts of this case, which were submitted on a stipulated record. Instead, our colleagues capitalize on the opportunity to narrowly circumscribe the Board's historically expansive definition of "picketing." Further, in assessing whether any conduct that does not involve traditional picketing is proscribed by Section 8(b)(4)(ii), the majority will now require a showing that the Union's conduct "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." This new standard substantially augments union power, upsets the balance Congress sought to achieve, and, at a time of enormous economic distress and uncertainty, invites a dramatic increase in secondary boycott activity.

To justify its new and narrow construction of Section 8 (b)(4), the majority also relies on the Supreme Court's admonition to avoid an interpretation that would raise serious constitutional questions under the First Amendment. However, even assuming arguendo that the Board, as an administrative agency, may engage in a constitutional analysis of the Act it administers, the prohibition of the coercive secondary conduct at issue here, like the prohibition against traditional secondary picketing, simply does not implicate constitutional concerns.

Therefore, we respectfully dissent.

Facts

Bannering can be, and frequently is, accompanied by other coercive "corporate campaign" activity away from or at the premises of the neutral employer. Since the parties did not stipulate to any such conduct in this case, we assume none occurred. Most of the undisputed facts are otherwise fully set forth in the majority decision. Briefly, the Respondent displayed large banners held by three or four union agents at the premises of neutrals Banner Medical, Northwest Hospital, and RA Tempe. These banners all proclaimed the existence of a "LABOR DISPUTE" and identified the neutral employer as the disputant in the following terms: "SHAME ON BANNER THUNDERBIRD MEDICAL CENTER," "SHAME ON NORTHWEST MEDICAL CENTER," and "DON'T EAT RA SUSHI."

In fact, the Respondent's dispute was with primary employers Eliason & Knuth, Delta, Enterprise, and Hardrock, nonunion construction contractors that the Respondent alleges do not pay their employees wages and benefits that accord with local standards. The only "dispute" between the Respondent and the neutral employers was that the primary employers at times performed work at facilities owned by the neutrals, although no such work was ever performed at the Northwest Hospital or RA Tempe sites.

At Banner Medical Center, the Respondent's agents were stationed on the public sidewalk just off the hospital's lawn and about 80 feet, or 5 car lengths, from the driveway entrance into the Medical Center's main parking lot. They held a banner measuring 16-feet long by 4-feet high. It is clear from photographs in the record and aerial photographs on public internet map sites that the banner was positioned as close as possible to private property at a point where it would be seen by most people entering onto the hospital's premises.

At Northwest Hospital, union agents held up two banners measuring 20 feet long by 3 feet high on public rights of way immediately adjacent to the Hospital's premises. The banners faced vehicular traffic and were clearly visible to employees, patients, and visitors to the Hospital, and to contractors working there. As with the banner at Banner Medical Center, many persons would confront the banners and posted union agents immediately prior to entering onto the Hospital's property.

At RA Tempe restaurant, the banner measured 15 feet long by 3 feet high and was held by two or more union agents posted at the sidewalk curb approximately 15 feet from the front door and large windowed facade of the

restaurant. The banner faced the street. Individuals going to the restaurant would be confronted by the sign and posted agents from the sidewalk across the street and from their cars as they drove by just prior to parking. Individuals parking curbside adjacent to the banner would have to walk around or duck under the banner in order to enter the restaurant.

Analysis

I. Both the Text of the Act and Well-Established Board Precedent Prohibit Bannering as a Means of Promoting a Secondary Boycott.

An 8(b)(4)(ii)(B) violation consists of two elements. First, a labor organization must "threaten, coerce, or restrain" a person engaged in commerce. Second, the labor organization must do so with "an object" of "forcing or requiring any person to . . . cease doing business with any other person." *San Francisco Building Trades Council (Goold Electric)*, 297 NLRB 1050, 1055 (1991). Both elements are satisfied in this case.

A. The Respondent Engaged in the Bannering to Compel Neutral Employers to Cease Doing Business with the Primary Employers with Whom it had a Labor Dispute

In reverse order of the statutory language, we first briefly address whether the Union's bannering had a secondary objective, an issue the majority does not reach. An unlawful "cease doing business" object is demonstrated by conduct that is intended to or is likely to disrupt or alter the business dealings between the primary employer and a neutral.[3] A union violates Section 8(b)(4)(B) if "any object of [its coercive activity] is to exert improper influence on secondary or neutral parties."[4]

Here, the Respondent does not seriously dispute that an object of its bannering was to force or require the neutral employers to cease doing business with the primary employers. In any event, there is overwhelming evidence of a cease doing business object in this case. First, letters sent by the Respondent to neutrals Banner Medical and Northwest Hospital prior to the bannering threatened protest activity at their facilities if the primary employers performed work for them. Second, the banners displayed at each of the neutral employers' locations broadly proclaimed a "labor dispute" without identifying the primary employers. Third, the bannering at times took place when the primary employers were not performing work at the site of the protest. Finally, the handbills distributed in conjunction with the bannering solicited the public to request the neutral employers to "change this situation" of substandard wages and benefits for the primary employers' employees. In order to "change this situation," the neutral employers would be required to sever their relationship with the primaries. In sum, the prebannering letters, the banners themselves, and the handbills all manifest the Respondent's objective of promoting a total customer boycott of the neutral employers in order to force them to "cease doing business" with the targeted primary employers.[5]

B. The Bannering Threatened, Coerced, or Restrained the Neutral Employers Within the Meaning of The Act

1. The statutory language and legislative history demonstrate a congressional intent to shield neutral employers from coercive secondary activity beyond traditional ambulatory picketing

The dispositive issue in this case is whether the Respondents' bannering activity threatened, coerced, or restrained persons within the meaning of Section 8(b)(4)(ii). In interpreting that statutory text, courts have made clear that the terms threaten, restrain or coerce "[do] not describe any sort of measurable physical conduct suggested by the ordinary meaning of those words, but [are] rather . . . term[s] of legislative art designed to capture certain types of boycotts deemed harmful by Congress."[6] Accordingly, Section 8(b)(4)(ii)'s proscription "broadly includes nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, *or other economic retaliation or pressure in the background of a labor dispute.*'"[7]

Moreover, the legislative history of Section 8(b)(4) demonstrates both that Congress intended the Section to

[3] *NLRB v. Operating Engineers Local 825*, 400 U.S. 297, 304–305 (1971); *Iron Workers Local 272 (Miller & Solomon)*, 195 NLRB 1063 (1972).

[4] *Electrical Workers Local 501 v. NLRB*, 756 F.2d 888, 892 (D.C. Cir. 1985); *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689 (1951).

[5] *NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607, 614 fn. 9 (1980) (*Safeco*) (appeal for total boycott of a neutral employer is evidence of unlawful cease doing business object); see also *Longshoremen ILA Local 799 (Allied International)*, 257 NLRB 1075, 1084–1085 (1981), enfd. 702 F.2d 1205 (D.C. Cir. 1983) (unlawful object may be inferred from the necessary and foreseeable consequences of exclusively secondary activity).

[6] *Soft Drink Workers Local 812 v. NLRB*, 657 F.2d 1252, 1267 fn. 27 (D.C. Cir. 1980) (citing *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 (Tree Fruits)*, 377 US 58, 71 (1964)).

[7] *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 fn. 2 (1992) (quoting *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964) (emphasis supplied)), cited with approval in *Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259, 1264 fn. 6. (11th Cir. 2005); *Laborers Local 1140 (Gilmore Construction)*, 127 NLRB 541, 545 fn. 6 (1960), enf. as modified 285 F.2d 397 (8th Cir. 1960), cert. denied 366 U.S. 903 (1961) (prohibition reaches not only picketing but also strikes and "other economic retaliation").

be applied flexibly and sensibly, drawing upon the Board's unique expertise, to protect neutrals from a broad range of coercive secondary activity, and that the Section's prohibitions were not limited to secondary activity that involved violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business.[8] As Senator Taft, the Senate sponsor of the Taft-Hartley amendments and Chairman of the Senate Committee on Labor and Public Welfare, explained:

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.[9]

The resulting secondary boycott provision, former Section 8(b)(4)(A), was understood by both its proponents and its opponents to "prohibit[] peaceful picketing, persuasion, and encouragement, as well as non-peaceful economic action, in aid of the forbidden objective"[10] because "Congress thought that [secondary boycotts] were unmitigated evils and burdensome to commerce." *Wadsworth Building,* supra.[11]

Moreover, when unions found and exploited limitations in the coverage of former Section 8(b)(4)(A), Congress closed the loopholes through amendments broadening the scope of the secondary boycott prohibition.[12] These included the addition in 1959 of Section 8(b)(4)(ii)(B), proscribing "direct pressures" on neutral employers like those used in this case. The legislative history discloses that this amendment simply perfected "the intention of Congress as far back as 1947 to outlaw all forms of the secondary boycott" and to protect "the rights of the innocent third parties who have no dispute with either the union or the primary employer, but who are subjected to coercion, threats, picketing and possible loss of jobs simply because the union bosses are permitted to use them as a lever in the quest for greater power . . . . [No organization] can be allowed to deprive other individuals of freedom from coercion, economic or otherwise."[13] Accordingly, the legislative history supports finding that Congress intended various means of promoting secondary boycotts, including outwardly peaceful picketing akin to the bannering activity here, to be covered by the definition of proscribed activity.[14]

2. Consistent with the legislative history and statutory text, the Board and courts have developed a broad and flexible definition of proscribed secondary picketing

The Board has long held that the use of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing. The coercion element is satisfied when a union posts its agents "at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."[15] The posting of union agents at the

[8] See, e.g., *Teamsters Local 25 v. NLRB,* 831 F.2d 1149, 1153 (1st Cir. 1987) (Sec. 8(b)(4)(ii)(B) is "broad and sweeping," and "pragmatic in its application, looking to the coercive nature of the conduct, not to the label which it bears."); accord: *Pye v. Teamsters Local 122*, 61 F.3d 1013, 1024 (1st Cir. 1995) ("Coercion under Section 8(b)(4)(ii)(B) is a broad concept, and the NLRB has not hesitated to include varied forms of economic pressure within the conceptual ambit.") (upholding 10(l) injunction against union mass shopping at neutral retail stores).

[9] 2 Leg. History Labor Management Relations Act of 1947 (LMRA) 1106 (93 Cong. Rec. 4323).

[10] *Carpenters (Wadsworth Building)*, 81 NLRB 802, 812 (1949), enfd. 184 F.2d 60 (10th Cir. 1950), cert. denied 341 U.S. 947 (1951) (cited with approval in *Electrical Workers v. NLRB,* 341 U.S. 694, 704 (1951)).

[11] The Supreme Court's decision in *Tree Fruits,* supra, is not to the contrary. The Court held in that case that Sec. 8(b)(4)(ii)(B) did not prohibit picketing at the site of a neutral employer against a struck product of the primary employer. Such picketing normally is "confined to [the union's] dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods." Id. at 63. But there is no claim that the Respondent's bannering was struck product picketing under *Tree Fruits.* Rather, the banners sought to cause a total consumer boycott of the neutrals, and "a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute." *Tree Fruits,* supra at 63–64. Such "appeals" are prohibited by Sec. 8(b)(4)(ii)(B). Id. Moreover, the *Tree Fruits* doctrine has limited application in cases, such as this, involving construction industry employers: "Unlike the products at a grocery store, the work of a subcontractor merges with the work of the general contractor and the developer. Consequently, publicity directed against a subcontractor embroils the general contractor and developer in the labor dispute." *Solien v. Carpenters District Council of Greater St. Louis,* supra, 623 F. Supp. at 601.

[12] 2 Leg. History Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) 1079 (Cong. Rec. (Senate) April 21, 1959, remarks of Sen. Goldwater).

[13] 2 Leg. History LMRDA 1630 (Cong. Rec. (House) 14354 (Aug. 12, 1959, remarks of Rep. Riehlman).

[14] While the legislative history does not specifically mention bannering, this is hardly surprising given that unions' widespread use of bannering to promote secondary boycotts substantially postdates the passage and amendment of that statutory provision. For that same reason, the Supreme Court's interpretation of this legislative history in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) (*DeBartolo II)* to distinguish between proscribed picketing and permitted handbilling cannot be regarded as conclusive of whether bannering should be proscribed to the same extent as picketing.

[15] *Lumber & Sawmill Workers Local Union No. 2797* (Stoltze Land & Lumber), 156 NLRB 388, 394 (1965). See also *Laborers Eastern*

site of a neutral employer is coercive within the meaning of Section 8(b)(4)(ii)(B) because it creates "a confrontation in some form between union members and the employees, customers, or suppliers who are trying to enter the employer's premises."[16]

Thus, traditional picketing, where union agents patrol in an elliptical pattern while carrying placards affixed to sticks, is but one example of the type of coercive union activity covered by Section 8(b)(4)(ii). [17] The prohibition against coercive secondary activity sweeps more broadly and has been held to encompass patrolling without signs,[18] placing picket signs in a snowbank and then watching them from a parked car, [19] visibly posting union agents near signs affixed to poles and trees in front of an employer's premises,[20] posting banners on a fence or stake in the back of a truck with union agents standing nearby[21] and, as mentioned above, simply posting agents without signs at the entrance to a neutral's facility.[22]

Further, "movement . . . [is] not a *sine qua non* of picketing," nor is the "carrying of placards" a necessary element.[23] Instead, the essential elements of picketing are: (1) the posting of union agents reasonably identifiable as such; and (2) placement of the union agents within the immediate vicinity of the employer's premises. Accord: *NLRB v. Teamsters Local 182,* supra, 314 F.2d at 57–58 (to "picket in the labor sense means to walk or stand in front of a place of employment as a picket" and a "picket" is "a person posted by a labor organization at an approach to the place of work.") (internal quotations omitted).

3. Bannering has the same coercive impact as traditional picketing

Here, the Respondent sought to bring about a consumer boycott of the neutrals through the posting of its agents, with massive banners, adjacent to the entrance of the neutrals' premises. This conduct was the confrontational equivalent of picketing, and thus proscribed by Section 8(b)(4)(ii) within the meaning of the statute, legislative history, and precedent discussed above. Customers about to enter the neutral premises encountered union agents, readily identifiable as such, posted by the Respondent and holding large signs, albeit ones stretched between two poles rather than affixed to a single picket, misleadingly claiming the existence of a "labor dispute" with the neutral employers. The banners sought to invoke "convictions or emotions sympathetic to the union activity" as well as "fear of retaliation if the picket is defied," *NLRB v. United Furniture Workers,* supra, 337 F.2d at 940 (internal quotation omitted). The display in front of the neutral's premises called for the same "automatic response to a signal" that traditional labor picketing evokes, and as such it is proscribed by Section 8(b)(4).[24]

Admittedly, there are differences between picket signs and banners, but those differences do not suggest the latter are any less likely to threaten, restrain, or coerce. On the contrary, banners are much larger and contain less speech. They are held by union agents, just as picket signs often are, but their imposing mass and length obviate the need for any patrolling to create a physical or, at the very least, symbolic confrontational barrier to those seeking access to the neutral employer's premises. Those agents holding the banners are not, as the Ninth Circuit has suggested, "human signposts."[25] They are sentient, watchful supporters of the boycott campaign, whose presence will provoke a far different reaction from passersby than the stanchions on a billboard. Oddly, the

Regional Organizing Fund (Ranches at Mt. Sinai), 346 NLRB 1251, 1253 fn. 5 (2006), and cases cited therein.

[16] *NLRB v. United Furniture Workers,* 337 F.2d 936, 940 (2d. Cir. 1964).

[17] See generally *Service Employees Local 87 (Trinity Maintenance),* 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996).

[18] *Service Employees Local 399 (Burns Detective Agency)*, 136 NLRB 431, 436–437 (1962).

[19] *NLRB v. Teamsters Local 182 (Woodward Motors),* 314 F.2d 53 (2d Cir. 1963), enfg. 135 NLRB 851 (1962).

[20] *NLRB v. United Furniture Workers,* supra. The court remanded the case to the Board to consider whether "the extent of confrontation necessary to constitute picketing" was present. Significantly, the court did not question the Board's determination that movement is not required to establish picketing and specifically agreed that "a picket may simply stand rather than walk." Id. at 939. Rather, the court was concerned that there was no indication that the union agents who sat in their cars after affixing the signs were visible to employees and customers entering the plant or clearly identifiable as union representatives. Those concerns are not present in this case.

[21] *Mine Workers Local 1329 (Alpine Construction),* 276 NLRB 415, 431 (1985), remanded on other grounds 812 F.2d 741 (D.C. Cir. 1987)

[22] *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001).

[23] *Lawrence Typographical Union 570 (Kansas Color Press),* 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968). The Board there recognized that it would "exalt form over substance" to limit the definition of picketing to situations where the union patrols with placards—precisely the error the majority commits.

[24] *Safeco,* supra, 447 U.S. at 619 (concurring opinion of Justice Stevens). Justice Stevens distinguished picketing—where the mere presence of the picketers sends an intimidating "signal" to those about to enter an establishment—from handbilling, which depends entirely on the persuasive force of the ideas expressed therein to produce a response. This concept is analytically distinct from the concept of signal picketing, where a union's conduct is directed at *employees* of a neutral employer urging them to strike, rather than at customers of the neutral urging a boycott. *Service Employees Local 254 (Women's & Infants Hospital)*, 324 NLRB 743 (1997). The General Counsel did not allege signal picketing directed at employees in this case.

[25] *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1214 (9th Cir. 2005).

Ninth Circuit itself admits to this reaction when rationalizing that members of the public can "avert [their] eyes" from the banner and agents.[26] Aversion and avoidance are characteristic behaviors of persons being threatened, restrained, or coerced. Indeed, it is clearly the intent of the agents engaged in bannering activity to have members of the public avoid them by avoiding the premises of the neutral employers, thus facilitating the secondary boycott objective.[27]

In sum, the size and placement of the banners, the stationing of union agents to hold them, and other direct similarities to picketing are all factors contributing to the confrontational impact of bannering, sharply distinguishing that conduct from handbilling's mere persuasion. The coercive impact was further heightened by the misleading message the banners conveyed. By naming only the neutral employers, the banners naturally and forseeably created the impression that the Respondent had a primary labor dispute with the neutral employers over the employment terms and conditions of the neutral's employees. In fact, however, the Respondent did not have a labor dispute with the neutral employers. See *San Antonio Community Hospital v. Carpenters Southern California District Council,* 125 F.3d 1230, 1235 (9th Cir. 1997) (hospital did not have labor dispute with union where union's primary labor dispute was with subcontractor working on hospital expansion project).

Having been misled into believing that the neutrals were unfair to their employees, potential customers would be more likely to support the union's boycott than they would if the banners truthfully indicated that the neutrals "must be dealing with other companies that deal with yet other companies that don't treat their employees right." *Overstreet v. Carpenters Local 1506,* 409 F.3d 1199, 1220 (9th Cir. 2005) (dissenting opinion). The result, of course, would be to increase pressure on the neutral employers to cease doing business with the unidentified primary employer targets.[28]

II. THE MAJORITY ABANDONS PRECEDENT AND REWRITES SECTION 8(B)(4), OPENING THE DOOR TO A SUBSTANTIAL EXPANSION OF SECONDARY ACTIVITY THAT CONGRESS INTENDED TO LIMIT

Rather than apply the settled understanding of "threaten, coerce, or restrain" established by decades of Board and court precedent, much of which is discussed above, the majority either ignores that precedent or claims it has been invalidated by the Supreme Court's decision in *DeBartolo II*, supra. Our colleagues are undeterred in their assertions by the fact that the Board has steadfastly adhered to its precedent after *DeBartolo II* and by the fact that nothing in the high court's decision negates the Board's historic definition of coercive picketing. The majority then fashions out of whole cloth a new definition of coercive picketing that effectively guts the protections afforded neutrals by Section 8(b)(4)(ii)(B). The standard they adopt today simply cannot be squared with the language or purpose of that statutory provision.

A. The Majority Ignores or Misapplies Precedent Governing Coercive Picketing

The majority begins its analysis by citing *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93, 99 (1958), for the proposition that Section 8(b)(4) did not enact a "wholesale condemnation of secondary boycotts," but instead allows such boycotts if the employer agrees to it or if it is brought about by means other than those proscribed by" that provision of the Act. We readily accept the notion that Section 8(b)(4) did not outlaw all union activity with a secondary objective. However, the holding of *Sand Door*–that Section 8(b)(4) did not prohibit boycotts with the employer's agreement–was legislatively overruled only a year later by the enactment of Section 8(e) in the Landrum-Griffin Act of 1959. See *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612, 634 (1967). Thus, while the Court's observation that Section 8(b)(4) did not outlaw all secondary activity re-

[26] Id.

[27] The majority seems to suggest that the distance of the bannering activity from the building entrances for Banner Medical and Northwest Hospital has some relevance to the confrontational nature of this conduct. Of course, the union agents in those situations could get no closer to the buildings without trespassing on private property. They displayed their banners in close proximity to main entrances to the neutral Employer's premises, at which point they would confront many or most persons who would ultimately enter the buildings in question.

The majority asserts that it was "highly impractical" for these union agents to observe customers as they entered the neutral premises due to the placement of the banners. At least as to Banner Medical Center and RA Tempe, we respectfully disagree. Union agents at those locations were stationed 80 feet from the parking lot entrance road and 15 feet from the restaurant's front door, respectively. Even if those agents normally faced the street (an issue the stipulation does not explicitly address), they could easily observe persons entering and leaving the neutral premises simply by turning their heads. Indeed, their attempt to confront and deter persons from entering onto the premises was logically directed towards those about to enter the premises.

[28] Member Schaumber observes that Board law requires unions to clearly identify the dispute with the primary employer and the neutral employer's relationship to the primary. See *Solien v. Carpenters of Greater St. Louis District Council,* 623 F.Supp. 597, 603–604 (E.D. Mo. 1985) (union cannot benefit from "publicity proviso" to Sec. 8(b)(4) if it misleadingly identifies neutral as disputant); *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950) (common situs picketing unlawful unless picketing clearly discloses that dispute is with primary). The Respondent's failure to comply with these well-settled standards supports an inference that it intended to mislead readers of the banners by creating the false impression that it had a primary labor dispute with them.

mains valid, the scope of the proscription intended by Congress was clearly broader than the Court in *Sand Door* foresaw.

The majority then asserts that the terms "threaten, coerce, or restrain" must be given their "ordinary meaning," which in their view requires proof of "violence, intimidation, blocking ingress or egress, or similar direct disruption of the secondaries' business." While as a matter of statutory construction, the plain and ordinary meaning of words generally controls in this context, we have been instructed that these terms do not "describe any sort of measurable physical conduct suggested by the ordinary meaning of those words," but are rather "legislative terms of art designed to capture certain types of boycotts deemed harmful by Congress." *Soft Drink Workers Local 812 v. NLRB,* supra. Further, as previously stated, it is beyond peradventure that *peaceful* picketing to promote a total secondary boycott is proscribed by Section 8(b)(4)(ii)(B).

Our precedent makes clear that the peaceful display of stationary signs by union agents posted at a neutral's premises, in support of a secondary object, is among the class of confrontational actions Congress condemned. Nevertheless, the majority now holds that both patrolling *and* the carrying of traditional picket signs are essential elements for a finding that coercive picketing occurred. That precise argument has been repeatedly and consistently rejected by the Board and reviewing courts. See, e.g., *Stolze,* supra (patrolling not essential); *Mine Workers (New Beckley Mining),* 304 NLRB 71 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (picket signs or placards not essential). While the majority makes an unpersuasive attempt to distinguish cases such as *Stolze*, *New Beckley,* and *Kansas Color Press,* supra, on their facts, our colleagues effectively concede that the Respondent's bannering would meet the definition of coercive picketing set forth in those cases. In each, the Board found that the posting of stationary union agents was coercive and violated Section 8(b)(4)(ii)(B). While its true that the unions in those cases also engaged in other coercive conduct, the Board did not rely on that conduct in its determination that the posting was unlawful.[29]

Unable to distinguish away precedent, the majority attempts a different tack and argues, in effect, that the *Stolze* standard is no longer good law because it was overruled in *DeBartolo II.* Unfortunately for our colleagues, history demonstrates otherwise. The Board has adhered to the *Stolze* standard in decisions issued both before and after *DeBartolo II.*[30] In *Jeddo Coal*, for example, union agents holding picket signs stood at the entrance to a neutral facility. The respondent union defended its actions on the grounds that there could be no 8(b)(4)(ii)(B) violation because there was no evidence of patrolling—precisely the reasoning advanced by the majority. But the Board rejected that position in a unanimous opinion that specifically relied upon the fact that "neither patrolling nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather, the essential feature of picketing is the posting of individuals at entrances to a place of work." 334 NLRB at 686. It cannot be gainsaid: the majority's decision flatly contravenes post-*De Bartolo II* precedent.

Nor is the majority's decision consistent with the Board's recent unanimous holding in *Brandon Regional Medical Center*[31] that a union "mock funeral procession" at a neutral hospital to pressure the hospital to cease doing business with a nonunion contractor violated Section 8(b)(4)(ii)(B). The procession involved union agents walking back and forth on the public sidewalks in front of the hospital's main entrance while carrying a "faux casket and accompanied by a [union] member dressed as the Grim Reaper." The union agents also distributed leaflets that detailed several malpractice lawsuits that had been filed against the hospital. Although the marchers did not carry any picket signs, the Board held that the funeral procession was picketing all the same. The majority fails to explain why picket signs were not necessary to establish picketing in *Brandon*, but are necessary now.[32]

[29] For example, in *Woodward Motors*, supra, the majority claims that the fact that "traditional" picketing (i.e., patrolling with signs on sticks) ended 2 weeks before the stationary display of signs began somehow distinguishes that case from the bannering at issue here. But the ambulatory picketing played no part in the Board's analysis of whether the stationary display of signs also constituted picketing. Further, in enforcing the Board's Order, the Second Circuit rejected the union's contention that the stationary display of signs was not picketing, and found instead that movement was not a "requisite" of picketing. *NLRB v. Local 182*, supra, 314 F.2d at 58.

[30] See, e.g., *Service Employees Local 87 (Trinity Maintenance),* supra, 312 NLRB at 743 (post-*DeBartolo II* case recognizing that posting is sufficient to find picketing and that patrolling or carrying signs not required); *Jeddo Coal),* supra (same).

While *Stolze* involved unlawful recognitional picketing in violation of Sec. 8(b)(7), the Board has repeatedly relied upon its definition of picketing in deciding. 8(b)(4) cases. See, e.g., *Ranches at Mt. Sinai,* supra, and cases cited therein. Any suggestion by the majority that *Stolze* and its progeny should be confined to 8(b)(7) cases—or that the same conduct could be picketing in that context but not under Sec. 8(b)(4)—cannot be reconciled with existing precedent.

[31] *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199 (2006), enf. denied 491 F.3d 429 (D.C. Cir. 2007).

[32] Far from reconciling their views on Sec. 8(b)(4) with *Brandon,* our colleagues rely only on the court of appeals decision denying enforcement. The court viewed the procession as a combination of noncoercive street theater and handbilling, in that the union members did

Our colleagues posit that these post-*De Bartolo II* Board decisions are entitled to no precedential deference because the Board in those cases "made no attempt to reconcile the 'posting' definition with *DeBartolo."* With all due respect, there was no need for such reconciliation. The Board was well aware of *DeBartolo II* when it decided these cases in 1993, 2001, and 2006. The *DeBartolo II* Court held that peaceful handbilling, not accompanied by picketing, urging a consumer boycott of a neutral employer did not violate Section 8(b)(4)(ii)(B). The Court reasoned that such handbilling is not coercive because it depends entirely on the persuasive force of the idea, and is thus distinguishable from picketing, which depends on intimidation to achieve its purpose.

There is no suggestion that the handbilling that occurred in this case violated the Act. Rather, the question presented is whether Respondent's bannering was unlawful. Nothing in *DeBartolo II* even hints that the Supreme Court intended to change the Board's longstanding and flexible definition of picketing, or the well-established understanding that posting an individual at a neutral's premises is sufficient to establish 8(b)(4)(ii)(B) coercion. Indeed, the court specifically endorsed the view that Section 8(b)(4)(ii)(B) proscribed stationary as well as ambulatory activity by its emphasizing that "[n]o picketing **or** patrolling was involved" in that case (emphasis added). See 485 U.S. at 575–576.

Our position finds further support in the 11th Circuit's 2005 decision in *Kentov v. Sheet Metal Workers Local 15,* 418 F.3d 1259 (11th Cir. 2005) (*DeBartolo II* "dealt only with a union's peaceful handbilling in the absence of any accompanying patrolling **or** picketing") (emphasis added). In obvious disagreement with the subsequent decision of the D.C. Circuit in *Brandon*, the court of appeals affirmed a lower court's issuance of a Section 10(l) injunction against the union's mock funeral protest, finding reasonable cause to believe that this conduct violated Section 8(b)(4)(ii)(B). Specifically relying on *Jeddo Coal*, *Trinity Building*, and *Stoltze*, the court "readily" concluded that the mock funeral was "the functional equivalent of picketing, and therefore, the First Amendment concerns in *DeBartolo* are not present in this case." Id. at 1265.

Indeed, the Supreme Court has endorsed the Board's broader and flexible view of picketing in a line of cases dating back many decades. See *Tree Fruits*, supra, 377 U.S. at 76 (Black, J., concurring) (emphasis added) ("'Picketing,' in common parlance and in § 8(b)(4)(ii)(B)," includes the concept of "patrolling, that is, *standing* or marching back and forth or round and round on the streets, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises[.]"); *Thornhill v. State of Alabama,* 310 U.S. 88, 101 fn. 18 (1940) (picketing includes merely observing workers or customers, persuading "employees or customers not to engage in relations with the employer. . . *through the use of banners*" and may include threatening employees or customers . . . by the mere presence of the picketer" which "may be a threat of, (i) physical violence, [or] (ii) social ostracism, being branded in the community as a 'scab'") (emphasis added). There is no indication that the *DeBartolo II* Court thought it was overturning these principles, and there is no justification for the majority to do so now.[33]

B. The Majority's New Standard Undercuts 8(b)(4) Protections

The majority requires proof that union agents patrol the neutral's premises with traditional picket signs before they will find that proscribed peaceful picketing has occurred. Absent such conduct, they will find an 8(b)(4)(ii)(B) violation *only if* the union engages in conduct that "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." This new standard lacks any support in, indeed, it is controverted by, the statutory text and Board precedent. The statutory text requires only that the union

not physically or verbally interfere with or confront hospital patrons and did not "creat[e] a symbolic barrier" by patrolling. In so finding, the court reasoned that the mock funeral procession took place 100 feet away from the hospital entrance, and thus satisfied the time, place, and manner requirements for limits on the abortion protests upheld by the Supreme Court in *Hill v. Colorado,* 530 U.S. 703, 734 (2000), and *Masden v. Women's Health Center,* 512 U.S. 753 (1994). As such, the court concluded that the funeral procession was protected by the First Amendment from regulation under Sec. 8(b)(4)(ii)(B).

We respectfully disagree with the opinion of the *Brando*n court and with our colleagues' summary reliance upon it rather than longstanding extant Board precedent. First, the standards applicable in an abortion protest context are obviously different from those where the conduct in question constitutes secondary activity subject to regulation by the Board. Second, the mock funeral procession constituted coercive picketing because the participants patrolled on the public right of way immediately adjacent to the hospital's property, and crossed the driveways and sidewalks commonly used by customers to enter the premises. *Brandon,* 346 NLRB at 203. As with the bannering activity in the present case, while the procession took place at a distance from the hospital building entrance, it was conducted at the entrance to the neutral *premises*.

[33] *Service Employees Local 399 (Delta Airlines),* 293 NLRB 602 (1989), a case on which the majority relies, is not to the contrary. There too, the disputed union conduct was limited to handbilling and nonpicketing publicity in the form of newspaper advertisements, both urging the public to boycott a neutral. "There was no violence, *picketing*, patrolling, or work stoppage." Id. at 603 (emphasis added). The Board's determination that this conduct was lawful, consistent with *DeBartolo II,* does not even question, much less overturn, the established principle that the posting of union agents at the premises of a neutral can constitute prohibited picketing under Sec. 8(b)(4)(ii)(B).

activity "restrain, coerce, or threaten"; no proof of actual or potential loss or damage is necessary to find that the means used to promote a secondary boycott is proscribed. And Board law, which, until today, encompassed a broad range of coercive activity beyond traditional picketing, was faithful to that statutory text. It required no specific, much less objectifiable, quantum of disruption to establish a violation.

Indeed, the Board has found violations of Section 8(b)(4)(ii)(B) where there was no evidence of picketing or proof of loss or damage to the neutral's operations whatsoever. For example, in *General Maintenance Co.*, supra, 329 NLRB at 664–665, 680, the Board held that the union violated Section 8(b)(4) by, among other things, a mass assembly of 40-60 union agents at the home of the owner of a neutral entity.[34] The owner was away, but his 9 year old son and housekeeper were present. The Board found that this conduct, which was not accompanied by any shouting or name calling, violated Section 8(b)(4)(ii)(B) because the union "reasonably could foresee that the visit would harass and embarrass [the owner] in front of his neighbors and, thus, would have a coercive effect." Id. at 682. There was no evidence of picketing and the employer's operations were entirely unaffected, but the Board found a violation all the same.[35]

Cases such as *General Maintenance Co.* demonstrate the folly of imposing a new requirement of proof of disruption of operations to establish an 8(b)(4) violation in the absence of traditional picketing, and of attempting to delimit coercive conduct to a narrow class of secondary activity. And, as discussed above, consistent with the statutory text, the Board has never required a showing of specific or likely damage for secondary boycott activity to be deemed unlawful. See, e.g., *New Beckley Mining,* supra, 304 NLRB 71 (mass gathering at motel of shouting strikers seeking to oust replacement employees was a form of coercive picketing; *sufficient that* crowd was gathered in furtherance of labor dispute and its shouted messages were directed to removal of replacements from motel); *Carpenters (Society Hill Towers Owner's Assn.),* 335 NLRB 814, 820–823 (2001), enfd. 50 Fed. Appx. 88 (3d. Cir. 2002) (broadcasting union message at excessive volume at condominium unlawful; "the Board has found violations of Section 8(b)(4)(ii)(B) where unions' secondary activities, short of picketing, have *interfered with* the use of private facilities by patrons and tenants of neutrals) (emphasis added). The majority's newly fashioned standard cannot be reconciled with this precedent.

The primary justifications offered by our colleagues for refuting the Congressional imperatives underpinning Section 8(b)(4) and rejecting the Board's heretofore broad and flexible definition of coercive conduct are newly divined policy considerations at odds with our statutory mandate. Thus, our colleagues observe that the consequences of an 8(b)(4) violation are "severe," as the conduct "becomes" an unfair labor practice and is subject to injunctive relief and a suit for damages, while employees who participate are not protected by the Act from discipline or discharge.

These considerations have no place in the Board's decisionmaking unless the general language in the Act's Preamble "to promote collective bargaining" is to be construed so broadly as to swallow enforcement of the specific provisions of the Act. Congress struck the secondary boycott weapon from the hands of organized labor in 1947 because it determined that the cost to society was too high. That decision was bitterly contested at the time, but it is settled law now. The fact that Congress imposed severe sanctions for violations of Section 8(b)(4) only reinforces the significance of the harm it perceived to flow from the untrammeled spread of labor disputes into interstate commerce. It is our duty to carry out that Congressional objective, not to second-guess the severity of the remedies Congress imposed. We have no authority to constrain the reach of Section 8(b)(4) to shield one of our stakeholders from the Act's proscriptions.

Our colleagues' new narrow definition of picketing and their new requirement for a showing of actual or threatened disruption before other secondary activity will be found unlawful unquestionably augments union power. Unless the General Counsel can prove that disruption could be expected to occur in the neutral's business directly as a result of the union's secondary boycott activity or that such a disruption has, in fact, occurred, the Board will no longer authorize the General Counsel to seek injunctive relief or subsequently find a violation. However, the majority fails to adequately explain the contours of their new standard, and their efforts to do so raise more questions than they answer. Is proof of disruption alone sufficient, or must the General Counsel also establish that actual "harm" to the neutral's opera-

[34] The many other violations found by the Board in that case included hurling trash bags into the lobby of a neutral office building. The majority appears to concede that such tactics violate Sec. 8(b)(4)(ii)(B).

[35] The majority allows that a mass assembly of this type would "exert a coercive force against the employer" – but only if it was accompanied by shouting and name calling that caused "employer agents" to fear for their safety. The majority never explains how this conduct fits within their "disruption of operations" standard. Moreover, our colleagues apparently would allow such mass assemblies if unaccompanied by shouting and name calling, or if aimed not at an agent, but his or her family. There is no justification for restricting Sec. 8(b)(4) in this manner.

tions was threatened or inflicted, as the majority appears to suggest at one point? Will disruption of other businesses owned by the neutral count? What form of proof will the majority require to establish the requisite likelihood of future harm? Our colleagues leave these and a host of other questions to another day, jeopardizing not just the existence of numerous vulnerable small businesses already battered by the economy, but also the livelihoods of their many employees

The standard adopted by the majority substantially increases the leverage of unions that may be tempted to exploit the threat of coercive secondary activity, and creates new incentives to utilize such tactics. Communications, such as the letters that were sent by the Respondent, routinely will be sent to neutral Employers warning of "vigorous" public protests unless the neutral ceases doing business with a primary employer. Neutral employers will be understandably reluctant, given the vague but heightened burden of proof imposed by my colleagues, to invoke the Board's processes, and will instead simply cease doing business with the primary employer before bannering commences.

In short, the majority's decision is inconsistent with the text of the statute, its legislative history, decades of precedent, and sound and well-established policy. There is simply no reasoned basis for their constrained reading of 8(b)(4), which will have a lasting and significant economic impact on scores of businesses across the country.

C. A Finding That Bannering To Promote A Secondary Boycott Violates Section 8(b)(4)(ii)(B) Does Not Raise Constitutional Concerns

The majority invokes the judicial doctrine of constitutional avoidance to conclude that the Board may not interpret Section 8(b)(4) to prohibit bannering. This arguably requires consideration of whether a finding that union bannering violates Section 8(b)(4)(ii)(B) would potentially conflict with the free speech clause of the First Amendment and, if so, "whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to" the statutory provision.[36] In *DeBartolo II,* the Court applied this rule of construction in holding that peaceful secondary handbilling is not coercive and therefore does not violate Section 8(b)(4)(ii)(B). In earlier cases, the Court found that no constitutional concerns were raised by holding that secondary picketing was violative of Section 8(b)(4).[37] *DeBartolo II* did not disturb these findings. Thus, even assuming arguendo that the Board, as an administrative agency, must engage in the same constitutional analysis used in *DeBartolo II* by the high court, no constitutional issue is raised by barring secondary bannering to the same extent as traditional secondary picketing because the differences between the two activities are legally insignificant, as we have explained.[38]

Furthermore, we disagree with our colleagues' interpretation of the Supreme Court's rulings about the breadth of First Amendment protections involved here. For instance, while they correctly state that the Supreme Court struck down the particular cross-burning law at issue in *Virginia v. Black*, 538 U.S. 343 (2003), the Court also held that states could constitutionally ban cross-burning when done with the intent to intimidate. Section 8(b)(4)(ii)(B) is addressed to confrontational union conduct that "threatens, coerces, or restrains," i.e., obviously including conduct that intimidates. More importantly, none of the individual free speech cases cited by our colleagues involves economic regulation, in which the Court has recognized a substantial governmental interest justifying some constraints on First Amendment freedoms,

[36] *DeBartolo II*, supra, 485 U.S. at 577. Member Schaumber notes that the Board has stated that reliance on constitutional avoidance principles improperly "arrogate[s] to this [agency] the power to determine the constitutionality of mandatory language in the Act we administer . . . [A] power that the Supreme Court has indicated we do not have." *Handy Andy, Inc.*, 228 NLRB 447, 452 (1977); see also *Hudgens v. NLRB,* 424 U.S. 507 (1976) (in which the Supreme Court castigated the Board for venturing into a First Amendment analysis, rather than applying the terms of the Act). While the Board's statement in *Handy Andy* may be interpreted as too categorical, in Member Schaumber's view, the majority's analysis demonstrates all too clearly the danger of an administrative agency invoking constitutional avoidance principles. Rather than construe the text as written and impart the Board's expertise and experience in assessing the coercive impact of secondary activity, the majority is able, under the guise of constitutional avoidance principles, to effectively reverse decades of Board precedent and narrowly construe statutory text to permit coercive secondary conduct Congress sought to outlaw.

[37] *Safeco*, supra at 616; *Electrical Workers v. NLRB,* 341 U.S. 694, 705 (1951).

[38] Member Schaumber observes that the First Amendment does not shield the coercive bannering in this case for the further reason that it falsely and fraudulently claimed that the Respondent had a labor dispute with the neutral employers. By displaying the banners in a manner that would cause most, if not all, readers to be misled into believing that the Respondent had a primary labor dispute with the neutrals, the Respondent crossed the line separating protected hyperbole from fraudulent misrepresentation. *San Antonio Community Hospital v. Carpenters Southern California District Council,* supra, 125 F.3d at 1236–1237. As such, the fraudulent nature of the banners' messages remove them from any First Amendment protection. Id.; see also *Madigan v. Telemarketing Associates, Inc.,* 538 U.S. 600, 612 (2003) ("the First Amendment does not shield fraud"); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637 (1980) ("fraudulent misrepresentations can be prohibited"). This is especially true in the labor context, where as noted above, Board law consistently requires unions to carefully distinguish between the primary employer and neutrals in their communications.

particularly in the "special context of labor disputes."[39] In this respect,

> [G]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States v. O'Brien*, 391 U.S. 367. A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has 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. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490; *NLRB v. Retail Store Employees*, 447 U.S. 607. . . . Secondary boycotts and picketing by labor unions may be prohibited, as part of "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." *NLRB v. Retail Store Employees*, supra, at 617-618 (BLACKMUN, J., concurring in part). See *Longshoremen v. Allied International, Inc.*, 456 U.S. 212, 222–223, and n. 20.[40]

Clearly, both bannering *and* picketing involve elements of speech. However, the expressive element represented by the brief, obtuse, and misleading written message on a union banner–such as "Don't Eat RA Sushi" in one of the cases before us–is less than the expressive element in picket signs, usually accompanied by vocal protests, and it is certainly less than in handbills. Even if the banner's message is entitled to some weight under the First Amendment's protections for free speech, it does not warrant *greater* weight than in traditional secondary picketing situations. Because the confrontational conduct element in secondary bannering predominates over the speech element, we may find it unlawful under Section 8(b)(4) without raising any serious concern for impairment of the freedom of speech.

[39] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 fn. 17 (1976).

[40] *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 912 (1982). The majority characterizes the Court's description of the scope of constitutional protection for boycott activity in the labor context as "dictum" and demands that it be read narrowly. We believe the Court's discussion of its own precedent is entitled to greater weight than the majority acknowledges. And while our colleagues also note the Court's caution that governmental regulation that has an "incidental effect on First Amendment freedoms" must restrict those freedoms no more than is essential to the furtherance of the Government's interest in imposing such regulation, id. at 912 fn. 47, prohibiting secondary bannering plainly furthers the important governmental interest in protecting neutrals from "coerced participation in industrial strife." Id. at 912.

Conclusion

Section 1 of the Act declares the national labor policy of eliminating obstructions to commerce caused by labor disputes. The Wagner Act sought to achieve that purpose without imposing any restraint on unions' use of economic pressure to achieve secondary objectives. This arrangement proved unworkable, and so Congress added the Taft-Hartley amendments in 1947. Those amendments, which were a response, in part, to abuses of union power, brought needed balance to American labor relations and needed protection to neutral employers, their employees, and customers.

Section 8(b)(4)(ii)(B) deprived unions of a substantial weapon. No longer could they further their cause in a dispute with a primary employer by picketing "'to persuade customers of a secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon the primary employer.' Such picketing spreads labor discord by coercing a neutral party to join the fray."[41]

Today, the majority puts that neutral party right back into the fray. Ignoring decades of precedent establishing that bannering is coercive, our colleagues hold that it is mere persuasion and thus lawful. In the process, the majority reaches out to narrow the protection established by Section 8(B)(4) through a new and narrow definition of picketing and a startling new standard that exempts other types of secondary activity from the Act's reach unless it causes or can be expected to cause some unknown quantum of "disruption of the secondary's operation." Their holding is not compelled by any construction of Section 8(b)(4) and its legislative history, nor by any valid concerns about a conflict with First Amendment protections. Our dissent *is* compelled by a serious concern that their standard will assuredly foster precisely the evil of secondary boycott activity and expanded industrial conflict that Congress intended to restrict by enacting Section 8(b)(4)(ii)(B). We will not be alone in finding this decision to be most troubling and ill-advised.

For all the foregoing reasons, we respectfully dissent.

APPENDIX A

The following companies are persons and/or employers engaged in commerce and in industries affecting commerce within the meaning of the Act. They are grouped by the location of the relevant bannering.

BANNER THUNDERBIRD MEDICAL CENTER

—Banner Health System (Banner Health), an Arizona nonprofit corporation, with an office and place of business in Phoenix, Arizona, has been engaged in the hospi-

[41] *Safeco*, supra at 616 (internal citations omitted).

tal/health care business and owns and operates the Banner Thunderbird Medical Center in Glendale, Arizona.

—Eliason & Knuth (E&K), a Nebraska corporation, with an office and place of business in Phoenix, Arizona, has been engaged as a contractor installing drywall, metal studs and interior finishes in commercial and residential construction projects at various job sites located throughout Maricopa County, Arizona.

—Layton Construction Company of Arizona (Layton) is an Arizona corporation with an office and place of business in Phoenix. Banner Health engaged Layton to be the general contractor on the remodeling of a building at its Thunderbird Medical Center. Layton subcontracted with E&K to perform construction work on this building.

NORTHWEST HOSPITAL

—Triad Hospitals, Inc. (Triad), a Delaware limited liability corporation, owns and operates medical facilities in 17 states, including Northwest Hospital, LLC (Northwest Hospital) in Tucson, Arizona and the Oro Valley Hospital that was under construction in Oro Valley, Arizona.

—Delta/United Specialties (Delta), a Tennessee corporation, with an office and place of business in Memphis, Tennessee, has been engaged as a contractor performing interior finish work.

—Hardrock Concrete Placement Co. Inc. (Hardrock), an Arizona corporation, with an office and place of business in Phoenix, Arizona, has been engaged as a contractor performing concrete work.

—Bovis Lend Lease, Inc. (Bovis), a Florida corporation has an office and place of business in Charlotte, North Carolina. Triad engaged Bovis to be the general contractor for the constriction of its Oro Valley Hospital. Bovis subcontracted with Delta and Hardrock to perform construction work on this hospital.

RA TEMPE

—RA Sushi Holding Corporation (RA Sushi), a Delaware corporation, is a wholly owned subsidiary of Benihana National Corporation (Benihana), also a Delaware corporation. RA Sushi owns RA San Diego Corporation, a Delaware corporation, which is engaged in the restaurant business and was constructing the RA San Diego restaurant in San Diego, California. RA Sushi also owns RA Tempe Corporation (RA Tempe), a Delaware corporation, which operated a restaurant in Tempe, Arizona.

—Enterprise Interiors, Inc. (Enterprise), a California corporation, with an office and place of business in Orange, California, has been engaged as a contractor performing interior finish work.

—R.D. Olsen Construction (R.D. Olsen) is a California limited partnership with an office and place of business in Irvine, California. Benihana, the parent of RA Sushi Holding, engaged R.D. Olsen to be the general contractor for the construction of the RA San Diego restaurant. R.D. Olsen subcontracted with Enterprise to perform construction work on this restaurant.

APPENDIX B

The specific circumstances of the bannering at each location were as follows:

(1) Banner Medical

At the Thunderbird Medical Center, where primary employer E&K was engaged as a construction subcontractor in a building remodeling project, the Union displayed a banner measuring 16 feet by 3 feet with the inscription "SHAME ON BANNER THUNDERBIRD MEDICAL CENTER" in large letters in the center of the banner, flanked on the left and right sides with the words "LABOR DISPUTE" in smaller letters. Two to three union representatives held the banner and distributed handbills to pedestrians who asked about the banner. The banner was erected on a public sidewalk in front of Banner Medical's parking lot, approximately 80 feet from the entrance to the parking lot and 510 feet from the front door of the Thunderbird Medical Center, facing automobile traffic on a public street.

Banner Health owns and operates the Thunderbird Medical Center.

(2) Northwest Hospital

At the location of neutral Northwest Hospital, the Union displayed two banners with the inscription "SHAME ON NORTHWEST MEDICAL CENTER" in large letters in the center of the banner, flanked on the left and right sides with the words "LABOR DISPUTE" in smaller letters. Both banners measured 20 feet by 3 feet and were placed on public rights of way facing automobile traffic on public streets. Two to three union representatives held each banner and had handbills available to distribute to pedestrians who inquired about the banner. One of the banners was displayed 1,050 feet from a vehicle entrance to Northwest Hospital and the other banner was displayed 450 feet from a vehicle entrance to the facility and 300 feet from its front door entrance. The primary employers, Delta and Hardrock, were never present at Northwest Hospital during the bannering. They were working 11 miles away at the Oro Valley Hospital construction project, which was owned by Northwest Hospital's parent corporation, Triad.

(3) RA Tempe

The bannering in the third case took place at the RA Tempe restaurant in Tempe, Arizona. The banner displayed at this neutral site measured 15 feet by 3 feet. It was set up on the curb side of a public sidewalk - i.e., immediately adjacent to the street - 15 feet from the restaurant's front door entrance, facing away from the entrance and towards the street. Two to three union representatives held the banner and distributed handbills to interested passersby. Rather than declaring shame on this neutral employer, the banner stated "DON'T EAT RA SUSHI" with the "LABOR DISPUTE" wording on both sides. The primary employer, Enterprise, was never present while the bannering took place at RA Tempe. Rather, Enterprise was performing construction work at the RA San Diego restaurant, which was owned by RA Sushi, the entity that also owned RA Tempe.

APPENDIX C

The text of the handbills distributed at the RA Sushi restaurant:

SHAME ON R A SUSHI

FOR DESECRATION OF THE AMERICAN

WAY OF LIFE

A rat is a contractor that does not pay all of its employees prevailing wages, including either providing or making payments for health care and pension benefits.

Shame on **R A Sushi** for contributing to erosion of area standards for San Diego carpenter craft workers. Carpenters Local 1506 has a labor dispute with *Enterprise* that is a subcontractor for **R D Olsen** on **R A Sushi's** newest restaurant. Enterprise does not meet area labor standards, including providing or paying for health care and pension to all its carpenter craft employees.

Carpenters Local 1506 objects to substandard wage employers like **Enterprise** working in the community. In our opinion the community ends up paying the tab for employee health care and because low wages tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 1506 believes that the **R A Sushi** has an obligation to the community to see that area labor standards are met when doing their construction work. They should not be allowed to insulate themselves behind "independent" contractors.

PLEASE CALL R A SUSHI AT [phone number] AND TELL THEM THAT YOU WANT THEM TO DO ALL THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK DONE AT THEIR FACILITIES.

The members and families of Carpenters Local 1506 thank you for your support. Call [phone number] for further information.

WE ARE NOT URGING ANY WORKER TO REFUSE TO WORK NOR ARE WE URGING ANY SUPPLIER TO REFUSE TO DELIVER GOODS.