

No. 17-73210

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

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

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH A. HEANEY
Supervisory Attorney

GREG P. LAURO
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570
(202) 273-1743
(202) 273-2965

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board to enforce a final Board Decision and Order issued against the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229, AFL-CIO (“Local 229”) on August 30, 2017, reported at 365

NLRB No. 126. (ER1-7.)¹ The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), and venue is proper because the unfair labor practices occurred in Temecula, California. The Board filed its application for enforcement on November 30, 2017. This filing was timely; the Act places no time limit on the institution of proceedings to enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. The overarching issue in this case is whether the Board reasonably found that Local 229 violated Section 8(b)(4)(i)(B) of the Act by repeatedly (and admittedly) inducing or encouraging the employees of a neutral employer to strike or refuse to perform work in support of Local 229’s primary labor dispute with another employer. A subsidiary issue is whether the Board properly rejected Local 229’s claim that the First Amendment protects its efforts, undertaken through oral and written communication, to induce or encourage neutral employees to stop work.

¹ “ER” refers to the record excerpts. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Local 229’s opening brief.

2. Whether the Board acted within its broad remedial discretion by using its standard remedial notice language.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.²

STATEMENT OF THE CASE

Section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), limits union pressure in a labor dispute to the “primary” employer involved, while shielding from pressure any “secondary” or “neutral” employer with whom a union has no direct labor dispute. *See NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951). Congress enacted Section 8(b)(4) to ensure “that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited,” and not unnecessarily affect commerce. *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 106 (1958). This case involves Section 8(b)(4)(i)(B), 29 U.S.C. § 158(b)(4)(i)(B), which prohibits a union from “inducing or encouraging” employees of a neutral employer to strike or refuse to perform services in support of the union’s dispute with a primary employer.

Here, Local 229 made appeals to employees of a neutral employer, Commercial Metals Company d/b/a CMC Rebar (“CMC”), through texts, flyers, phone calls, and conversations, inducing and encouraging those employees to stop

² Other statutory and constitutional provisions are reproduced in Local 229’s Brief.

working in support of Local 229's dispute with another employer. CMC filed charges, and the Board's General Counsel issued a complaint, alleging that Local 229 violated Section 8(b)(4)(i)(B) by inducing or encouraging employees to stop working for CMC, in furtherance of Local 229's primary labor dispute with another employer, Western Concrete Pumping, Inc. ("WCP"). (ER2; 8-27.) The parties waived a hearing before an administrative law judge and submitted the case to the judge with a joint stipulation of facts and exhibits, which the parties agreed constituted the entire record in this case. (ER2-4; 8-37.) The parties stipulated that the purpose of Local 229's activity was to induce or encourage the employees of neutral-employer CMC to strike or refuse to perform work in support of Local 229's primary labor dispute with WCP. Based on that record, the judge found that Local 229's attempts to enmesh neutral-employer CMC in its primary labor dispute with WCP constituted unlawful secondary activity in violation of Section 8(b)(4)(i)(B). (ER3-5.)

The judge also rejected Local 229's claim that Section 8(b)(4)(i)(B), as applied here to activities involving verbal and written communications, ran afoul of the First Amendment, finding that the Supreme Court rejected that claim in *IBEW Local 501 v. NLRB*, 341 U.S. 694, 705 (1951) ("*IBEW Local 501*"). (ER5.) In addition, the judge found no merit in Local 229's other challenges to the application of Section 8(b)(4)(i)(B) based on Section 8(c) of the Act, 29 U.S.C. §

158(c), the Thirteenth Amendment, and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (“RFRA”). (ER5-6.) Local 229 filed exceptions. (ER1, 38.) The Board (then-Chairman Miscimarra and Members Pearce and McFerran) affirmed the judge’s findings and recommended order, as modified. (ER1.)

I. The Board’s Findings of Fact

The Board findings of fact, based on the stipulated record, are summarized below.

A. Background: Local 229’s Primary Labor Dispute with WCP

The underlying labor dispute involved construction of a parking structure at the Pechanga Resort & Casino in Temecula, California (“Pechanga jobsite”). The general contractor on that jobsite was McCarthy Building Companies, Inc. (“McCarthy”). CMC worked as McCarthy’s subcontractor at the jobsite from February 2016 to December 2, 2016. CMC furnished and installed reinforcing steel and post-tensioning reinforcement. WCP, another McCarthy subcontractor, performed concrete work at the jobsite. (ER2; 12, ¶ 3(b).)

Local 229 and Operating Engineers Local 12 (“Local 12”) have a primary labor dispute with WCP because WCP does not pay area standard wages.³ (ER2;

³ Hereafter, the two unions’ common labor dispute with WCP will be referred to as “Local 229’s primary labor dispute with WCP,” unless context requires a separate reference.

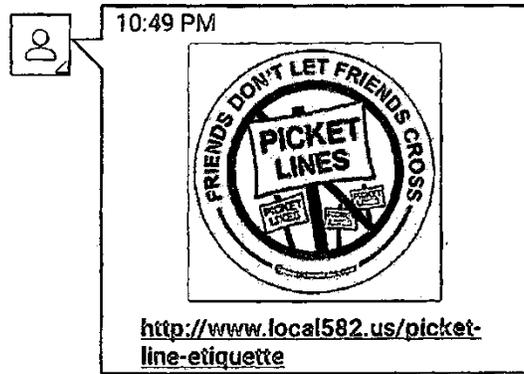
14, ¶ 9(a)-(b).) At no time have Local 229 or Local 12 been engaged in a primary labor dispute with CMC, McCarthy, or any contractors at the jobsite other than WCP. (ER2; 14, ¶ 9(c)-(d).)

On August 16, 2016, Local 12, in support of its primary labor dispute with WCP, began picketing at the Pechanga jobsite. The picketing was aimed solely at WCP. The picketers carried signs reading, “Not Paying Area Standard Wages – Western Pumping.” The picketing continued until mid-November. There is no contention that this (primary) picketing was unlawful. (ER2-3; 11, ¶ 11.)

B. Local 229 Repeatedly Induces and Encourages Employees of Neutral-Employer CMC to Stop Work in Support of Local 229’s Primary Labor Dispute with WCP

On four occasions over about a two-week period, Local 229’s business agent, James Alvernaz, appealed to employees of CMC, a neutral employer, for the purpose of inducing or encouraging those employees to strike or refuse to perform work for CMC in support of Local 229’s primary labor dispute with WCP. (ER3-4; 14-16, ¶¶ 8, 12-15.) These appeals, detailed below, included texting, passing out flyers, calling, and speaking directly to CMC’s employees.

On August 16, Alvernaz sent a text message to CMC employees. (ER3; 15, 35, ¶ 12 & exh. 5.) The text message contained a link to a webpage describing picket-line etiquette and a Picket Lines symbol circled by the words, “FRIENDS DON’T LET FRIENDS CROSS.” The text message provided:



(Id.)

A few days later, Alvernaz again appealed to CMC employees, this time by calling them on the telephone. Specifically, Alvernaz telephoned a CMC employee about the Local 12 picket against WCP to encourage the employee that in support of Local 229's labor dispute with WCP, he and other employees should not perform work for CMC. (ER3; 15, ¶ 13.)

In late August, Alvernaz again induced or encouraged CMC's employees at the Pechanga jobsite to refuse to perform work, by placing a flyer in employees' lunch boxes. The flyer, entitled "Picket Line Etiquette," stated in relevant part:

Picket Line Etiquette

Labor's first commandment:

"THOU SHALL NOT CROSS THE LINE"

A good Union member is EXTREMELY CAREFUL when confronted with a picket line situation.

When a picket line is established on a job where you are working:

You MAY LEAVE. You DO NOT TALK.

You READ the PICKET SIGN as you leave.

You DO NOT hang around near the job.

You know that ONCE A PICKET LINE IS ESTABLISHED, your Business Agents and other Union Officials are legally gagged and handcuffed from giving advice pertaining to THAT JOB. They can only tell you if the Picket Line is AUTHORIZED.

(ER3; 16, 36, ¶ 14 & exh. 6) (emphasis and capitalization in original). While at the jobsite that day to deliver the flyers, Alvernaz also spoke directly with employees to further encourage them to support Local 229's dispute with WCP by not working for CMC. *Id.* Around the same time, Alvernaz visited the jobsite again and further encouraged employees that in support of Local 229's dispute with WCP, they should not perform work for CMC. (ER3; 16, ¶ 15.)

II. The Board's Decision and Order

Consistent with the parties' stipulations, the Board (then-Chairman Miscimarra and Members Pearce and McFerran) found, in agreement with the administrative law judge, that Local 229 violated Section 8(b)(4)(i)(B) of the Act by (1) appealing to employees to induce or encourage them to strike or stop work for their neutral employer for (2) the unlawful secondary purpose of furthering Local 229's primary labor dispute with another employer. (ER1.) The Board affirmed the administrative law judge's rejection of Local 229's constitutional and statutory arguments. The Board also adopted the judge's recommended Order as modified to conform to the Board's standard remedial language. (*Id.*) The Board ordered Local 229 to cease and desist from the violations found. Affirmatively, the

Board ordered Local 229 to post and, if appropriate, electronically distribute a remedial notice at its office and union hall in San Diego, California, and to provide signed copies of the notice for posting by CMC at its Temecula, California facility, if CMC wishes to do so. (*Id.*)

STANDARD OF REVIEW

The Court will uphold the Board's interpretation and application of the Act provided it is rational and consistent with the Act and controlling precedent. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996); *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995). Relevant here, "[t]he Board's reading and application of [Section 8(b)(4)] are long established, have remained undisturbed by Congress, and fall well within that category of situations in which courts should defer to the agency's understanding of the statute which it administers." *NLRB v. Local 638, Enterprise Ass'n of Steam Pipefitters*, 429 U.S. 507, 528 (1977). The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1464 (9th Cir. 1997).

The Court, however, does not defer to the Board's interpretation of the First Amendment or other constitutional provisions, *Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1209 (9th Cir. 2005), or to the Board's interpretation

of statutes other than the Act, such as RFRA. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008).

SUMMARY OF ARGUMENT

1. The parties stipulated that Local 229's secondary activities satisfied both elements of a Section 8(b)(4)(i)(B) violation. They agreed that Union Agent Alvernaz, through texts, flyers, phone calls, and conversations: (1) induced or encouraged the employees of neutral employer CMC to strike for (2) the secondary purpose of pressuring CMC to cease doing business with WCP, the employer with whom Local 229 had a labor dispute. Because there is no dispute regarding Local 229's activity and purpose, substantial evidence supports the Board's finding that Local 229 violated Section 8(b)(4)(i)(B).

The Board properly rejected Local 229's contention that its oral and written inducements were "pure speech" protected by the First Amendment, and that Section 8(b)(4)(i)(B) is unconstitutional as applied to this case. In doing so, the Board explained that the Supreme Court "answered the free speech argument" in *IBEW Local 501*, where it held that Congress's decision to proscribe any kind of inducement or encouragement of secondary pressure does not violate the First Amendment. The Board properly observed, as have the courts of appeals, that *IBEW Local 501* remains "binding law," thereby rejecting the claim that its decision is not sustainable under current First Amendment jurisprudence.

Local 229's attempts to undermine *IBEW Local 501* lack merit. Section 8(b)(4)(i)(B)'s broad statutory language, Congress's expressed intent to prohibit all secondary inducements, and established precedent belie Local 229's claim that *IBEW Local 501* is limited to the picketing context and cannot be applied to this case, which involves speech. Local 229, moreover, ignores precedent that speech used to obtain an unlawful object does not warrant First Amendment protection. It also errs in claiming that a sea change in recent First Amendment jurisprudence calls *IBEW Local 501* into question. Local 229's cited cases do not address Section 8(b)(4) or *IBEW Local 501*; therefore, they do not modify the relevant First Amendment analysis from that binding precedent.

The Board also properly rejected Local 229's claim that Section 8(c) of the Act immunizes its unlawful secondary appeals because they contained no threat of reprisal. As the Board observed, *IBEW Local 501* rejected this claim as well, holding that Section 8(c) does not limit the phrase "induce or encourage" in Section 8(b)(4)(i) to require a threat or promise.

Next, the Board properly rejected the claim that the application of Section 8(b)(4)(i)(B) here violated the Thirteenth Amendment's bar on involuntary servitude. The Supreme Court and this Court have rejected an identical Thirteenth Amendment challenge. There is no involuntary servitude because the Board's Order does not compel neutral employees to work. Rather, the Order bars Local

229 from inducing or encouraging them to strike to put secondary pressure on another employer with whom Local 229 has a labor dispute.

Nor, as the Board determined, does RFRA protect Local 229's unlawful appeals for secondary pressure. Pursuant to RFRA, the government may substantially burden the free exercise of religion only in furtherance of a compelling state interest using the least restrictive means. The Board assumed, without deciding, that Local 229 was correct in claiming that protected, concerted activity under the Act may constitute an "exercise of religion" under RFRA. Local 229, however, did not show that Section 8(b)(4)(i)(B) substantially burdens its right to engage in such activity. That section narrowly prohibits unions from acting to enmesh neutral entities in its dispute with another entity, and as the Board observed, Local 229 does not argue that enmeshing neutrals is a religious requirement of engaging in protected, concerted activity. Moreover, the RFRA claim also fails because the Board's Order furthers a compelling state interest (avoiding economic disruption caused by enmeshing neutrals) by the least restrictive means (prohibiting inducement or encouragement of secondary pressure that enmeshes neutrals).

2. Local 229 cannot show that the Board abused its broad remedial discretion by using the traditional notice language for the violation found. The

notice serves its intended purpose—it accurately apprises employees of their rights under the Act and the nature of the violations found.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT LOCAL 229 VIOLATED SECTION 8(b)(4)(i)(B) BY ADMITTEDLY INDUCING OR ENCOURAGING EMPLOYEES OF A NEUTRAL EMPLOYER, CMC, TO STRIKE OR REFUSE TO WORK FOR THE SECONDARY PURPOSE OF SUPPORTING LOCAL 229’S PRIMARY LABOR DISPUTE WITH ANOTHER EMPLOYER

A. The Act Bars a Union From Inducing or Encouraging Employees of a Neutral Employer To Engage in a Work Stoppage To Further the Union’s Labor Dispute with the Primary Employer

Since 1947, Section 8(b)(4) of the Act has restricted unions in their use of a tactic “known as the secondary boycott,” in which the union engages in activity “whose sanctions bear, not upon the employer” with whom the union has a labor dispute, “but upon some third party who has no concern in it.” *Local 761, Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 672 (1961) (citation and internal quotation marks omitted). Thus, Section 8(b)(4)(i)(B), 29 U.S.C. § 158(b)(4)(i)(B), forbids, as relevant here, a union to induce or encourage employees to refuse to work for their employer with an object of forcing that employer to cease doing business with another employer.⁴

⁴ Section 8(b)(4)(i)(B) makes it an unfair labor practice for a union:

These restrictions on a union’s ability to disrupt the commerce of neutral parties in furtherance of its own labor-relations goals serve important statutory purposes. Specifically, they implement “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.” *Denver Bldg. & Trades Council*, 341 U.S. at 692 (emphasis added). As the language of Section 8(b)(4)(i)(B) makes clear, the “others” that are shielded from unwanted union pressure include the neutral’s employees. *See Int’l Longshoremen’s Ass’n v. Allied Intern., Inc.*, 456 U.S. 212, 222-23 & n.20 (1982) (secondary-boycott provisions prohibit unions from inducing employees of a neutral employer to cease work for an unlawful object). In other words, the Act’s secondary boycott provisions

(i) to engage in, or to induce or encourage any individuals employed by any person . . . to engage in, a strike or a refusal . . . to perform any services; . . . where . . . an object thereof is:

(B) forcing or requiring any person . . . to cease doing business with any other person, Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Id. Section 8(b)(4)(i)(B)’s predecessor, Section 8(b)(4)(A), contained nearly identical language, making it an unfair labor practice for a union to “induce or encourage the employees of any employer” to stop work for the purpose of forcing the employer “to cease doing business with any other person.” *See Denver Bldg. & Constr. Trades Council*, 341 U.S. at 677 n.1.

prohibit a union that has a dispute with one employer (the “primary”) from pressuring other “secondary” or “neutral” employers (or their employees) who deal with the primary, where the union’s objective is to force the secondary to cease dealing with the primary and thus increase the union’s leverage in its dispute with the primary. *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 620-27 (1967). *See generally Iron Workers Dist. Council v. NLRB*, 913 F.2d 1470, 1475 (9th Cir. 1990) (explaining that prohibited “[s]econdary boycott activities are those which are calculated to involve neutral employers and employees in the union’s dispute with the primary employer”). Thus, the purpose of the secondary boycott provisions is to limit an industrial dispute to the parties involved, with Section 8(b)(4)(i)(B) specifically proscribing union pressure on neutral employees. *See, e.g., Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 106 (1958).

Secondary boycotts have long been proscribed because of their disruptive and—in the judgment of Congress and the courts—unjustified expansion of economic warfare to injure neutral businesses and impair commerce. *See, e.g., Int’l Longshoremen’s Ass’n*, 456 U.S. at 223 (noting that secondary activity imposes a “heavy burden” on neutral employers and widens “industrial strife”). This harm was recognized and discussed during the legislative debate, with Congressional proponents of Section 8(b)(4) predicting that allowing unions to

induce or encourage employees to engage in secondary activity would cause “thousands of strikes” leading to “a chain reaction that will tie up the entire United States in a series of sympathetic strikes.” *United Bhd. of Carpenters & Joiners of Am. (Wadsworth Bldg. Co.)*, 81 NLRB 802, 809 & n.29 (1949) (citing 93 Cong. Rec. 4198, 4323 (April 29, 1947)), *enforced*, 184 F.2d. 60 (10th Cir. 1950). Section 8(b)(4)’s prohibitions were necessary, in Congress’s view, “in order adequately to protect the public welfare which is inextricably involved in labor disputes.” *Carpenters Local 1976 (Sand Door & Plywood Co.)*, 113 NLRB 1210, 1219 (1955) (Member Rodgers, concurring) (citation omitted), *enforced sub nom. NLRB v. Local 1976 United Bhd. of Carpenters & Joiners of Am.*, 241 F.2d 147, 155 (9th Cir. 1957), *aff’d*, 357 U.S. 93 (1958). *See also Printing Specialties & Paper Converters Union, Local 388 v. Le Baron*, 171 F.2d 331, 334 (9th Cir. 1948) (prohibition of secondary activity is necessary to “safeguard the national interest in the free flow of commerce”).

“Recognizing that ‘[i]llegal boycotts take many forms,’ . . . Congress intended [Section 8(b)(4)’s] prohibition to reach broadly” so as to best protect neutral parties—“the helpless victims of quarrels that do not concern them at all.”” *Int’l Longshoremen’s Assn.*, 456 U.S. at 225 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 23-24 (1947)). Inducement therefore covers any action, including handbilling or verbal statements, meant to cause any individual to strike or refuse

to perform services. Indeed, as the Board has explained, “it can hardly be supposed that Congress, in enacting Section 8(b)(4)[] as the legislative response to the asserted evils of secondary boycotts, did not envisage the whole gamut of union activities by which such boycotts are achieved.” *Wadsworth Bldg. Co.*, 81 NLRB at 810-11. And this “gamut” includes peaceful activities meant to persuade or encourage the statute’s proscribed purpose. *Id.*

The statute’s broad coverage can be seen in the array of activities that have long been deemed to be unlawful inducement or encouragement, which encompasses both spoken and written language. For example, the Board and this and other courts have found that union statements to neutral employees that the material they were handling was “unfair,” *NLRB v. District Council of Painters No. 48*, 340 F.2d 107, 111 (9th Cir. 1965), or that walking off a job would be true to “union principles,” constituted unlawful inducement. *NLRB v. Local Union No. 3, IBEW*, 477 F.2d 260, 264, 266 (2d Cir. 1973). *Accord Sheet Metal Workers Local 104*, 297 NLRB 1078, 1083-84 (1990). Likewise, a union’s distribution of a handbill providing that good union members are “extremely careful” and “just leave” when a picket is set up where they are working, and statements asking a neutral employee why he was working when he knew there was a strike in progress, constituted unlawful inducement. *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562, 562, 570, 584-85 (1989),

enforced, 913 F.2d 1470 (9th Cir. 1990). *Accord Warshawsky & Co. v. NLRB*, 182 F.3d 948, 952-53 (D.C. Cir. 1999).

The secondary object forbidden by paragraph (B) of Section 8(b)(4) includes forcing the pressured neutral employer to “cease doing business with any other person.” *Nat’l Woodwork Mfr. Assn.*, 386 U.S. at 632-34; *Serv. Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 742-43 (1993), *enforced mem.*, 103 F.3d 139 (9th Cir. 1996). The term “cease doing business” is liberally construed. A “cease doing business objective” may be found where the union attempts to cause disruptions and changes in the method of doing business short of total cessation. *NLRB v. Local 825, Operating Engineers*, 400 U.S. 297, 304-05 (1971). The secondary object need not be the union’s only object for the activity to violate the Act. *Int’l Longshoremen’s Assn.*, 456 U.S. at 224 & n.21.

In sum, while Section 8(b)(4)(i)(B) encompasses a broad range of activities within its scope, its prohibition is circumscribed to only secondary activity meant to cause a cessation of work. Congress still allows unions to continue to bring economic pressure to bear directly on the primary employer. *Denver Bldg. & Trades Council*, 341 U.S. at 692. Accordingly, Section 8(b)(4) does not prohibit a union from taking traditional economic action against an employer whose employees it represents or seeks to represent, in furtherance of a dispute with that “primary” employer. *Local 825, Operating Engineers*, 400 U.S. at 303.

B. Substantial Evidence Supports the Board’s Finding that Local 229 Violated Section 8(b)(4)(i)(B)

The parties stipulated that Local 229’s secondary activity met both elements of a Section 8(b)(4)(i)(B) violation. Specifically, there is no dispute that Union Business Agent Alvernaz appealed to employees of CMC, a neutral employer, through his text messages, phone calls, flyers, and in-person conversations, to induce or encourage them to strike or refuse to perform work for CMC. (ER4; *see* pp. 4-8, above).

Indeed, consistent with the stipulations, and as the Board found, CMC employees would reasonably understand Alvernaz’s text message and flyer as signals or requests meant to induce or encourage them to stop working for their employer, who was not involved in Local 229’s dispute with WCP. (ER2, 4; 14-16, 35-36.) As the Board explained, employees would reasonably read Alvernaz’s text stating, “Friends Don’t Let Friends Cross Picket Lines,” as a request to withhold services from CMC by refusing to cross Local 12’s picket line. (ER4; 15, 35.) Any possible doubt about this clear message was removed when Alvernaz placed “picket line etiquette” flyers directly in CMC employees’ lunch boxes commanding, “THOU SHALL NOT CROSS THE LINE.” (ER2; 16, 36) (emphasis in original.) The Board reasonably construed these flyers as “contain[ing] a blanket admonition not to cross picket lines,” and found that employees would read the flyers “as a request to stop working for their employer.”

(ER4.) The Board has in similar circumstances found, with court approval, that similar language constituted “inducement or encouragement” in violation of Section 8(b)(4)(i)(B). *See* cases cited at pp. 17-18.

In sum, Local 229 admits (1) that Alvernaz’s actions “induced or encouraged” the employees of CMC “to engage in a strike or a refusal . . . to perform any services”; and (2) that an object of his inducement or encouragement was to pressure neutral employers CMC or McCarthy to “cease doing business with” WCP, the employer with whom Local 229 had a labor dispute. (ER3 n.14, 4.) These admissions and the stipulated facts provide substantial evidence to support the Board’s findings that Local 229 violated 8(b)(4)(i)(B) in all four instances, and this Court should affirm those findings.

C. Well-Settled Precedent Holds that Speech Aimed at Encouraging or Inducing Unlawful Secondary Activity Warrants No First Amendment Protection

Having admitted that its oral and written communications were meant to induce or encourage CMC employees to cease work for their employer, Local 229 invokes the First Amendment by claiming that Alvernaz’s appeals were “pure speech” and constitutionally protected. (Br. 13-35.) The problem with this argument is that the Supreme Court rejected it in *IBEW Local 501*. Local 229’s attempts to undermine that decision—by claiming it addressed only picketing and that contemporary First Amendment jurisprudence has effectively overruled it—

lack merit. Accordingly, this Court should reject Local 229's attempt to thwart Congress's statutory solution to address the significant harm and disruption caused by enmeshing neutrals in labor disputes. This solution, embodied in Section 8(b)(4)(i)(B), should not be read to condone verbal or written inducement or encouragement as a means of achieving a congressionally proscribed objective.

1. In *IBEW Local 501*, the Supreme Court held that proscribing union inducement and encouragement of secondary pressure does not violate the First Amendment

The Board properly rejected Local 229's assertion that "pure speech" that constitutes unlawful inducement and encouragement under settled Section 8(b)(4)(i)(B) precedent is protected by the First Amendment. As the Board accurately observed (ER5), "the [Supreme] Court answered the free speech argument in 1951 when it decided *IBEW Local 501* . . . holding that outlawing inducement or encouragement of 'secondary pressure' does not violate the First Amendment." The Board also properly found that *IBEW Local 501* "remains binding law" on this issue. (ER5.)

IBEW Local 501 involved a labor dispute between a union and one of two subcontractors at a jobsite over the subcontractor's employment of nonunion workers for electrical work. The union had no labor dispute with the other subcontractor, which performed carpentry work, or with the general contractor. The union's agent, like Alvernaz did here, visited the job site and informed

employees of the neutral employer (the carpentry subcontractor) that the electrical subcontractor, the primary employer, was hiring non-union labor. When the union agent returned again to the site, he repeated the statement, and proceeded to picket, causing the employees of the neutral employer to stop working and leave the site. In addition to the picketing, the union's pressure included a telephone call to the general contractor to reiterate the purpose of the picket. The union's picketing and statements resulted in the general contractor's termination of the electrical subcontractor's contract. 341 U.S. at 697-98, 705. The Court, agreeing with the Board, held that the union had unlawfully induced and encouraged the employees of the neutral employer to engage in a work stoppage with the object of forcing the general contractor to cease doing business with the primary employer in violation of Section 8(b)(4)(A).⁵ *Id.* at 699-700.

The Court rejected the claim, raised by Local 229 here, that the application of that statutory proscription to this inducement effort (peaceful picketing and statements) violated the First Amendment. The Court, reviewing the legislative history and purpose of Section 8(b)(4)(A), found that the words "induce or encourage are broad enough to include in them every form of influence and persuasion." *Id.* at 701-02. With this broad statutory scope in mind, the Court held

⁵ *IBEW Local 501* addressed Section 8(b)(4)(A), the pre-cursor to Section 8(b)(4)(i)(B); both versions use the "induce or encourage" language. *See* p. 13 n.4.

that “[t]he prohibition of inducement or encouragement of secondary pressure by [Section] 8(b)(4) carries no unconstitutional abridgment of free speech.” *Id.* at 705.

In so holding, the Court cited precedent of the courts of appeals and the Board. It noted that the courts of appeals had already held that the secondary-boycott provisions do not impinge on First Amendment rights. *Id.* at 705 & n.9 (citing *Paper Converters Union v. Le Baron*, 171 F.2d 331, 334-35 (9th Cir. 1948) (peaceful picketing), and *NLRB v. Local 74, United Bhd. of Carpenters & Joiners of Am.*, 181 F.2d 126, 132 (6th Cir. 1950) (work stoppages), *aff’d*, 341 U.S. 707 (1951)). The Court also cited the Board’s decision in *Wadsworth*, 81 NLRB at 811-12, 819, which found no constitutional infringement in the application of the secondary-boycott provisions to peaceful picketing and the distribution of a “Do not patronize” list to induce neutral employees not to perform services for the primary employer. *IBEW Local 501*, 341 U.S. at 703. *See also United Bhd. of Carpenters v. Sperry*, 170 F.2d 863, 868-69 (10th Cir. 1948) (upholding district court’s injunction in *Wadsworth* and rejecting union’s claim that its secondary activity warranted First Amendment protection). The Board here properly adhered to that precedent to find that the Supreme Court had answered the free-speech question.

2. The Supreme Court’s holding in *IBEW Local 501* is not limited to picketing

Local 229 seeks to lessen the vitality of *IBEW Local 501* by claiming (Br. 13-15) that the decision addressed only picketing and that picketing was “paramount to the Court’s reasoning and holding.” (Br. 14.) It also claims that since it issued *IBEW Local 501*, the Supreme Court has only applied that decision to secondary activity involving picketing. (Br. 16.) Because its efforts to induce or encourage CMC’s employees involved only speech, Local 229 argues that the holding in *IBEW Local 501* is inapplicable here. As shown below, these arguments ignore the expansive reasoning of *IBEW Local 501*, which is not limited to picketing. Moreover, the courts of appeals view *IBEW Local 501* as binding precedent, and have likewise upheld the constitutionality of applying Section 8(b)(4)(i)(B) to restrict the use of any form of persuasion, including handbilling and speech, for an unlawful secondary object.

Although *IBEW Local 501* involved picketing and conversations, the Supreme Court recognized that “[t]he words induce or encourage [in Section 8(b)(4)] are broad enough to include in them *every form of influence and persuasion.*” *Id.* at 701-02 (emphasis added). With this broad statutory coverage in mind, the Supreme Court made clear that in finding no unconstitutional abridgement of free speech, it was addressing both “*speech or picketing in furtherance of unfair labor practices such as are defined in [Section] 8(b)(4).*” *Id.*

at 704 (emphasis added). Thus, the Supreme Court rejected the claim, raised here, that the Act's secondary boycott provision is unconstitutional as applied to non-picketing "influence or persuasion."

The courts of appeals have agreed that the Supreme Court's decision in *IBEW Local 501* remains binding, applicable law that upholds the constitutionality of applying Section 8(b)(4)(i)(B) to restrict the use of any form of persuasion, including union handbilling and speech, for an unlawful secondary object.

Accordingly, the courts have followed that binding Supreme Court precedent and have likewise held that applying Section 8(b)(4)(i)(B) to restrict a union's use of "pure speech" for such an unlawful object involves no infringement of the First Amendment. Notably, Local 229 cites no case supporting its contrary view that *IBEW Local 501* is either limited to picketing or has been overruled.

In *Warshawsky & Co. v. NLRB*, 182 F.3d 948 (D.C. Cir. 1999), for example, a union was engaged in area-standards picketing of a subcontractor at the worksite with whom the union had a primary labor dispute. The D.C. Circuit found that the union's area-standards handbilling directed at neutral employees of the general contractor and other subcontractors, together with conversations by union agents to neutral employees, constituted unlawful inducement of a secondary work stoppage under Section 8(b)(4)(i)(B). *Id.* at 949-52. The handbill discussed the fact that a subcontractor on the site paid substandard wages and referred to the "sacrifices of

all union members,” but contained a small-print disclaimer stating that union did not seek a work stoppage. The specific content of the conversations was unknown.

Id.

In rejecting the very challenge Local 229 makes here, the D.C Circuit, applying *IBEW Local 501*, held that “the First Amendment does not protect communications directed at—and only at—the neutral employees merely because the form of communications is handbilling and conversations.” *Id.* at 952. Moreover, it observed that the Supreme Court in *IBEW Local 501* “emphatically” held that the prohibition of inducement or encouragement of secondary pressure, which covers “every form of influence and persuasion,” carries no unconstitutional abridgement of free speech. *Id.* Indeed, in prohibiting such inducements, the D.C. Circuit held that “the First Amendment is not at all implicated and once it is put aside, the Board’s finding can be judged in accordance with the standard substantial evidence test.” *Id.*

Likewise, the Second Circuit, applying *IBEW Local 501*, has held that the First Amendment does not protect non-picketing activity, including union speech, that violates Section 8(b)(4)(i)(B). *NLRB v. Local Union No. 3, IBEW*, 477 F.2d 260, 266 (2d Cir. 1973). In that case, the activity found to violate Section 8(b)(4)(i)(B) involved a union agent’s statements to neutral employees encouraging them to refuse handling the goods of a primary employer. *Id.* at 263-

66. As here, the union argued that the section was unconstitutional as applied to “pure speech.” *Id.* at 266. The court rejected that claim, observing that the Supreme Court in *IBEW Local 501* “dispose[d] of any First Amendment objections to [Section] 8(b)(4).” *Id.* More specifically, the court explained that it is “clear that the [Supreme] Court which rejected First Amendment objections to § 8(b)(4) [in *IBEW Local 501*] had ‘speech’ as well as ‘picketing’ inducements in mind.” *Id.* As the court observed, “while the Union is correct in noting that the inducement in [*IBEW Local 501*] involved picketing and not the ‘pure speech’ presented here, that is a distinction without a difference.” *Id.*

Local 229, however, ignores this settled precedent when it persists in claiming (Br. 16) that Section 8(b)(4)(i)(B) is only constitutional as applied to conduct designed to coerce, and not its activity here, which it characterizes as “persuasion.” As the legislative history of Section 8(b)(4) shows (*see pp. 15-17*), the drafters were acutely aware that the conduct covered by that section included peaceful (non-coercive) activity, and that such activity may constitute unlawful inducement. When Congress enacted the prohibition against secondary activity, “there was no disagreement as to its sweeping implications and meaning, and that it was intended to prohibit peaceful picketing *as well as persuasion and encouragement* to further a secondary boycott.” *Wadsworth*, 81 NLRB at 810 (emphasis added). The Supreme Court’s statement in *International*

Longshoremen's Association “that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment” does not, as Local 229 appears to suggest (Br. 16), demonstrate that only coercive secondary activity, like the political boycott picketing at issue in that case, falls outside the ambit of First Amendment protection. 456 U.S. at 226-27. In that case, the Supreme Court did not limit *IBEW Local 501*'s holding in any way, and in fact declined to adopt any broad exception to Section 8(b)(4)'s prohibition on secondary activities. *See id.* at 225 (recognizing that Congress drafted the prohibition on secondary activities “broadly” and declining to create a large exception for all “political boycotts”). Such a limitation would fly in the face of the Supreme Court's recognition in *IBEW Local 501* that Section 8(b)(4) may be constitutionally applied to proscribe inducement or encouragement of secondary pressure through any form of influence or persuasion, peaceful or otherwise. 341 U.S. at 701-02, 704-05.

3. The Supreme Court has repeatedly held that speech utilized to obtain an unlawful objective does not receive First Amendment protection

Local 229's insistence that the First Amendment protects speech to enmesh neutrals in a labor dispute ignores the broad principle that the Supreme Court relied on when it rejected this argument in *IBEW Local 501*. Thus, the Court, citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), followed established

precedent holding that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct that violates a valid statute.

IBEW Local 501, 341 U.S. at 705 & n.10.

In *Giboney*, the Supreme Court addressed a state statute that banned secondary boycotts as an unlawful restraint of trade. The Court rejected the union's claim that the First Amendment protected its picketing aimed at compelling a supplier not to sell its product to nonunion buyers. 336 U.S. at 492-94. In sustaining the injunction against the union's claim of constitutional infringement, the Court explained that "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Id.* at 502. Local 229 asserts (Br. 14) that the union's conduct in *Giboney* consisted only of picketing, but as the Court observed, "the agreements and course of conduct here were as in most instances brought about through *speaking or writing*." *Id.* (emphasis added). The Court did not find such communications constitutionally protected, explaining that "[s]uch an expansive interpretation" of the free-speech guarantee would "make it practically impossible" to enforce laws against agreements in restraint of trade and other agreements "deemed injurious to society." *Id.* Thus, *Giboney*'s proscription on providing constitutional protection to the means used to obtain an unlawful end is

not limited to picketing; it also extends to “speech or writing” to establish a statutory violation.

Giboney’s principle of ensuring that unlawful ends are not achieved, regardless of the means used, has endured, and the Court has repeatedly found that “First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils’” that the legislature has the power to control. *California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) (citing *NAACP v. Button*, 371 U.S. 415, 444 (1963)). See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (“First Amendment . . . does not prohibit evidentiary use of speech to establish the elements of a crime or to prove motive or intent”); cf. *U.S. v. Osinger*, 753 F.3d 939, 946 (9th Cir. 2014) (“[W]here speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.”) (internal quotes and citation omitted).

Thus, by relying on *Giboney* in *IBEW Local 501* to find that secondary activity aimed at enmeshing neutrals in labor disputes did not warrant First Amendment protection, the Supreme Court acted consistent with its precedent recognizing Congress’s authority to proscribe any activities, including speech, in furtherance of “unlawful objectives” such as the “substantive evil” of “the secondary boycott.” 341 U.S. at 705 & n.10. The Supreme Court was, in fact, not the first court to rely on *Giboney* to reject a First Amendment challenge to the

Act's secondary boycott provisions. *See id.* at 705 n.9 (citing *NLRB v. Wine, Liquor & Distillery Union, Local 1*, 178 F.2d 584, 587 (2d Cir. 1949) (rejecting the union's claim that its strike and refusal to handle goods was constitutionally protected and explaining that *Giboney* "make[s] it plain that Section 8(b)(4) . . . cannot be regarded as invalid under the First Amendment to the Constitution"). Moreover, consistent with, and in addition to *Giboney*, the Court also relied on the related doctrine, "deeply embedded in our civil and criminal law," that "he who provokes or instigates a wrong makes himself a party to it." *IBEW Local 501*, 341 U.S. at 704. The holding in *IBEW* is therefore not limited to the picketing context but embraces the broader principle that "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful." *California Motor*, 404 U.S. at 514.

Adopting Local 229's view (Br. 13-15) that Section 8(b)(4)(i)(B) cannot prohibit its written and spoken inducements would, contrary to *Giboney* and *IBEW Local 501*, wrongly emphasize the means rather than focusing on the unlawful end those means seek to achieve. Placing oral and written communications outside the proscriptions of Section 8(b)(4)(i)(B) would enable unions to use expressive conduct like handbilling and conversations as an end-run around the secondary-boycott proscriptions, as Local 229 sought to do here. As the Board reasonably observed (ER 3-4), Local 229's texts and flyers "contained a blanket admonition

not to cross picket lines,” and were admittedly for the unlawful purpose of enmeshing CMC in a labor dispute in which it was not a party. *See Hoffman Constr.*, 292 NLRB at 562, 570, 584-85 (finding similar handbill language and statements constituted unlawful inducement), and cases cited at pp. 17-18. This is the exact “substantive evil” that Congress sought to avoid in prohibiting secondary boycotts—the economic disruption caused by the proliferation and expansion of labor disputes beyond the immediate parties, which effectively undermines the Act’s overall purpose of promoting and maintaining industrial peace. Yet, if Local 229’s argument were adopted, there would be no limit on a union’s ability to use such tactics in future cases, thereby negating Congress’s purpose in enacting Section 8(b)(4)(i)(B).

In sum, because it has never been the rule of the Supreme Court that verbal or written inducement of unlawful conduct is protected speech, unions may not lawfully pursue an unlawful course of secondary activity in violation of Section 8(b)(4)(i)(B) merely because it was “initiated, evidenced, or carried out by means of language.” *Giboney*, 336 U.S. at 502. Section 8(b)(4)(i)(B), therefore, should not be (and has not been) construed to allow verbal or written inducement of a forbidden objective.

4. Contemporary First Amendment precedent does not undermine *IBEW Local 501*

The Supreme Court’s holding in *IBEW Local 501* that Section 8(b)(4) is constitutional as applied to inducement or encouragement, including by handbilling or speech, of employees of a neutral to engage secondary pressure, is dispositive here. Local 229, however, cites five cases (Br. 1, 16, 18-34) that it claims have caused a sea change in the Supreme Court’s First Amendment jurisprudence and have called *IBEW Local 501* into question: *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)⁶; *Sorrel v. IMS Health, Inc.*, 564 U.S. 552 (2011)⁷; *Snyder v. Phelps*, 562 U.S. 443 (2011)⁸; *Citizens United v. FEC*, 558 U.S. 310

⁶ In *Reed*, the Court invalidated a city ordinance—which allowed more, larger, or better-located signs on some subjects than others—because it drew facially content-based restrictions within a single medium of expression in violation of the First Amendment. *Id.* at 2224.

⁷ *Sorrel* addressed the constitutionality of Vermont’s Prescription Confidentiality Law, which restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. The Court held that law was subject to and failed to meet strict scrutiny because it “prevent[s] [marketers]—and only [marketers]—from communicating with physicians in an effective and informative manner.” 564 U.S. at 564, 580.

⁸ *Snyder* addressed a First Amendment challenge to a state-law tort action for intentional infliction of emotional distress, brought by the father of a deceased soldier against church members who had picketed near the son’s funeral, carrying signs with offensive messages like “God Hates the USA/Thank God for 9/11.” *Id.* at 448-50. The Court held that the picketers’ speech, while offensive, was entitled to First Amendment protection, and, accordingly, disallowed the state tort action. *Id.* at 457-59.

(2010)⁹; and *United States v. Alvarez*, 567 U.S. 709 (2012).¹⁰ Local 229 claims (Br. 16, 18-32) that per these cases, any statute that discriminates on the basis of content, speaker identity, viewpoint, or a public issue is subject to strict scrutiny. Local 229 expansively interprets this precedent to argue (Br. 18-29) that Section 8(b)(4)(i)(B) is subject to strict scrutiny, because it purportedly discriminates against speech based on all of these factors.

This Court should reject Local 229’s argument that this recent precedent undermines *IBEW Local 501*. The purported sea change brought by “contemporary . . . First Amendment jurisprudence” (Br. 1) did not discuss either Section 8(b)(4)(i)(B) or the particular problem that Congress sought to address in that section. Moreover, none of the cases cited by Local 229 examine or even mention *IBEW Local 501*. As the Supreme Court recognizes, when deciding First Amendment issues, “the reach of our opinion is limited to the facts before us.” *Snyder*, 562 U.S. at 460. Therefore, absent any specific ruling undermining *IBEW Local 501*, this Court remains bound by that precedent.

⁹ In *Citizens United*, the Court held that a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment. *Id.* at 323-24.

¹⁰ In *Alvarez*, a plurality of the Supreme Court held that the Stolen Valor Act, which criminalized falsely claiming military honors, violated the First Amendment. *Id.* at 729-30.

None of the five cases cited by Local 229—or any precedent upon which it relies—involve the concerns the Supreme Court addressed in *IBEW Local 501*, namely, the balancing of a union’s First Amendment rights against protecting the public from the harmful effects to interstate commerce that Congress determined would flow from enmeshing neutral employers in disputes not of their own making. See *United Bhd. of Carpenters*, 170 F.2d at 868-69 (“The constitutional right of free speech . . . postulates the authority of Congress to enact legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts.”). When interpreting Section 8(b)(4), this Court is “entitled” to, and should do so, “in . . . light of the Congressional declaration of purpose and policy ‘to promote the full flow of commerce’ and ‘to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare.’” *Nat’l Maritime Union of Am., AFL-CIO v. NLRB*, 346 F.2d 411, 417 (D.C. Cir. 1965) (citation omitted). This is so because “[l]abor laws reflect a careful balancing of interests,” *Int’l Longshoremen’s Assn.*, 456 U.S. at 226, and the balance between “union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife” is particularly “delicate.” *NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607, 617-18 (1980) (Blackmun, J. concurring). In *IBEW Local*

501, the Supreme Court recognized and upheld as constitutional Congress's balancing of First Amendment rights and the prevention of significant harm to interstate commerce from union inducements of neutral employees to exert secondary pressure. 341 U.S. at 705. This Court should likewise be reluctant to question that balancing based on subsequent cases decided in wholly different contexts.¹¹

Notably, this Court has already declined to view this contemporary precedent as undermining well-established Section 8(b)(4) law. In *NLRB v. Teamsters Union Local No. 70*, 668 F. App'x 283, 284 (9th Cir. 2016), *cert. denied* 137 S. Ct. 2214 (Jun. 5, 2017), this Court rejected a union's claim that *Reed* disturbs settled Section 8(b)(4) precedent. In that case, the union engaged in secondary picketing in violation of Section 8(b)(4)(ii)(B), which bars threats or coercion to apply secondary pressure. This Court enforced several Board orders requiring the union to cease and desist from such activity, and then found the union in contempt of one of the judgments by engaging in further picketing. The union argued that its picketing activity should be protected under First Amendment

¹¹ Local 229's reliance (Br. 25-26) on this Court's decision in *Eagle Point Ed. Assoc. v. Jackson*, 880 F.3d 1097 (2018), is also misplaced. That case addressed a Section 1983 action brought by striking teachers regarding denial of access to school grounds and did not address Section 8(b)(4) or *IBEW Local 501*. Indeed, this Court observed that the teachers' claim in *Eagle* "is not contingent on labor laws." *Id.* at 1108.

principles announced in *Reed*, and that *Reed* constituted a significant change in circumstances warranting modification of the judgment. This Court assumed, without deciding, that *Reed* “changed the Supreme Court’s First Amendment jurisprudence in some respects,” but held that it “did not do so in a way that matters here [in the Section 8(b)(4) context].” *Id.* This Court noted that “[w]hen faced with a constitutional challenge, the Supreme Court has not disturbed the [Act’s] prohibition against peaceful secondary picketing.” *Id.* (citations omitted). Therefore, the Court was not “free to disregard the Supreme Court’s picketing-specific jurisprudence.” *Id.*

Likewise, here, this Court is not free to disregard *IBEW Local 501*, the Supreme Court’s inducement-specific jurisprudence under the almost identically worded precursor to Section 8(b)(4)(i)(B). As this Court observed, the Supreme Court has instructed that, “[i]f a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions.” *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). *Accord Flanigan’s Enter., Inc. of Georgia v. City of Sandy Springs, Georgia*, 703 F. App’x 929, 935 (11th Cir. 2017) (holding, under *Agostini*, that court “cannot read *Reed* as abrogating” Supreme Court or circuit court precedent that it did not directly

address). *Cf. National Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017) (*Reed* did not address, and therefore did not displace, constitutional precedent regarding commercial speech; despite party’s struggles “to find a new First Amendment principle between the lines of *Reed*, there is simply nothing new to find”). As shown, *IBEW Local 501* is the Supreme Court “case which directly controls” here, and it remains binding precedent. *Agostini*, 521 U.S. at 237. Neither *Reed*, nor any of the other precedent cited by Local 229, discusses, much less overturns, *IBEW Local 501*, or any Section 8(b)(4) precedent, or any labor law principles.¹²

Local 229 attempts to muddy the waters and give its cited First Amendment precedent relevance by claiming (Br. 26-27) that it is “incongruous” that per *Snyder*, a protester can lawfully stand on public property holding an offensive sign but, pursuant to Section 8(b)(4)(i)(B), a union cannot hold a sign aimed at neutral employees stating that another employer does not pay fair wages. (Br. 27.) Along the same lines, Local 229 claims (Br. 20-22) that Section 8(b)(4)(i)(B) is incompatible with *Citizens United* and *Sorrel* because anyone but an “NLRA-governed” union can lawfully tell neutral employees that they should stop working

¹² Even putting aside *Reed*’s inapplicability here, Local 229 (Br. 20) over reads *Reed* as mandating that all content-based restrictions must be subject to strict scrutiny—a claim that this Court has rejected. *See National Biweekly Admin.*, 873 F.3d at 732; *United States v. Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc).

for any reason. The answer to these claims, as discussed above, is that Congress, in enacting Section 8(b)(4), examined whose speech and conduct induced secondary boycotts, and determined that the substantive evil of such boycotts justified the restrictions on those inducements specifically by unions. None of the “unregulated” scenarios painted by Local 229 involve an actor engaged in secondary conduct that Congress determined warranted proscription

Nor should this Court be detained by Local 229’s attempt to alter the congressionally intended scope of Section 8(b)(4)(i) based on its assertion that modern-day unions lack sufficient “economic power” to warrant protecting neutral employers against unlawful secondary inducement. (Br. 17-18.) It would be for Congress to decide whether such circumstances, if true, justify modifying Section 8(b)(4)(i)(B) to allow inducements by “weaker” unions. In enacting this provision, Congress “heard evidence for weeks,” which demonstrated that there was no such thing as a “good secondary boycott.” *Int’l Longshoremen’s Assn.*, 456 U.S. at 225 n.23. Regardless, Local 229 cannot claim that because unions are supposedly weaker than in the past, they can now violate Section 8(b)(4)(i)(B) with impunity.

Finally, Local 229 (Br. 28-29) makes the misleading claim that Section 8(b)(4)(i) muzzles unions, leaving them with no voice to speak “on matters of public concern.” Not so. As the Supreme Court has stated, “there are many ways in which a union may express its opposition . . . without infringing upon the rights

of others,” including neutral employers. *Int’l Longshoremen’s Assn.*, 456 U.S. at 227. That section does not prohibit a union from taking economic action against an employer with whom it has a primary labor dispute. Further, it does not prevent a union from engaging in activity meant to educate employees about their rights or about the deficiencies of either their own or other employees’ terms and conditions of employment and even prompt them to action—so long as the action is not a cessation of work by the secondary employees. *See, e.g., S.W. Reg’l Council of Carpenters*, 356 NLRB 613, 617 (2011) (union may educate secondary employees about labor dispute “for many reasons other than to induce them to stop work,” including to inform them about area standards); *Bldg. & Constr. Trades Council (Tampa Sand & Material Co.)*, 132 NLRB 1564, 1565-66 (1961) (no unlawful inducement in union “making the law known to its members” regarding their rights as individuals not to handle products of nonunion employer). Section 8(b)(4)(i) is thus confined to a circumscribed context: it bars unions from inducing neutral employees to strike, not because they have an issue with their own working conditions, but to support the union’s dispute with another employer. Thus, as applied here, Section 8(b)(4)(i)(B) is limited to a subset of speech leading to what Congress has identified as a “substantive evil.”¹³

¹³ As Local 229 notes (Br. 28-29), the Supreme Court has observed that proscription of leafleting to the public generally pursuant to “an educational effort against substandard pay,” would raise First Amendment issues. *Edward J.*

D. Local 229’s Unlawful Conduct Is Not Protected By Section 8(c) of the Act

The Board also reasonably rejected Local 229’s claim (Br. 35) that Section 8(c) of the Act protects its appeals to neutral employees—even though they sought to induce a secondary boycott made unlawful by Section 8(b)(4)—because they contained no threat of reprisal.¹⁴ As the Board accurately observed (ER5), the Supreme Court in *IBEW Local 501* rejected this exact argument, and made clear that Section 8(c) does not limit the phrase “induce or encourage” in Section 8(b)(4) to require a threat or promise. 341 U.S. at 701-02. *See also Denver Bldg. & Const. Trades Council*, 341 U.S. at 952-53 & n.22 (Section 8(c) protections do not apply to Section 8(b)(4) conduct). *Accord Printing Specialties & Paper Converters Union, Local 388 v. Le Baron*, 171 F.2d 331, 334 (9th Cir. 1948).

DeBartolo Corp. v. Gulf Coast Trades Council, 485 U.S. 568, 576 (1988). That observation, however, has no relevance here. The Supreme Court there held that an appeal *to consumers* (not neutral employees) not to patronize stores in a mall until the mall’s owner promised that all construction would be done by contractors paying fair wages, did not constitute “coercion” in violation of Section 8(b)(4)(ii). *Id.* at 570-71 & n.1, 575, 578, 583-84. By contrast, the instant case deals with an appeal inducing a neutral’s employees to engage in a work stoppage, which is unlawful under the express terms of Section 8(b)(4)(i)(B). Moreover, as *DeBartolo* does not mention *IBEW Local 501*, it does not displace *IBEW Local 501* as the controlling precedent in this case.

¹⁴ *See* 29 U.S.C. § 158(c) (“The expressing of any views, argument, or opinion . . . shall not constitute . . . evidence of any unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”).

In so finding, the Supreme Court explained that to use Section 8(c) to broadly exempt certain kinds of inducement “from the condemnation of [Section] 8(b)(4)(A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section.” *IBEW Local 501*, 341 U.S. at 701. As the Supreme Court further observed, “[t]here is no legislative history to justify an interpretation that Congress,” by using the broad language of “induce or encourage,” limited its proscription of secondary boycotts “to cases where the means of inducement or encouragement amount to a ‘threat of reprisal or force or promise of benefit.’” *IBEW Local 501*, 341 U.S. at 701-02.

Indeed, the Court explained, such an interpretation would also ignore the larger statutory context of Section 8(c) and Section 8(b)(4). *Id.* at 702. “The intended breadth of the words ‘induce or encourage’” in Section 8(b)(4) is “emphasized by their contrast” with the more “restrictive phrases” that Congress used in other parts of Section 8(b). *Id.* at 703. Thus, for example, the unfair labor practice is worded in Section 8(b)(1) as “to restrain or coerce” employees. *Id.* To have Section 8(c) import into Section 8(b)(4)(i) the restrictive “threat of reprisal” language that Congress chose to omit from the latter section would nullify its choice of language.¹⁵

¹⁵ Notably, Congress subsequently enacted an additional secondary boycott provision, Section 8(b)(4)(ii) of the Act, 158 U.S.C. § 158(b)(4)(ii), and used the more restrictive terminology “threat or coerce,” as opposed to the broader term

In other words, the application of Section 8(c) would “be destructive of the purpose” of the statutory proscription of inducement or encouragement of secondary activity. *IBEW Local 501*, 341 U.S. at 702. To rely on Section 8(c) to find inducements lawful, so long as they contain no threat, would permit “the accomplishment of an objective which [Congress] forbade to be accomplished directly,” and “vitiate its underlying purpose.” *Id.* at 703, 704 (citation and internal quotes omitted).

Finally, Local 229’s view conflicts with Section 8(c)’s function, which is to “protect noncoercive speech by employer and labor organization alike in furtherance of a *lawful object*.” *Id.* (emphasis added). Section 8(c) serves that purpose without protecting “speech . . . in furtherance of unfair labor practices” defined in Section 8(b)(4). *Id.* Thus, here, the Board properly followed the Supreme Court’s holding that “[t]he general terms of [Section] 8(c) appropriately give way to the specific provisions of [Section] 8(b)(4).” *Id.* at 704-05.

E. Section 8(b)(4)(i)(B) Does Not Violate the Thirteenth Amendment’s Bar on Involuntary Servitude

The Board properly rejected Local 229’s argument (Br. 36-37) that the application of Section 8(b)(4)(i)(B) to prohibit efforts to induce or encourage workers to leave their work violates the Thirteenth Amendment’s bar on

“induce or encourage”—a word choice that demonstrates Congress’s intent to include “every form of influence and persuasion” within Section 8(b)(4)(i)’s proscription. *IBEW Local 501*, 341 U.S. at 701-02.

involuntary servitude. (ER5.) Local 229 fails to explain its theory that the Thirteenth Amendment applies in these circumstances, particularly where, as the Board explained, there is no involuntary servitude. (*Id.*) Contrary to Local 229's assertion (Br. 37), this case involves no "restriction on the right of employees to quit their labor." The Board's Order in no way compels employees (or anyone else) to work or prevents them from choosing to quit work or strike. Indeed, the Order says nothing at all about employees' right to quit work or strike. Rather, the Order, which runs against Local 229, not any employee, prohibits Local 229 from inducing or encouraging the employees of a neutral employer, CMC, to strike to put secondary pressure on another employer, WCP, with whom the Union has a labor dispute. (ER1.)¹⁶

Not surprisingly, the Supreme Court has rejected Local 229's Thirteenth Amendment argument. As the Court observed in rejecting a similar claim that a state labor law imposed involuntary servitude, and using the very reasoning that the Board echoed here, "nothing in the statute or the order makes it a crime to abandon work individually . . . or collectively," or "prohibit[s] or restrict[s] any employee from leaving the service of the employer, either for reason or without reason, either with or without notice." *Int'l Union, U.A.W.A., A.F. of L., Local 232*

¹⁶ The cases Local 229 cites (Br. 37) discussing the Thirteenth Amendment are irrelevant. They do not address Section 8(b)(4) or the secondary boycott provisions, but laws that, unlike Section 8(b)(4), subjected individuals to criminal liability for failing to work.

et al. v. Wisconsin Employment Relations Board, 336 U.S. 245, 251 (1949), overruled on other grounds, *Lodge 76, IAM v. Wisconsin Employment Relation Commission*, 427 U.S. 132 (1976). Thus, as here, such “facts afford no foundation for the contention that any action of the [Board] has the purpose or effect of imposing any form of involuntary servitude.” *Id.* Accordingly, this Court has rejected, as “patently groundless,” the claim that the application of Section 8(b)(4) to prohibit union efforts to induce or encourage workers to leave their work violates the Thirteenth Amendment. *Printing Specialties & Paper Converters Union, Local 388*, 171 F.2d at 334 n.2. *Accord NLRB v. Wine, Liquor & Distillery Workers*, 178 F.2d 584, 587 (2d Cir. 1949).

F. Enmeshing Neutral Employers In Violation of Section 8(b)(4)(i)(B) of the Act Is Unprotected by RFRA

The Board properly found that Local 229’s unlawful appeals for secondary pressure were not protected by the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb-2000bb-4. Pursuant to RFRA, the government may substantially burden the free exercise of religion only in furtherance of a compelling state interest using the least restrictive means. *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1014 (9th Cir. 2016). Local 229 claims (Br. 37-39) that the right to engage in protected, concerted activity for mutual aid and protection under the Act is an exercise of religion, and that Section 8(b)(4)(i)(B) significantly burdens its exercise by prohibiting it from helping

fellow workers and “bear[ing their] burdens.” The Board assumed, without deciding, that protected, concerted activity may constitute an “exercise of religion” under RFRA. (ER5.) The Board found, however, that Local 229 had not met its burden of showing that Section 8(b)(4)(i)(B) imposes a substantial burden on its right to engage in such activity. (ER5.) That finding is supported by substantial evidence and should therefore be affirmed. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210, 1212, 1214-15 (9th Cir. 2008) (holding that while agency’s interpretation of RFRA is reviewed *de novo*, its finding that party did not prove a substantial burden on its free exercise of religion is a factual finding reviewed for substantial evidence).

Local 229 faces an uphill battle in its attempt to show a substantial burden. To meet its burden of proof, it must show that it (a) is forced to choose between following the tenets of its religion and receiving a governmental benefit, or (b) is coerced to act contrary to its religious beliefs by the threat of civil or criminal sanction. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc). *See also Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that “substantial burden” inquiry asks whether the regulation at issue “force[d plaintiffs] to engage in conduct that their religion *forbids* or . . . prevents them from engaging in conduct that their religion *requires*”) (emphasis added) (internal quotation marks omitted). The challenging party must demonstrate an

actual conflict between the statute and its religious practice; vague and general claims are insufficient. *See Oklevueha*, 828 F.3d at 1016-17 (parties produced no evidence they were forced to choose between religious obedience and government sanction). *Accord Carroll College, Inc.*, 345 NLRB 254, 259 (2005) (college failed to prove substantial burden where it “did not offer a single piece of evidence” showing how compliance with the Act conflicted with religious practices).

Applying these principles, the Supreme Court found, for example, that forcing a prisoner to shave a beard that is expressly required by his religion constitutes a substantial burden, because the adherent is placed in the proverbial “Catch-22” situation of complying with his religion and risking legal sanction, or complying with the law and violating his religious beliefs. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015).¹⁷ In contrast, no substantial burden is shown where the prohibited activity is not specifically required by the religious tenet in question, and the law leaves adequate means of religious compliance. For example, a federal law banning cannabis use did not substantially burden church members’ religious

¹⁷ *Holt* addressed a claim under RFRA’s “sister statute,” the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc, *et seq.*, which provides that state and local regulations governing land use or institutionalized persons may substantially burden the free exercise of religion only in furtherance of a compelling state interest using the least restrictive means. 135 S. Ct. at 859-60. RLUIPA “mirrors” RFRA, *id.* at 860, and this Court can look to relevant RLUIPA cases in addressing RFRA claims. *See Oklevueha*, 828 F.3d at 1017.

beliefs, which relied on cannabis only to supplement peyote, the church's "significant sacrament," and the church members did not claim that peyote was unavailable or that cannabis served a unique religious function. *Oklevueha*, 828 F.3d at 1016. Thus, because the cannabis prohibition did not force church members to choose between obedience to religion and criminal sanction, the court found no substantial burden. *Id.*

The Board adhered to these principles in finding that Local 229 failed to show substantial burden because (1) Local 229's religious beliefs do not specifically require it to enmesh neutrals; and (2) Section 8(b)(4)(i)'s restriction on enmeshing neutrals involves only one of a multitude of means by which Local 229 can engage in concerted activity. First, Local 229 does not argue, much less prove, that enmeshing neutrals—an activity that Congress declared illegal in enacting Section 8(b)(4)—is itself a religious requirement of engaging in protected, concerted activity. *Cf. Ukiah Adventist Hosp.*, 332 NLRB 602, 603, 608-09, 613 (2000) (employer offered extensive evidence that its Adventist faith prohibits it from recognizing or bargaining with unions). Second, as the Board observed (ER5), that section does not generally forbid unions from requesting that individuals honor lawful picket lines, or from, as Local 229 puts it, "teach[ing] CMC employees to bear one another's burdens and fulfill the law of Christ" (Br. 38), but instead narrowly prohibits them from acting to enmesh neutral entities in a

labor dispute. Thus, because Local 229 remains able to engage in protected, concerted activity, it fails to show that Section 8(b)(4)(i)(B) substantially burdens its ability to practice its religion, and, consequently, its RFRA claim fails.

The Board also properly found (ER6) that even if Local 229 demonstrated a substantial burden, its RFRA claim still fails because the Board has a compelling interest which was implemented by the least restrictive means. There is no doubt that the Board has a compelling interest in regulating labor-management relations to avoid economic disruption.¹⁸ There is a particularly compelling interest in proscribing Local 229's conduct here, which admittedly involved the type of secondary pressure that Congress found disrupts commerce.

Moreover, that compelling interest was implemented by the least restrictive means to achieve the legislative goal, prohibiting the inducement and encouragement of secondary pressure that enmeshes neutrals and disrupts commerce. The restriction imposed on the inducement of such secondary pressure "is no broader than the interest the government has put forward," and Local 229 suggests no less restrictive condition that could "feasibly and adequately" achieve those interests. *See U.S. v. Lafley*, 656 F.3d 936, 941-42 (9th Cir. 2011). *See also Walker v. Beard*, 789 F.3d 1125, 1137 (9th Cir. 2015) ("Although the government

¹⁸ *See, e.g., Int'l Longshoremen's Ass'n*, 456 U.S. at 223 & n.20 (Congress designed the secondary-boycott provisions to prevent the "widening of industrial strife" that occurs when unions pressure neutral employers) (citation omitted).

bears the burden of proof to show its practice is the least-restrictive means, it is under no obligation to dream up alternatives that the plaintiff himself has not proposed.”). Rather, as shown, broadly exempting all union speech and handbilling from Section 8(b)(4)(i)(B)’s prohibition on secondary activity, as Local 229 effectively suggests should occur by operation of RFRA, would negate Congress’s purpose in enacting that section. The courts and the Board have rejected such overboard RFRA claims, which would unnecessarily abrogate another valid statute. *Cf. Lafley*, 656 F.3d at 941-42 (no less restrictive way of ensuring drug offender did not violate parole terms other than by requiring parolee to not engage in recreational drug use); *Ukiah Adventist Hosp.*, 332 NLRB at 603-05 (enforcing obligation to bargain collectively on Adventist hospital was “crucial to the statutory scheme,” and exception would frustrate compelling interests in promoting industrial peace and avoiding disruptions to vital healthcare services).¹⁹

¹⁹ Local 229 misplaces its reliance (Br. 40) on Title VII caselaw because Title VII’s “reasonable accommodation” requirement is determined through a completely different analytical framework than RFRA. *See Reed v. UAW*, 569 F.3d 576, 579-80 (6th Cir. 2009) (discussing employer’s burden under Title VII to demonstrate inability to “reasonably accommodate” employee’s religious observance without imposing “undue hardship” on employer’s business.)

II. THE BOARD DID NOT ABUSE ITS BROAD REMEDIAL DISCRETION BY USING ITS STANDARD REMEDIAL NOTICE LANGUAGE

Local 229 admits that the Board used its standard remedial notice language, described below, for the violation found, but claims the notice must be modified to provide a “basic explanation” of the violation so that employees can understand what Local 229 did to violate the Act. (Br. 42-43, 46.) It asks the Court to remand for the Board to either modify the notice or “more fully” explain why it declined to do so. (Br. 48.) As discussed below, the Board reasonably denied Local 229’s challenge to the notice because it “had not demonstrated that . . . the Board’s standard remedial language is inaccurate or should be modified.” (ER1 n.1.)

Local 229 faces a heavy burden in challenging the Board’s notice language. The Board’s power to fashion remedies is “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); accord *California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996) (Board’s remedial order is reviewed only for “clear abuse of discretion”). Because of its special expertise, the Board is afforded broad discretion in formulating remedies and notices that will further the purposes of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Accordingly, to succeed on appeal, Local 229 must show that the Board’s use of the standard remedial notice “is a patent attempt to achieve ends other than those which can fairly be said to

effectuate the policies of the Act.” *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). Local 229 plainly fails to meet this burden.

The purpose of a remedial notice is to notify employees of their rights under the Act and the violations found. *J&R Flooring, Inc.*, 356 NLRB 11, 12 (2010), *enforced sub nom. Int’l Union of Painter & Allied Trades v. J&R Flooring, Inc.*, 656 F.3d 860 (9th Cir. 2011). The Board’s standard notice fulfills that purpose. It enumerates employees’ rights under “Federal Law” (ER2), and states that the Board found that Local 229 “violated Federal labor law and has ordered [Local 229] to post and obey this notice.” (*Id.*) Moreover, the notice accurately informs employees of the elements of the Section 8(b)(4)(i)(B) violation found and the type of unlawful conduct that Local 229 is barred from repeating. Specifically, the notice states that Local 229 “WILL NOT induce or encourage any individual employed by [CMC], or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal to perform work . . . where an object is to force or require CMC . . . or any other person to cease doing business with [WCP].” (ER2.) The notice’s accurate description of the violation belies any claim that it “must be modified” or else those who read it will be “misled” as to the nature of the violation. (Br. 42, 46.) Moreover, the Board’s conclusions of law (ER6) specify that Local 229 violated the Act through its texts, flyer, phone calls, and conversations with CMC employees. As Local 229

observes, the remedial notice provides employees with a link and a “CR Code” to obtain a copy of the Order. (Br. 45, ER2.) It is specious, therefore, to claim (Br. 46) that employees will be “misled as to the conduct” involved.

Local 229 provides no basis for its claim that the notice is inadequate. The notice does not “encompass[] conduct which did not occur,” as Local 229 wrongly claims. (Br. 47.) Nor is there any reason for the Board to adopt Local 229’s suggested notice language, which would state: “We unlawfully asked employees of CMC Rebar to stop work because of a dispute that Local 229 had with another employer in circumstances that constituted an unlawful secondary boycott.” (Br. 46.) Local 229 does not explain how its suggested language and the current notice’s description of the violation materially differ, much less prove that the Board’s notice is inaccurate or otherwise amounts to a clear abuse of discretion. Local 229 essentially admits as much, claiming only that its suggested change “would do no harm” (Br. 46). Such a claim falls far short of proving a clear abuse of discretion.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment granting the Board's application for enforcement and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

/s/ Elizabeth A. Heaney
ELIZABETH A. HEANEY
Supervisory Attorney

/s/ Greg P. Lauro
GREG P. LAURO
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570
(202) 273-1743
(202) 273-2965

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
June 2018

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	No. 17-73210
)	
v.)	
)	
INTERNATIONAL ASSOCIATION OF BRIDGE,)	Board Case No.
STRUCTURAL, ORNAMENTAL, AND)	21-CC-183510
REINFORCING IRON WORKERS, LOCAL 229,)	
AFL-CIO)	
)	
Respondent		

STATUTORY ADDENDUM

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Section 8(b) of the Act (29 U.S.C. § 158(b)) provides in relevant part:

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents . . .

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . .

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Section 8(c) of the Act (29 U.S.C. § 158(c)) provides in relevant part:

[Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act

[subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) [Powers of Board generally] The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	No. 17-73210
)	
v.)	
)	
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS, LOCAL 229, AFL-CIO)	Board Case No. 21-CC-183510
)	
Respondent		

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,530 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 1st day of June, 2018

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

David A. Rosenfeld
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway
Alameda, CA 94501

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 1st day of June, 2018