UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 04-CC-223346

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION 98,

Respondent,

and

SHREE SAI SIDDHI SPRUCE LLC, d/b/a
FAIRFIELD INN & SUITES BY MARRIOTT,

Charging Party.

BRIEF, *AMICI CURIAE,* OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and NORTH AMERICA'S BUILDING TRADES UNIONS

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INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a voluntary federation of 55 national and international labor unions that represent 12.5 million working men and women. North America's Building Trades Unions ("NABTU") is a labor organization composed of 14 affiliated national and international unions that together represent more than 3 million men and women employed in the construction industry.

When a labor dispute exists, unions affiliated with the AFL-CIO and NABTU use various lawful means to enlist public support, frequently by asking the public not to patronize designated companies. That request takes various forms. It may be communicated in a handbill, on a billboard, in a speech, or, as in this case, by displaying inflated rat balloons near a company's premises, or by some combination of these and perhaps others.

In this case, the General Counsel is challenging the display of inflated rat balloons as a violation of § 8(b)(4)(ii)(B) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(b)(4)(ii)(B). That contention, if accepted would deprive unions throughout the United States of an important means of symbolically communicating their message to the public. It would also strip AFL-CIO and NABTU affiliates of rights currently protected by the First Amendment to the U.S. Constitution and by § 7 of the Act, 29 U.S.C. § 157.

The AFL-CIO and NABTU are filing this brief to protect and preserve those important rights.

ISSUE PRESENTED

Whether the respondent, International Brotherhood of Electrical Workers Local Union 98 ("Local 98"), violated § 8(b)(4)(ii)(B) of the Act by peacefully displaying inflated rat balloons on a public sidewalk near a hotel and restaurant, without blocking the entrance to either, to publicize the fact that renovation work on those establishments had been performed by a nonunion contractor providing substandard wages and benefits.

INTRODUCTION

For decades, labor unions have been using rat balloons to notify the public that a labor dispute exists at a particular location and to solicit public support in connection with that dispute. Tzvi Mackson-Landsberg, *Is a Giant Inflatable Rat an Unlawful Secondary Picket under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1524 (2006) [hereinafter Mackson-Landsberg]; Alan Fuer, *Labor's Huge Rubber Rat Caught in a Legal Maze*, N.Y. TIMES, Dec. 28, 2005, at B-1; Michael Gold, *Scabby the Giant Inflatable Union Protest Rat Faces Extinction,* N.Y. TIMES, July 31, 2019, at A-27; Mark Lasswell, *In Defense of Scabby,* WASHINGTON POST, Sept. 8, 2019, at A-23 As the General Counsel has acknowledged, unions use rat balloons "to convey to the general public that an employer operates non-union or otherwise fails to meet area standards." *Sheet Metal Workers Local 15 (Brandon Regional Hospital)*, NLRB Advice Mem., Case 12-CC-1258, at 7 (April 4, 2003).

During three days in June 2018, Local 98 distributed handbills and displayed

one or more rat balloons on the sidewalk running in front of a hotel and restaurant in center city Philadelphia as part an effort to notify the public that renovation work at those premises had been performed by a nonunion electrical contractor providing substandard wages and benefits. That display took place peacefully, on a public sidewalk, and without blocking the entrance to either establishment. ALJD at 4-6.[1]

In his decision, Chief Administrative Law Judge Robert Giannasi rejected the General Counsel's contention that Local 98 had violated § 8(b)(4)(ii)(B) by displaying the rat balloons in that manner. He concluded that "[n]either the placement of the rats, which were always on public sidewalks, nor the Respondent's activity in connection with the rats amounted to picketing or coercion." *Id.* at 8. He based that conclusion in part on the absence of any evidence that the rat balloons, by their presence, had obstructed or interfered in any way with neutral employers, their customers, or pedestrians. "There is no evidence that the stationary rats interfered with pedestrian traffic or people entering or exiting the hotel." *Id.* "Nor did . . . the rats cause disruption of the operations of either the hotel or the restaurant." *Id.* And, the rat balloons "had little or no effect on the public. Most pedestrians walked right by the rat without even pausing to look at it." *Id.*[2]

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[1] In this brief, the decision of the administrative law judge will be cited as "ALJD," and the brief of the General Counsel in support of his exceptions will be cited as "GC Br."

[2] The General Counsel also alleged that Local 98 had violated the Act by patrolling in front of the hotel and restaurant; moving tables and chairs owned by those businesses to accommodate the union's rat balloons; and using a bullhorn at high volume to criticize the hotel and restaurant. ALJD at 4. The ALJ found that there had been no genuine patrolling, ALJD at 9; that the movement of furniture was

The General Counsel takes exception to Judge Giannasi's conclusion that Local 98 did not violate the Act by displaying rat balloons, but not to his findings that the presence of those balloons did not interfere with or obstruct any businesses, customers, or pedestrians. Accordingly, the issue presented here is whether the mere display of one or more rat balloons – a well-recognized symbol of the existence of a labor dispute – violates the Act, despite the absence of any such effects.

As this brief explains, that display did not violate § 8(b)(4)(ii)(B). First, the constitutional avoidance doctrine, applied in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988), [hereinafter *DeBartolo*] requires the Board to avoid interpreting the Act in a way that would raise serious constitutional problems. Second, the contention in this case that Local 98 violated § 8(b)(4)(ii)(B) of the Act, if accepted, would raise serious constitutional problems because, as several courts and the Board itself have concluded, peacefully displaying a stationary rat balloon on a public sidewalk constitutes symbolic speech protected by the First Amendment to the U.S. Constitution. Third, the stationary display of rat balloons in this case – which were near, but not blocking the entrances to, neutral business establishments – did not create a barrier between those businesses and their customers or employees, and

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minimal and temporary and therefore not coercive, ALJD at 9; but that, because the bullhorn was "excessively loud," its use had disrupted the operations of the hotel and restaurant and violated § 8(b)(4)(ii)(B), ALJD at 11-12. This *amicus* brief focuses solely on the General Counsel's contention that § 8(b)(4)(ii)(B) forbids unions from peacefully displaying a stationary rat balloon on a public sidewalk to enlist public support in connection with a labor dispute. It does not address other issues that may be raised by this case.

therefore lacked the confrontational element that is the *sine qua non* of coercive picketing. And fourth, the display did not severely or significantly disrupt the operations of either establishment and therefore did not "threaten, coerce, or restrain" those businesses within the meaning of § 8(b)(4)(ii).

ARGUMENT

Local 98 did not Violate § 8(b)(4)(ii)(B) of the Act by Peacefully Displaying Stationary Rat Balloons on a Public Sidewalk Near, but without Blocking the Entrance to, Neutral Establishments, to Notify the Public that Work at those Establishments had been Performed by an Employer Paying Substandard Wages and Benefits.

As an initial matter, it is important to note that the Board in this case is not writing on a blank slate. Labor unions have been displaying rat balloons for years, and both the courts and the Board have addressed the status of those displays under the First Amendment to the U.S. Constitution and under § 8(b)(4)(ii)(B) of the Act.

The constitutional issue has arisen most often when local governments have applied their sign ordinances to prohibit the display of rat balloons. In *Construction and General Laborers Local 330 v. Town of Grand Chute,* 915 F.3d 1120, 1123 (7th Cir. 2019), the Seventh Circuit concluded that "there is no doubt that a union's use of Scabby [the rat balloon] to protest employer practices is a form of expression protected by the First Amendment."[3] Similarly, the Sixth Circuit in *Tucker v. City of Fairfield,*

[3] The court cited its earlier decision in which Judge Richard Posner, concurring in part and dissenting in part, had stated, "There is no doubt that large inflated rubber rats widely used by labor unions to dramatize their struggles with employers are forms of expression protected by the First Amendment." *Construction and General Laborers Local 330 v. Town of Grand Chute,* 834 F.3d 745, 751 (7th Cir. 2016). In its 2019 decision, the court held that the ordinance at issue had been properly

398 F.3d 457, 462 (6th Cir. 2005), stated that "there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to the Union's message." In support of that holding, the Sixth Circuit cited the district court decision in *Operating Engineers Local 150 v. Village of Orland Park,* 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001), in which the court "easily conclude[d] that a large inflatable rat is protected, symbolic speech."[4] And, in *New Jersey v. DeAngelo,* 197 N.J. 478, 963 A.2d 1200 (N.J. 2009), the Supreme Court of New Jersey overturned the conviction of a union official fined for displaying a rat balloon, holding that the ordinance under which he had been fined "violate[d] defendant's constitutional right to free speech and [wa]s therefore unconstitutional." *Id.* at 489.

Other courts in other types of proceedings have reached the same conclusion about a union's use of rat balloons in connection with a labor dispute. *King v. Construction & General Building Laborers Local 79,* 2019 BL 243656 at *7 (E.D.N.Y. July 1, 2019) (refusing to issue a § 10(l) injunction in part because the union's "peaceful use of stationary inflatable rats and a cockroach to publicize a labor protest is protected by the First Amendment"); *Microtech Contracting Corp. v. Mason*

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applied because it was content-neutral, narrowly tailored, and had not been enforced selectively. 915 F.3d at 1122-27.

[4] The *Tucker* court held that the city had been properly enjoined from enforcing its sign ordinance to prohibit display of a rat balloon. 398 F.3d at 461-64. In *Village of Orland Park*, the district court held that one sign ordinance was unconstitutional as applied to a union's request to display a rat balloon but that another was a valid, content-neutral restriction on time, place, and manner of expression. 139 F. Supp. 2d at 960-65.

Tenders District Council, 55 F. Supp. 3d 381, 389 (E.D.N.Y. 2014) (denying a request to enjoin an alleged contract violation because display of a rat balloon was "protected by the First Amendment"); *see also Ameristar Casino East Chicago, LLC v. UNITE HERE Local 1,* 2018 BL 305897 at *11 (N.D. Ill. Aug. 24, 2018) (holding that a union's peaceful bannering was constitutionally protected speech that did not violate § 303 of the Act, 29 U.S.C. § 187(a), and that "[t]he presence of a large inflatable rat does not alter the analysis").

The Board has twice addressed the question whether a union violates the Act by displaying an inflated rat balloon. In *Sheet Metal Workers Local 15 (Brandon Regional Medical Center),* 356 NLRB 1290 (2011) [hereinafter *Brandon II*], the Board held that the union had not violated § 8(b)(4)(ii)(B) by displaying a large inflated rat balloon on public property at a secondary employer's worksite.[5] Relying on its analysis in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.),* 355 NLRB 797 (2010)[6], the Board held that the display did not constitute picketing because it "did not involve any confrontational conduct" and was not otherwise coercive because it

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[5] In its initial decision in *Brandon,* the Board held that the union had violated § 8(b)(4)(ii)(B) by staging a mock funeral in front of a hospital but did not address the union's use of the rat balloon. 346 NLRB 199 (2006). The D.C. Circuit, applying the constitutional avoidance doctrine, reversed the Board's decision and remanded the case for the Board to consider the issue posed by displaying the balloon. *Sheet Metal Workers Local 15 v. NLRB,* 491 F.3d 429 (D.C. Cir. 2007).

[6] In *Eliason & Knuth,* the Board, applying the constitutional avoidance doctrine, held that the union had not violated § 8(b)(4)(ii)(B) by displaying a large stationary banner on a public sidewalk near a secondary employer's worksite. The Board concluded that bannering was not tantamount to picketing or to the non-picketing disruptive conduct that constituted coercion within the meaning of § 8(b)(4)(ii)(B). *Id.* at 797, 801-06, 807-11.

did not disrupt the operations of the secondary employer. 356 NLRB at 1291-92. The Board observed that the constitutional avoidance doctrine "strongly supported" its conclusion because "the rat balloon . . . must be viewed as 'expressive activity' protected by the First Amendment." *Id.* at 1293. In *Laborers Local 872 (Westgate Las Vegas Resort & Casino),* 363 NLRB No. 168 (April 29, 2016), the Board again held that displaying inflated rat balloons (along with a cockroach, pig and cat) did not constitute picketing or coercive conduct and therefore did not violate § 8(b)(4)(ii)(B). *Id.*, slip op. at 1 n.2. *See also Operating Engineers Local 150 (Lippert Components, Inc.),* Case No. 25-CC-228342 (July 15, 2019) (ALJ held that union did not violate § 8(b)(4)(ii)(B) by displaying rat balloon and banners near public entrance to a trade show.).

I. The Constitutional Avoidance Doctrine of *DeBartolo* Requires the Board to Avoid Interpreting the Act in a way that would Raise Serious Constitutional Problems.

The applicability to the NLRA of the constitutional avoidance doctrine – the rule that a federal statute should not be interpreted in a manner that raises serious questions about its constitutionality if another acceptable interpretation exists – is well established. In *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 (Tree Fruits),* 377 U.S. 58 (1964), the Supreme Court held that § 8(b)(4) did not prohibit peaceful secondary picketing, at a neutral business establishment, asking the public not to buy a struck product. The Court based that conclusion in part on its concern "that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *Id.* at 63. The Court more clearly described

the doctrine in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), holding that the NLRB could not exercise jurisdiction over teachers at church-operated primary and secondary schools. Noting that such coverage would raise serious questions under the First Amendment, the Court declined, "in the absence of a clear expression of Congress' intent," to construe the Act in a manner that would require the Court "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

Nine years later, in *DeBartolo,* the Supreme Court applied *Catholic Bishop* to § 8(b)(4)(ii)(B) of the Act. In that case, a union had distributed handbills at a shopping mall asking the public not to patronize stores in that mall because a nonunion contractor paying substandard wages had been hired to build one of the mall's stores. The Board had read § 8(b)(4)(ii)(B) to prohibit that handbilling, 273 NLRB 143 (1985), but the Court observed that interpreting the Act to prohibit peaceful, non-picketing "expressive activity" "posed serious questions of the validity of § 8(b)(4) under the First Amendment." 485 U.S. at 575-76. Citing *Catholic Bishop,* the Court stated that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 575.

The courts and the Board have frequently invoked the constitutional avoidance doctrine in cases in which bannering or other expressive activity has been challenged as a violation of § 8(b)(4)(ii)(B). *520 South Michigan Avenue Associates Ltd. v. UNITE HERE Local 1,* 760 F.3d 708, 723 (7th Cir. 2014) ("the Supreme Court has

cautioned us to be especially careful not to label expressive union conduct as coercive if such an interpretation could interfere or limit free speech"); *Sheet Metal Workers Local 15 v. NLRB,* 491 F.3d 429, 437 (D.C. Cir. 2007) ("the canon of constitutional avoidance is not suspended merely because a secondary boycott is at issue"); *Overstreet v. Carpenters Local 1506,* 409 F.3d 1199, 1209-10 (9th Cir. 2005) (citing *Catholic Bishop* and *DeBartolo*); *Carpenters Local 1827 (United Parcel Service, Inc.)*, 357 NLRB 415, 416 (2011) ("our duty [is] to avoid construing the Act, if possible, to avoid raising serious constitutional questions"); *Eliason & Knuth,* 355 NLRB at 807 (conclusion that bannering does not violate § 8(b)(4)(ii)(B) "is supported, if not mandated, by the constitutional concerns that animated the Supreme Court's decision in *DeBartolo*"). Together, these decisions leave no doubt that, in this case, in which the General Counsel is challenging conduct that several courts and the Board have characterized as expressive activity protected by the First Amendment, *supra* at 5-8, *Catholic Bishop* and *DeBartolo* require the Board to apply the constitutional avoidance doctrine.

The General Counsel argues that this case raises no constitutional concerns because "the First Amendment does not shield unlawful secondary picketing." GC Br. at 33. This argument – that conduct prohibited by § 8(b)(4)(ii)(B) is for that reason unprotected by the First Amendment – stands the constitutional avoidance doctrine on its head. It would be impossible to reconcile that argument, moreover, with *Tree Fruits* in which the Supreme Court held that § 8(b)(4) did not prohibit the peaceful, secondary picketing at issue there because that prohibition "might collide with the

guarantees of the First Amendment." 377 U.S. at 63.[7]

II. Holding that Local 98 Violated § 8(b)(4)(ii)(B) of the Act by Peacefully Displaying Stationary Rat Balloons on a Public Sidewalk Would Raise Serious Constitutional Problems.

In this case, Local 98 peacefully displayed stationary rat balloons on a public sidewalk to publicize the fact that certain work had been performed by a nonunion contractor providing substandard wages and benefits. The proposition that Local 98 thereby violated the Act, if accepted by the Board, would raise serious questions about the constitutionality of § 8(b)(4)(ii)(B) because, as explained herein, that display constituted symbolic speech regarding an issue of public concern in a public place occupying a special, protected position under the First Amendment.

The First Amendment to the U.S. Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." It is well-established that this provision protects more than written or spoken words. "The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black,* 538 U.S. 343, 358 (2003). "Symbolism," as the Court has stated, "is a primitive but effective way of communicating ideas." *Id.* at 354 (quoting *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 632 (1943)

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[7] In *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982), the Supreme Court rejected reasoning similar to that offered by the General Counsel in this case. In *Claiborne,* the lower court had turned aside the claim that peaceful conduct in support of a boycott of white merchants, conducted by the NAACP, was constitutionally protected, stating, "We know of no instance . . . wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime." *Id.* at 895. The Supreme Court reversed, despite the claimed violation of state criminal law, because the activities at issue were protected by the First Amendment.

(refusal to salute the flag)).

The Court has held that the First Amendment protects cross-burning, *Virginia v. Black,* 538 U.S. at 363-67, flag burning, *Texas v. Johnson,* 491 U.S. 397, 403-06 (1989), wearing black armbands, *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 505-06 (1969), displaying a red flag, *Stromberg v. California,* 283 U.S. 359, 369 (1931), and other symbolic, expressive acts.

Symbolic displays must be considered in context to determine whether "[a]n intent to convey a particularized message was present" and whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington,* 418 U.S. 405, 410-11 (1974) (peace symbol affixed to American flag). The display at issue here clearly meets that standard. As Judge Giannasi found, the rat balloons "did no more than visually reinforce the same message in the handbills – that nonunion labor was used in the renovations." ALJD at 8. "This was essentially speech in another form." *Id.*

Not all speech receives the same First Amendment protection. The protection afforded may depend on the subject matter and specifically on whether the speech addresses a matter of public concern. Speech regarding public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown,* 447 U.S. 455, 467 (1980) (state statute barring picketing at residence but not at place of employment held unconstitutional). By contrast, speech concerning private or commercial matters receives somewhat less protection. *See Snyder v. Phelps,* 562 U.S. 443, 451 (2011) ("Whether the First Amendment prohibits holding

Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern."); *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 571-72 (2011) (In commercial speech inquiry, government must show "that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest.").

"Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Snyder,* 562 U.S. at 453 (internal quotation marks omitted). A labor organization's expressive conduct seeking to enlist public support in a labor dispute over the payment of substandard wages constitutes speech regarding a public issue. In 1940, the Supreme Court described labor disputes as "matters of public concern." *Thornhill v. Alabama,* 310 U.S. 88, 104 (1940). And in *DeBartolo,* the Court observed that handbills "pressing the benefits of unionism to the community and the dangers of inadequate wages to the economy" did "not appear to be typical commercial speech such as advertising." 485 U.S. at 576.

As *DeBartolo* shows, the Board must reject the General Counsel's effort to categorize the speech at issue here as commercial speech. GC Br. at 19, 31. First, the fact that Local 98 may have been motivated at least in part by economic issues affecting its members is of no consequence. *Sorrell,* 564 U.S. at 567 ("While the burdened speech results from an economic motive, so too does a great deal of vital expression."). And second, commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric*

Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561 (1980) (emphasis added). In seeking public support, Local 98 was not appealing to the economic interests of those who read its handbill or observed its rat balloons. It was instead appealing to the public's sense of fairness and belief in economic justice. These are matters of public, not private concern.

The protection provided to symbolic speech and expressive activity may depend not only on its content, but also on its location. *Frisby v. Schultz,* 487 U.S. 474, 479 (1988) ("To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech."). In this case, the expressive conduct took place on a public sidewalk. The Supreme Court has frequently stated that public sidewalks "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen v. Coakley,* 573 U.S. 464, 476 (2014) (quoting *United States v. Grace,* 461 U.S. 171, 180 (1983)); *Snyder,* 562 U.S. at 456. In *McCullen,* the Court held that a state law making it a crime to stand on a sidewalk within 35 feet of a reproductive health care facility violated the First Amendment even though the law was content neutral.

The constitutional issue presented in this case cannot be swept aside by describing rat balloons as offensively ugly, frightening, or as something that "evokes an emotional reaction." GC Br. at 29. "[S]peech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder,* 562 U.S. at 458 (signs stating *inter alia*, "Thank God for 9/11."); *Iancu v. Brunetti,* 139 S. Ct. 2294 (June 24, 2019) (statute prohibiting registration of immoral or scandalous trademarks held unconstitutional).

Nor can the constitutional issue be avoided simply by labeling the display of rat balloons as "picketing." *See* GC Br. at 33. The Supreme Court has in several cases held that the First Amendment protects peaceful, non-coercive picketing activity. *Snyder,* 562 U.S. at 456 ("picketing peacefully on matter of public concern at a public place"); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 907 (1982) ("The boycott was supported by speeches and nonviolent picketing.") *Thornhill,* 310 U.S. at 93-94 (picketing by employees on their employer's property).

The conduct at issue in this case, the display of inflated rat balloons, consists of nonviolent symbolic speech regarding a matter of public concern conducted on a public sidewalk. As these cases show, a decision that § 8(b)(4)(ii)(B) prohibits that conduct would raise serious questions about the constitutionality of that section. The Board should therefore take care to reject any such reading of that section, unless compelled by a clear showing of congressional intent. *Eliason & Knuth,* 355 NLRB at 802 ("we must take care not to define the category of proscribed picketing more broadly than clearly intended by Congress"). That showing has not been offered in this or any other case, because it does not exist.

III. The Peaceful Display of Stationary Rat Balloons in this Case Lacked the Confrontational Element that is the *Sine Qua Non* of Coercive Picketing.

Section 8(b)(4)(ii)(B) provides that a union may not "threaten, coerce, or restrain any person" to achieve a cease doing business objective. 29 U.S.C. § 158(b)(ii)(B). In many instances, picketing constitutes coercion prohibited by that section. *NLRB v. Retail Store Employees Local 1001 (Safeco),* 447 U.S. 607, 608

(1980) ("the picketing plainly violated the statutory ban on the coercion of neutral parties"). But, not every activity fairly described as "picketing" is coercive within the meaning of § 8(b)(4)(ii)(B). *Id.* at 611-12 ("In *Tree Fruits,* the Court held that § 8(b)(4)(ii)(B) does not prohibit all peaceful picketing at secondary sites.").[8] Mackson-Landsberg at 1528 ("Labeling a particular activity as picketing does not necessarily clarify whether or not it violates section 8(b)(4)(ii)(B)").

What makes picketing coercive within the meaning of § 8(b)(4)(ii)(B) and therefore subject to prohibition is the element of confrontation. As the Supreme Court observed in *DeBartolo,* "picketing is qualitatively different from other modes of communication." 485 U.S. at 580 (internal quotation marks and citations omitted). It is "a mixture of conduct and communication" and it is the conduct and not the ideas communicated that can be regulated. *Id.* (quoting *Safeco,* 447 U.S. at 617 (Stevens, J. concurring)). In *Hughes v. Superior Court of California for Contra Costa County,* 339 U.S. 460, 464-65 (1950), the Supreme Court explained that "industrial picketing is more than free speech since it involves patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the ideas which are being disseminated." *Accord, Building Service Employees Local 262 v. Gazzam,* 339 U.S. 532, 536-37 (1950) (Industrial picketing "establishes a *locus in quo* that has far more potential for inducing action or non-action than the message the pickets convey."); *see Kohn v. Southwest Regional*

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[8] The General Counsel is thus incorrect in arguing, GC Br. at 14, that "even peaceful picketing or persuasive conduct in aid of the secondary boycott is unlawful under Section 8(b)(4)."

Council of Carpenters, 289 F. Supp. 2d 1155, 1167 (C.D. Cal. 2003) ("analysis [under] § 8(b)(4)(ii)(B) must focus on the union representatives' conduct and not . . . on the content of their speech"). Mackson-Landsberg at 1539-40 (*DeBartolo* establishes that picketing falls outside the First Amendment only if it "achieve[s] its ends through conduct, for example, intimidation by a line of picketers who are blocking the entrance to a store.").

In determining whether picketing violates § 8(b)(4)(ii)(B), courts and the Board have generally described the critical question in one of two ways: whether the activity at issue creates a barrier between the neutral establishment and its potential customers or whether that activity creates a confrontation between the alleged picketers and those seeking to enter the neutral establishment. *520 South Michigan Avenue,* 760 F.3d at 720 ("courts have noted that a defining characteristic of picketing is that it creates a physical barrier between a business and potential customers"); *Sheet Metal Workers Local 15,* 491 F.3d at 438 (mock funeral did not constitute picketing "because it had none of the coercive character of picketing"); *United Parcel Service,* 357 NLRB at 417 (display of banners was not picketing "because they lacked the 'element of confrontation'") (quoting *Eliason & Knuth,* 355 NLRB at 802); *Eliason & Knuth,* 355 NLRB at 802 ("conduct that renders picketing coercive" is that which "creat[es] a physical or, at least, a symbolic confrontation between picketers and those entering the worksite")

This standard is hardly new. In *Chicago Typographical Union No. 16,* 151 NLRB 1666 (1965), the Board stated that "[o]ne of the necessary conditions of

'picketing' is a confrontation in some form between union members [conveying a cease doing business message] and employees, customers, or suppliers who are trying to enter the employer's premises." *Id.* at 1669 (quoting *NLRB v. Furniture Workers,* 337 F.2d 936, 940 (2nd Cir. 1964)). Prohibited picketing requires confrontation because, absent that confrontation, no danger of intimidation exists, and the effects produced will result, not from any confrontation, but only from the persuasive force of the union's message, symbolic or otherwise.

However the question is phrased, in this case the unchallenged findings of Chief Judge Giannasi provide the answer. He found that the presence of the rat balloons created neither a confrontation nor a barrier. "There is no evidence that the stationary rats interfered with pedestrian traffic or people entering or exiting the hotel." ALJD at 8. "Most pedestrians walked right by the rat without even pausing to look at it." *Id.*

The General Counsel argues for a broader definition of coercive picketing that would include any activity during which union agents stand near the entrance to a neutral business. GC Br. at 15-16, 21-22. In making that argument, the General Counsel relies primarily on cases applying § 8(b)(7) of the Act, 29 U.S.C. § 158(b)(7), *e.g. Lumber and Saw Mill Workers Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965). That section, however, explicitly prohibits picketing in certain circumstances, regardless of whether the picketing is coercive. The Supreme Court took note of that distinction in *Tree Fruits,* stating:

> When Congress meant to ban picketing *per se*, it made its meaning clear; for example, § 8(b)(7) makes it an unfair labor practice, "to picket or

> cause to be picketed . . . any employer . . . ." In contrast, 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. Mackson-Landsberg at 1542 n.141 ("Section 8(b)(7) does not make the kind of distinction that section 8(b)(4) makes between coercive conduct, in section 8(b)(4)(ii)(B), and inducement and encouragement, in section 8(b)(4)(i)(B)."). The cases cited by the General Counsel do not, therefore, provide an accurate or useful guide to what does and does not constitute coercive picketing under § 8(b)(4)(ii)(B).

Coercive picketing creates a barrier between a neutral business and its customers. It is something that one must pass through, rather than something that one can pass by, as the pedestrians in this case nonchalantly passed by the rat balloons displayed by Local 98. Because the rat balloons displayed by Local 98 created neither a barrier nor a confrontation, their display cannot be characterized as coercive picketing prohibited by § 8(b)(4)(ii)(B). *See Brandon II,* 356 NLRB at 1292 (display of inflated rat balloons "did not involve any confrontational conduct").

IV. The Peaceful Display of Stationary Rat Balloons in this Case did not Significantly or Severely Disrupt the Operations of either Neutral Establishment and Therefore did not "Threaten, Coerce, or Restrain" those Businesses within the Meaning of § 8(b)(4)(ii)(B).

Violations of § 8(b)(4)(ii)(B) are not confined to picketing. Courts and the Board agree that non-picketing activity can also constitute the threats, coercion or restraint prohibited by that section. "Harassment, if severe enough, could rise to the level of coercive behavior under Section 158(b)." *520 South Michigan Avenue Associates,* 760 F.3d at 721 (harassment or repeated trespass, including numerous phone calls and

threats to disrupt events); *Service Employees Local 525 (General Maintenance Service Co.),* 329 NLRB 638, 664-65, 680 (1999), *aff'd,* 52 Fed. Appx. 357 (9th Cir. 2002) (throwing bags filled with trash into a building's lobby); *Mine Workers (New Beckley Mining Corp.),* 304 NLRB 71, 71-72 (1991), *enf'd,* 977 F.2d 1470 (D.C. Cir. 1992) (early-morning mass rally with shouting and name-calling). *Service Employees Local 399 (Wm. J. Burns Detective Agency, Inc.)*, 136 NLRB 431, 432, 436 (1962) (mass demonstration blocking entrance).

Other, less disruptive non-picketing activity, although perhaps causing inconvenience, does not constitute prohibited coercion or restraint. *E.g., 520 South Michigan Avenue Associates,* 760 F.3d at 715-16 (three unannounced visits and telephone calls to neutral employer's offices); *Sheet Metal Workers Local 15,* 491 F.3d at 432-33 (mock funeral conducted in front of a hospital); *Brandon II,* 356 NLRB at 1290 (display of inflated rat balloon and union member holding leaflet in his outstretched arms).

In *Eliason & Knuth* and other decisions, the Board described in these terms the standard for determining whether non-picketing activity constituted coercion within the meaning of § 8(b)(4)(ii)(B): "The Board has found nonpicketing conduct to be coercive only when the conduct directly caused, or reasonably could be expected to directly cause, disruption of the secondary's operations." 355 NLRB at 805. And, the Board cited blocking ingress or egress as "an obvious example." *Accord, Westgate Las Vegas Resort,* 363 NLRB No. 168, slip op. at 1 n.1; *Brandon II,* 356 NLRB at 1292.

A broader standard would contravene the Supreme Court's cautionary

admonition that the language of § 8(b)(4)(ii) "should be interpreted with 'caution' and not given a 'broad sweep.'" *DeBartolo,* 485 U.S. at 578 (quoting *NLRB v. Drivers Local 610,* 362 U.S. 274, 290 (1960)); *520 South Michigan Avenue Associates.* 760 F.3d at 719. *See Sheet Metal Workers Local 15,* 491 F.3d at 438-39 ("'coercion' must be understood in a manner consistent with the First Amendment").

Under this standard, the fact that non-picketing union activity results in a loss of revenue or customers by a targeted neutral business does not show that such activity is coercive. *DeBartolo,* 485 U.S. at 579, 580 ("economic impact on the neutral" insufficient); *United Parcel Service,* 357 NLRB at 418 ("an employer's fear that a banner's message will lead its customers to take action does not render the banner display coercive").[9]

Nor does the proximity of the rat balloons to a company's entrance doors, as the General Counsel argues, GC Br. at 24, 31, make the display of those balloons coercive. The Board has rejected the General Counsel's contention that banners l0 and 15 feet from entrances were for that reason coercive. *Carpenters Local 1506 (Marriott Warner Center),* 355 NLRB 1330, 1330 (2010) (banner located 10 feet from entrance); *Eliason & Knuth,* 355 NLRB at 798 (banners as close as 15 feet from entrance).

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[9] The General Counsel argues that coercion and restraint should be read broadly to include any union activity if, as a result of that activity, "targeted individuals . . . would reasonably have been dissuaded from patronizing the neutral's businesses." GC Br. at 18. That argument is irreconcilable with the admonition that those terms should be read narrowly and with the holding of *DeBartolo* that § 8(b)(4)(ii)(B) does not prohibit the distribution of handbills even if they do dissuade individuals from patronizing the targeted neutral business.

Judge Giannasi's findings of fact show that Local 98's display of inflated rat balloons did not constitute coercion or restraint within the meaning of § 8(b)(4)(ii)(B). He specifically found that "there is no evidence that the stationary rats interfered with pedestrian traffic or people entering or exiting the hotel" or evidence that the rat balloons "cause[d] disruption to the operations of either the hotel or the restaurant." ALJD at 8. Both continued to operate normally. These findings, to which exceptions have not been filed, preclude any conclusion that the secondary companies were coerced by Local 98's display of inflated rat balloons.

In support of his exceptions, the General Counsel describes the inflated rat balloons as "imposing," "menacing," "intimidating," and "threatening." GC Br. at 1, 2, 18, 22. These descriptions ignore two obvious facts. The rats were merely balloons. And, those who saw them or walked by them clearly understood that they were just balloons. No reasonable person would be menaced, intimidated, or threatened by a stationary balloon.[10]

Local 98 did more than display inflated rat balloons. On the three days that the balloons were displayed, one union member distributed handbills to hotel guests, and, on one of those three days, moved outdoor furniture a few feet to accommodate one of the balloons. ALJD at 4-5. But, as Judge Giannasi found, that additional activity also failed to cause the disruption required to establish a violation of §

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[10] An editor of the Washington Post recently observed that rat balloons "can lend a carnival-like air to an otherwise forlorn scene" and made light of the General Counsel's view that rat balloons are somehow intimidating. "If he thinks the rat's bad, he should take a look at the sinister Ronald McDonald and Pillsbury Doughboy in the Macy's Thanksgiving Day Parade." Lasswell*, supra* at 2.

8(b)(4)(ii)(B):

> Only one person, Donoghue, was alleged, at times, to have walked 'back and forth' in front of the hotel entrance while handbilling. Although he moved away from the stationary rat nearby, he carried no sign and did not engage in anything that could cause a confrontation. There is no evidence that Donoghue established an actual or symbolic barrier that interfered with pedestrians on the sidewalk or the egress or ingress of people utilizing the hotel.

ALJD at 8. As these findings show, none of the activities that took place on the three days that the rat balloons were displayed – whether considered collectively or individually – caused the type of disruption required to show coercion within the meaning of § 8(b)(4)(ii).[11]

In this case, the General Counsel is alleging that Local 98 violated § 8(b)(4)(ii)(B) of the Act by, *inter alia,* displaying stationary inflated rat balloons as a means of notifying the public that certain work had been performed by a nonunion contractor providing substandard wages and benefits and asking the public for support in Local 98's dispute with that contractor. That display constituted peaceful, symbolic speech, on a public sidewalk, that did not impede or interfere with businesses or individuals nearby. Holding that § 8(b)(4)(ii)(B) prohibits such conduct

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[11] On a fourth day, when no rat balloons were displayed, Local 98 placed small A-frame signs by the curb reading "Do Not Buy Here," and a member of Local 98 used a bullhorn to read Local 98's handbill and criticize the hotel and restaurant. ALJD at 10-11. Judge Giannasi concluded that, because the bullhorn was "excessively loud" its use violated § 8(b)(4)(ii)(B). ALJD at 11-12. Even if that conclusion were correct, it could have no effect on the issue posed by Local 98's earlier display of rat balloons, since that display could not have been retroactively rendered unlawful by events that took place after the balloons had been removed. *See General Maintenance Service,* 329 NLRB at 638 n.8 (incident cannot have been rendered unlawful by conduct that postdated it).

would raise serious questions about the constitutionality of that section. The Board must therefore reject that contention if another acceptable interpretation exists. Clearly it does, because the conduct at issue in this case did not create the confrontation that is the *sine qua non* of coercive picketing and did not disrupt the operations of any neutral business. That conduct did not, therefore, violate the Act.

CONCLUSION

For all the foregoing reasons, the Board should adopt Judge Giannasi's findings and his conclusion that Local 98 did not violate § 8(b)(4)(ii)(B) of the Act by peacefully displaying inflated rat balloons on a public sidewalk to publicize the fact that work at two neutral establishments had been performed by a nonunion contractor providing substandard wages and benefits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Motion of the AFL-CIO and NABTU for Leave to File a Brief *Amici Curiae* and the proposed Brief, *Amici Curiae,* of the AFL-CIO and NABTU were electronically filed and served by email on the date stated below on the following:

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Dated: September 16, 2019