

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

**SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87,  
Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD,  
Respondent**

and

**PREFERRED BUILDING SERVICES, INC.,  
Intervenor**

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**ON PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS  
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**No. 19-70334**

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**ON PETITION FOR REVIEW OF AN ORDER OF  
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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

This case is before the Court on the petition of the Service Employees International Union Local 87 (“the Union”) to review the Board’s Order reported at 366 NLRB No. 159 (Aug. 28, 2018). (ER 2-38.)<sup>1</sup> In its Order, the Board

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<sup>1</sup> When citing the agency record, this brief uses “ER” to refer to the Union’s excerpts of record and “SER” to refer to the Board’s supplemental excerpts. “Br.”

dismissed an unfair-labor-practice complaint against employers Preferred Building Services, Inc. and Ortiz Janitorial Services (referred to in this brief as Preferred and Ortiz Janitorial, or “the Companies”). The complaint alleged that the Companies, as joint employers, violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 151, 158(a)(1) and (3), by, among other things, discharging employees for picketing outside a building where they worked, which was also occupied by “neutral” employers with whom they had no labor dispute. The Board dismissed the complaint, finding merit in the Companies’ affirmative defense that the employees had lost the Act’s protection because their picketing, which was coercive and targeted the neutral employers, was unlawful under Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. § 158(b)(4)(ii)(B).

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the Act, 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding under Section 10(f) of the Act, 29 U.S.C. § 160(f), because the unfair labor practices occurred in San Francisco, California. The Union’s petition for review was timely filed. Before the Court, Preferred has intervened on the Board’s

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refers to the Union’s opening brief, and “A.” to the Amicus brief filed in support of the Union. General Counsel’s Exhibit 79, a video of the picketing, is referred to as GCX 79. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

behalf, and a group of labor law professors (“Amici”) filed an amicus brief in support of the Union.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether the Board provided a rational basis for dismissing the complaint after finding merit to the Companies’ affirmative defense that the discharged employees lost the Act’s protection by engaging in coercive picketing that enmeshed neutral employers in their labor dispute.

### **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the Act are reproduced in the Addendum to this brief.<sup>2</sup>

### **STATEMENT OF THE CASE**

Section 8(b)(4)(ii)(B) of the Act limits pressure that unions and employees can apply in a labor dispute to their “primary” employer, while shielding any “secondary” or “neutral” employers with whom the union and employees have no direct labor dispute. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951). In this case, the complaint alleged that the Companies violated Section 8(a)(1) and (3) of the Act by discharging employees and taking related actions in response to their picketing outside an office building they cleaned, which was occupied by neutral employers. (ER 35.) The Board, however, found that the

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<sup>2</sup> Other statutory and constitutional provisions are reproduced in the Union’s brief.

picketing was unlawful because in addition to being coercive, a finding that the Union did not contest before the Board, the picketing had a prohibited secondary objective of targeting neutral employers, which rendered the employees' participation unprotected by the Act. Because the complaint allegations involved the Companies' reaction to the unprotected conduct, the Board dismissed the complaint in its entirety. (ER 2.) The facts supporting the Board's Order are summarized below, followed by a summary of the proceedings before the administrative law judge and the Board's Decision and Order.

## **I. The Board's Findings of Fact**

### **A. Background: the Union's Primary Labor Dispute with Ortiz Janitorial**

Preferred provides janitorial services to several residential and commercial buildings in San Francisco. (ER 240 ¶1, SER 4.) In 2012, Preferred subcontracted some of that work, including the cleaning of an office building at 55 Hawthorne, to Ortiz Janitorial. (ER 2; ER 240 ¶10, ER 249-63, SER 6.) Harvest Properties acts as the agent for the owner of 55 Hawthorne and contracted with Preferred for janitorial services at the building. (ER 8; SER 21-22.)

Rafael Ortiz, the sole owner of his eponymous company, worked as the day porter at 55 Hawthorne and supervised his janitorial employees at the building. (ER 14; ER 240 ¶9, ER 264-337, SER 12-13.) During the fall of 2014, employee

Yuneun Useda complained to Ortiz about the amount and difficulty of the work. (ER 17; ER 111.) Useda told Ortiz that things were different when “Giovanni,” a prior supervisor, had been in charge. Ortiz replied that Giovanni paid more because he was sleeping with an employee, and “if it was like that, then he [Ortiz] could pay up to 20 an hour.” (ER 17; ER 113.)

Also in the fall of 2014, Ortiz told employee Balbina Mendoza that his wife had given him permission to have sex with anyone so long as he used a condom. (ER 17; ER 79.) Around the same time, when Mendoza left work early one day because she was vomiting, Ortiz asked employee Joel Banegas, “So you got her pregnant already?” (ER 17; ER 137b-138.)

Useda first approached Carl Kramer and David Frias, co-directors of the San Francisco Living Wage Coalition, and asked for assistance with her working conditions and Ortiz’s harassing comments about women. (ER 17; ER 114.) Later, Mendoza and Banegas began attending meetings with the Coalition as well. (ER 17; ER 114b-115.) At Kramer’s suggestion, the employees spoke with Union President Olga Miranda. (ER 17; SER 10-11.) After the employees described their situation to Miranda, she asked if they would participate in a picket. The employees agreed. (ER 17; ER 115-16.)

**B. The Employees Demonstrate Outside 55 Hawthorne and Distribute Handbills Targeting Neutral Building Tenants**

On October 29, 2014, members of the Union and the Living Wage Coalition joined employees Useda, Mendoza, and Banegas in a protest outside 55 Hawthorne. (ER 17; ER 240 ¶5.) During the demonstration, the marchers carried placards, chanted “up with the union, down with exploitation,” and gave handbills to passersby. (ER 2; ER 83a.)

Some of the signs carried by marchers displayed the Union’s name, and others included slogans such as “Preferred Building Services Unfair!” “We PREFER no more sexual harassment,” and “We PREFER a living wage.” (ER 3; ER 348-68, 404, 408.) Some signs also included a disclaimer in small print that “this is NOT a strike. It is an informational picket line. We are NOT calling for a boycott of this building. We are in a labor dispute with the cleaning contractor at this building.” (ER 3 n.6; ER 412). The handbills included photographs of Useda and Mendoza and read:

Who Needs a Minimum Wage Increase? We do. We work for Preferred Building Services which cleans the offices of KGO radio. We get paid the San Francisco minimum wage of \$10.74 per hour. We endure abusive and unsafe working conditions and sexual harassment. The work involves heavy lifting and the risk of serious injury. A foreman arbitrarily cut hours from eight hours per day to six hours and said that any additional hours would need to include sexual favors. The company does not provide paid sick days that are required by San Francisco law or pay medical bills for injuries on the job as required by workers compensation. We are calling on KGO radio

to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights. Vote yes on Prop J on Nov. 4 to raise the city minimum wage. Join us for a picket line outside the offices of KGO radio.

(ER 243.) The handbills concluded with the date and location of the demonstration and contact information for the Living Wage Coalition. Neither the handbills nor the picket signs named Ortiz Janitorial. (ER 3; ER 243.)

A few days after the October 29 demonstration, Miranda met with Banegas, Mendoza, and Useda. They discussed the “reactions and responses” of the tenants at 55 Hawthorne, and the employees reported that the tenants were “upset by what they had learned.” (ER 3; SER 19-20.) One of the tenants, KGO Radio, asked the building manager to ensure that Ortiz Janitorial employees did not clean some of its office space because of sensitive documents; KGO wanted to be “extra cautious” given that the handbills “directly labeled” KGO. (ER 3 n.7; SER 25.)

On November 19, members of the Union and the Living Wage Coalition again joined employees to protest outside 55 Hawthorne. (ER 3; ER 240 ¶6.) During the demonstration, the marchers carried placards, chanted, and gave handbills to passersby. One participant drummed, and chant leaders used a megaphone. (GCX 79.)

The handbills were somewhat different from those used in the first demonstration. (ER 3 & n.8; ER 244.) This time, the handbills called on two tenants—KGO Radio and Cumulus Media—to “help in getting Preferred Building Services to listen to our demands and not ignore us.” (ER 3 n.8; ER 244.) They again asked readers to join the employees “for a picket line outside the offices of KGO radio.” (ER 244.)

**C. The Union and Employees Demand that Harvest Properties, a Neutral in their Employment Dispute, Make Changes to Their Working Conditions**

During the demonstration on November 19, Miranda, Kramer, and some employees met with Harvest Properties Building Manager Ben Maxon. Miranda and Kramer complained about the employees’ working conditions and told Maxon that the protesters “were going to keep showing up until we made changes, more specifically to the wage.” (ER 3, 8; ER 215, SER 21.) Miranda added that “it just seemed inappropriate that [Ortiz] was still here, knowing what they knew since October.” (ER 3; SER 17-18.) When Maxon responded that Harvest intended to substitute a unionized contractor for Preferred, the reaction of those assembled was “happy.” (ER 3; ER 216.) Maxon further stated that Ortiz would be banned from the building pending an investigation. (ER 32; ER 216-17.)

Frias, co-director of the Living Wage Coalition, filmed the protest and later

created a video shown on local public-access television and posted to the Living Wage Coalition's YouTube channel.<sup>3</sup> (ER 3; SER 15.) The video depicts the demonstration and comments made by employees Useda and Mendoza to the assembled protestors following the meeting with Maxon. Useda observed that "the negotiations . . . were successful and we gained a victory . . . the person that we wanted to leave, it seems has been let go. What I like most is that Lauren [Squeri] from Preferred was present and saw that we're not playing." (ER 3; GCX 79 at 7:53.) Squeri, an accounts manager with Preferred, oversaw the subcontract with Ortiz Janitorial. (ER 8, 10; ER 175, SER 5, 7, 14.) Mendoza told the crowd that they "spoke with the building manager and he suspended our employer and promised there will be changes and respect for us." (ER 3; GCX 79 at 10:20.)

**D. Maxon Demands an Investigation; Ortiz Discharges Mendoza and Banegas; Preferred Cancels Its Contract to Clean 55 Hawthorne and Terminates Ortiz Janitorial's Subcontract**

On November 19, Maxon sent a copy of the protestors' handbill to Preferred and asked for an investigation. He also instructed Preferred that Ortiz was not allowed on the premises until the investigation was completed. (ER 3-4; SER 1-3, 23-24.) Instead of investigating, Preferred cancelled the contract with Harvest

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<sup>3</sup> General Counsel's Exhibit 79 is the video created by Frias. As required by Circuit Rule 27-14, the Board filed a motion for permission to transmit a copy of that exhibit to the Court.

Properties, effective December 19. (ER 4; ER 240 ¶11, SER 2-3.) As a result, Ortiz lost his subcontract to clean 55 Hawthorne and another Harvest property. (SER 26.) Ortiz immediately discharged Banegas and Mendoza. (ER 4; ER 97a-98, 148.) He discharged Useda, Tapia, and four other employees in December when the contract ended. (ER 4; SER 26.)

## **II. Proceedings Before the Administrative Law Judge; the Board's Decision and Order**

After Ortiz discharged the employees, the Union filed an unfair-labor-practice charge against Preferred and Ortiz Janitorial as joint employers, alleging that the discharges violated Section 8(a)(3) and (1) of the Act and that the Companies committed several independent violations of Section 8(a)(1). The Board's General Counsel issued a complaint, and an administrative law judge held a hearing on the allegations. (ER 7 & n.1; ER 419-29.)

During the hearing, Preferred raised several affirmative defenses, including that the protesting employees lost the protection of the Act by engaging in secondary picketing that was unlawful under Section 8(b)(4)(ii)(B) of the Act. (ER 2 n.3.) The administrative law judge issued an interim order dismissing

Preferred's secondary picketing defense and prohibiting Preferred from introducing any evidence in its support.<sup>4</sup> (ER 413-15.)

After the hearing ended, the judge issued a recommended decision, rejecting Preferred's defense that the employees' picketing was unprotected because it contravened Section 8(b)(4)(ii)(B) of the Act. Specifically, she found that "although [the employees] engaged in coercive picketing, they did not have a prohibited secondary object." (ER 4, 19.) She then found that Preferred and Ortiz Janitorial, acting as joint employers, violated Section 8(a)(3) and (1) of the Act by discharging the employees, and by terminating the subcontract between them as well as the contract with Harvest Properties. (ER 35.) She also found that Preferred and Ortiz Janitorial independently violated Section 8(a)(1) of the Act by taking other actions in response to the employees' picketing, such as photographing it and telling employees that the picketing would cost Ortiz his cleaning contracts with Preferred. (ER 2, 29, 25-26, 35.)

The Companies filed exceptions to the judge's recommended decision. Although the Board's General Counsel filed an answering brief and cross-exceptions, the Union, which had not participated in the proceeding, filed nothing.

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<sup>4</sup> The judge also dismissed Preferred's recognitional picketing defense under Section 8(b)(7) of the Act. 29 U.S.C. § 158(b)(7). That ruling is no longer at issue in this case.

The Board (Chairman Ring, Members Kaplan and Emanuel) found merit in the Companies' exceptions and determined that "the judge erred by rejecting the [Companies'] secondary picketing defense and restricting their ability to present evidence relevant to that defense." (ER 5.) The Board nevertheless found the record evidence sufficient to establish that the employees had engaged in picketing with a secondary object of enmeshing neutral employers in their labor dispute. In the absence of exceptions, the Board also affirmed the judge's finding that the picketing was coercive. (ER 5.) Accordingly, the Board found that the employees lost the Act's protection by engaging in picketing prohibited by Section 8(b)(4)(ii)(B) of the Act, and, as a result, the Companies did not violate Section 8(a)(1) and (3) of the Act by discharging them. Because the remaining unfair-labor-practice allegations also involved the Companies' reactions to the unlawful picketing, the Board dismissed the complaint in its entirety, finding it unnecessary to reach the judge's findings regarding joint-employer status or Preferred's other affirmative defenses. (ER 2 n.3, 6.)

Although the Union filed the unfair-labor practice charge that served as the basis for the General Counsel's decision to issue the complaint, the Union did not otherwise participate in any of the proceedings before the administrative law judge or the Board. It was not until after the Board had decided the case and issued its

Decision and Order that the Union appeared in the case for the first time by filing a motion for reconsideration with the Board. In that motion, the Union argued that the Board had incorrectly held that the picketing was coercive—a finding the Board had adopted in the absence of exceptions—and argued that the picketing was protected by the First Amendment, an issue not previously raised or litigated in the case. (ER 39-56.) The Board denied the motion because the Union did not identify any material error or demonstrate any extraordinary circumstances warranting reconsideration. (ER 1.)

### **SUMMARY OF ARGUMENT**

The Board had a rational basis for dismissing the unfair-labor-practice complaint, which alleged that the Companies violated Section 8(a)(1) and (3) of the Act by discharging employees and taking related actions in response to their picketing. As the Board found, the picketing was unprotected—it contravened Section 8(b)(4)(ii)(B) of the Act because it was coercive and enmeshed neutral employers in their dispute with their primary employer. The Board therefore found that the Companies’ response to the unlawful picketing did not violate Section 8(a)(1) and (3) of the Act, and dismissed the complaint.

Secondary activity, including picketing, violates Section 8(b)(4)(ii)(B) of the Act if it is coercive and has an objective to embroil neutral employers in a dispute

not their own. The Board found both elements here. As the Board noted, when the employees picketed outside 55 Hawthorne, a building with multiple neutral tenants, their picket signs failed to clearly disclose that their dispute was with their primary employer. Instead, their signs targeted neutral building tenants (mainly KGO Radio, but also Cumulus Media) by asking KGO to take action to ensure they received better wages and benefits, and by calling on the public to join the picket line outside KGO's offices. By obfuscating the object of their dispute, the employees sought to enmesh those neutral employers in their labor dispute and have them pressure the primary targets, Preferred and Ortiz Janitorial.

Accordingly, the Board determined that the picket signs did not meet the Board's four-factor *Moore Dry Dock* analysis, which created a strong presumption that the employees and their union had an unlawful secondary objective—a presumption that was not rebutted.

As the Board further found, independent record evidence also showed a secondary object. During a meeting with Harvest Properties, a neutral in the labor dispute, the Union threatened to continue picketing until *Harvest* raised their wages. By the end of the meeting, Harvest had announced that it was hiring a unionized cleaning contractor and banning Ortiz from the building. Following the meeting, two employees described their negotiations with Harvest as “successful”

because it had “suspended [their] employer and promised [them] changes and respect.” By agreeing to remove their picket line if Harvest, a neutral, met their demands, the employees and their union were attempting to disrupt the business relationships of a neutral employer, which is prohibited by Section 8(b)(4) of the Act.

Moreover, as the administrative law judge found, the employees’ picketing, which included patrolling in circles, chanting, and drumming, was coercive under Section 8(b)(4)(ii)(B) of the Act. No party excepted to the coercion finding, which the Board accordingly adopted. Section 10(e) of the Act therefore imposes a jurisdictional bar against consideration of the Union’s belated challenge to that finding.

Finally, although the Union and its Amici vociferously argue that the picketing was protected by the First Amendment, the Union failed to raise that claim before the Board at the time appropriate under the Board’s rules and regulations. The Union chose not to participate in the proceedings before the administrative law judge, nor did it avail itself of the opportunity to file cross-exceptions to the judge’s recommended decision or an answering brief to the Companies’ exceptions that argued the picketing was unlawful. Instead, the Union waited until after the Board had already issued its Decision and Order to file a

motion for reconsideration, which was too late. Consequently, the issue is jurisdictionally barred from court review under the dictates of Section 10(e) of the Act. However, even if the issue were properly before the Court, it would fail, given longstanding Supreme Court precedent holding that the First Amendment does not protect coercive secondary picketing prohibited by the Act.

### **STANDARDS OF REVIEW FOR BOARD ORDERS**

The Court will uphold the Board's orders if the Board "correctly applied the law and its factual findings are supported by substantial evidence." *Glendale Assocs. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003) (citations omitted). In reviewing the Board's application of the law, the Court accords "considerable deference" to the Board's interpretation of the Act "as long as it is rational and consistent with the statute." *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) (internal quotation marks and citation omitted).

The Court treats the Board's factual findings as conclusive if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). *Accord Healthcare Emps. Union, Local 399 v. NLRB*, 463 F.3d 909, 918 & n.12 (9th Cir. 2006). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). *Accord Recon Refractory & Const. Inc. v.*

*NLRB*, 424 F.3d 980, 986 (9th Cir. 2005). Under that standard, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. *Accord Local Joint Exec. Bd.*, 515 F.3d at 945. Nor is the substantial evidence standard “modified in any way when the Board and its [judge] disagree.” *Universal Camera*, 340 U.S. at 496-97. *Accord Int’l Chem. Workers Union Council v. NLRB*, 467 F.3d 742, 748 n.2 (9th Cir. 2006).

Given the Board’s “special expertise” in the field of labor relations, the Court will defer to “reasonable derivative inferences drawn by the Board from the credited evidence.” *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986) (internal quotation marks and citation omitted). This remains true in cases where the Board’s inferences run counter to the judge’s interpretation of the facts. *NLRB v. Pac. Grinding Wheel Co.*, 572 F.2d 1343, 1347 (9th Cir. 1978). Further, the Court will uphold the Board’s credibility determinations unless they are “inherently incredible or patently unreasonable.” *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

The distinction between lawful primary activity and unlawful secondary activity is not always “glaringly bright,” and is often marked by “lines more nice

than obvious.” *Local 761, Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 673-74 (1961). Drawing that distinction requires a “pragmatic” judgment that “is best made by [the Board, as] the agency which views the battle at first hand.” *Elec. Workers IBEW Local 480 v. NLRB*, 413 F.2d 1085, 1091 (D.C. Cir. 1969). *Accord Ironworkers Local 433 v. NLRB*, 598 F.2d 1154, 1157 (9th Cir. 1979) (“*Local 433 1979*”). On appellate review, “[n]ot only are the findings of the Board conclusive with respect to findings of fact in this field when supported by substantial evidence on the record as a whole, but the Board’s interpretation of the Act and . . . application of it in doubtful situations are entitled to great weight.” *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 691-92 (1951). *Accord Elec. Workers IBEW Local 76 v. NLRB*, 742 F.2d 498, 501 (9th Cir. 1984); *NLRB v. Carpenters Local 35*, 739 F.2d 479, 482 (9th Cir. 1984).

Ultimately, in cases like this one, where the Board concludes that there has been no violation of the Act, the Court must uphold the Board’s determination unless it has no rational basis. *See Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978); *Int’l Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (9th Cir. 1972). *Accord Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 727 (D.C. Cir. 1990); *Kankakee-Iroquois Cty. Emp’r Ass’n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987). In other words, a reviewing court may reverse the

Board's dismissal only where "the evidence required the Board" to find a violation of the Act. *Amalgamated Clothing Workers v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964). The application of the "rational basis" standard in dismissal cases essentially "particularizes the general rule that the court will defer to Board findings of facts supported by 'substantial evidence on the record considered as a whole.'" *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-87 (D.C. Cir. 1991) (quoting 29 U.S.C. § 160(f)).

## **ARGUMENT**

### **Because the Employees Lost the Act's Protection by Engaging in Unlawful Secondary Picketing, the Board Had a Rational Basis for Dismissing the Complaint**

In this case, the Board dismissed a complaint alleging that the Companies violated Section 8(a)(1) and (3) of the Act by discharging employees and taking related actions in response to their picketing outside an office building occupied by neutral employers. The Board based the dismissal on its finding that the employees lost the Act's protection because their picketing contravened Section 8(b)(4)(ii)(B) of the Act. Specifically, the Board found that the picketing was unprotected because in addition to being coercive, it had a prohibited secondary objective of targeting neutral employers. As shown below, substantial evidence supports the Board's finding that the picketers had an unlawful secondary

objective. Moreover, the Court lacks jurisdiction to consider the Union’s belated challenge to the Board’s further finding, which has ample record support, that the picketing was coercive. The Court likewise lacks jurisdiction to consider the Union and Amici’s belated and meritless First Amendment challenges to the Board’s Order.

**A. The Act Prohibits Unions and Employees from Picketing Neutral Secondary Employers To Further a Labor Dispute with the Primary Employer**

Section 8(b)(4), the so-called “secondary boycott” provision of the Act, makes it an unfair labor practice for a labor organization “to threaten, coerce, or restrain” a person not party to a labor dispute “where . . . an object thereof is . . . forcing or requiring [him] to . . . cease doing business with any other person. . . .” 29 U.S.C. § 158(b)(4)(ii)(B). *See also NLRB v. Retail Clerks Local 1001 (“Safeco”)*, 447 U.S. 607, 611 (1980). Congress recognized that “[i]llegal boycotts take many forms,” and therefore drafted Section 8(b)(4)’s “prohibition broadly to protect neutral parties, ‘the helpless victims of quarrels that do not concern them at all.’” *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 225 (1982) (“*Allied Int’l*”) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 23-24 (1947)). As the Supreme Court has explained, the provision implements “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.*, 341 U.S. at 692. *Accord NLRB v. Int’l Ass’n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433*, 891 F.3d 1182, 1184 (9th Cir. 2018).

While Section 8(b)(4) is directed toward union conduct, employees who participate in an unlawful secondary protest also engage in conduct unprotected by the Act. Accordingly, under longstanding precedent, those employees can be discharged by their employer for that unprotected conduct. *Martel Constr., Inc.*, 302 NLRB 522, 522 (1991) (remanding to administrative law judge), *after remand*, 311 NLRB 921 (1993), *enforced mem.*, 35 F.3d 571 (9th Cir. 1994). *Cf. Rapid Armored Truck Corp.*, 281 NLRB 371, 371 n.1 (1986) (employer did not violate the Act by discharging employees who participated in unprotected recognitional picketing under Section 8(b)(7) of the Act); *Local 707, Motor Freight Drivers*, 196 NLRB 613, 614, 629 (1972) (same). This rule is based on the principle embedded in Supreme Court cases that employees who engage in unprotected conduct are not entitled to reinstatement. *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 281 (1960) (citing, among other cases, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 259 (1939) (employer not required to offer

reinstatement to employees who participated in unlawful sit-down strike)). *Accord Nat'l Packing Co. v. NLRB*, 352 F.2d 482, 484-85 (10th Cir. 1965).

Conduct violates Section 8(b)(4)(ii)(B) if it is coercive and has a “cease doing business” objective. Regarding the coercion element, picketing is the quintessential form of coercion contemplated in Section 8(b)(4)(ii) of the Act. When picketing combines holding signs and persistent patrolling, it “creat[es] a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite” and is coercive. *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797, 802 (2010). Patrolling “is not constitutionally protected [and] is often a more forceful deterrent to individuals about to enter a business establishment than the ideas expressed on a picket line.” *Miller v. United Food & Commercial Workers Union, Local 498, AFL-CIO*, 708 F.2d 467, 471 (9th Cir. 1983). Coercion also encompasses “any form of economic pressure of a compelling or restraining nature.” *Associated Gen. Contractors Inc. v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975).

Regarding the cease doing business element, if a union and employees pressure “a neutral employer . . . to induce or coerce him to cease doing business with an employer with whom the union was engaged in a labor dispute,” then they are engaging in unlawful secondary activity. *Nat'l Woodwork Mfrs. Ass'n v.*

*NLRB*, 386 U.S. 612, 622 (1967). *Accord Iron Workers Dist. Council v. NLRB*, 913 F.2d 1470, 1475 (9th Cir. 1990). By contrast, if their pressure “is addressed to the labor relations of the contracting employer vis-a-vis his own employees,” then it is directed at primary activity and lawful. *Nat’l Woodwork Mfrs.*, 386 U.S. at 645.<sup>5</sup> In determining whether parties have a proscribed secondary object, the Board draws reasonable inferences from the foreseeable consequences of the conduct, the nature of the acts themselves, and the totality of the circumstances. *Allied Int’l, Inc.*, 456 U.S. at 224 & n.21; *United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada, Local 32, AFL-CIO v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990); *Allied Concrete, Inc. v. NLRB*, 607 F.2d 827, 830 (9th Cir. 1980); *Soft Drink Workers Local 812 v. NLRB*, 657 F.2d 1252, 1261-62 (D.C. Cir. 1980).

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*, 386 U.S. at 632-34. *Accord Serv. Emps. Local 87*, 312 NLRB 715, 742-43 (1993), *enforced mem.*, 103 F.3d 139 (9th Cir. 1996). The

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<sup>5</sup> Section 8(b)(4)(B) provides that “nothing contained in this clause . . . shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.” 29 U.S.C. § 8(b)(4)(B). Under that section, unions and employees can bring economic pressure to bear directly on the primary employer. *Burns & Roe*, 400 U.S. at 303; *Denver Bldg. & Trades Council*, 341 U.S. at 692.

term “cease doing business” is liberally construed. *NLRB v. Local 825, Int’l Union of Operating Engineers* (“*Burns & Roe*”), 400 U.S. 297, 304 (1971); *NLRB v. Local 85, Int’l Bhd. of Teamsters*, 454 F.2d 875, 878-79 (9th Cir. 1972). A “cease doing business objective” may be found where a union and participating employees attempt to cause disruptions and changes in the neutrals’ method of doing business short of total cessation. *Burns & Roe*, 400 U.S. at 304-05. Thus, this Court has held that the cease-doing-business requirement is met where “the foreseeable result of secondary activity will be more than a ‘slight’ disruption of business relations.” *Local 85*, 454 F.2d at 878-79. Moreover, the secondary object need not be the only object for the activity to violate the Act. *Allied Int’l*, 456 U.S. at 224 & n.21.

In sum, while Section 8(b)(4)(ii)(B) encompasses a broad range of activities, its prohibition is limited to coercive secondary activity. As shown below, the employees’ picketing was both coercive and had a secondary objective. Accordingly, their participation in the picketing was unprotected, and the Companies did not violate Section 8(a)(1) and (3) by discharging them and taking related actions in response to their picketing.

**B. The Union and Employees Had a Secondary Objective: To Enmesh Neutrals (KGO Radio and Harvest Properties) in Their Dispute with Preferred and Ortiz Janitorial**

**1. Where multiple employers share a common site, the Board analyzes picketing using its longstanding *Moore Dry Dock* criteria**

In applying the ban on secondary conduct to disputes at a “common situs”—where employees of both primary and secondary employers are at work—the Board attempts to accommodate both the rights of the union and affected employees to picket in furtherance of their primary dispute and the neutral parties’ statutory right not to be enmeshed in the dispute.<sup>6</sup> As this Court has emphasized, because of “the delicate nature of common situs picketing,” it must be “conducted in a manner least likely to encourage secondary effects.” *Local 433 1979*, 598 F.2d at 1159.

Accordingly, the Board, with this Court’s approval, has long required that for a union and employees who picket at a common situs to avoid a finding that their conduct has an unlawful secondary object, they must make every reasonable effort to ensure that the inducements and restraints inherent in the picket line are limited to employees of the primary employer. *See, e.g., Retail Fruit & Vegetable*

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<sup>6</sup> Because employees of Preferred, Ortiz, Harvest Property, and the building’s tenants all worked at 55 Hawthorne, it was a common situs.

*Clerks Union, Local 1017*, 116 NLRB 856, 859 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957) (cited with approval in *Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 678 (1961)); *Allied Concrete*, 607 F.2d at 830.

As a further evidentiary aid in assessing the object of picketing at a common situs, the Board, again with this Court's approval, uses the criteria first developed in *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950) ("*Moore Dry Dock standards*"). See *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 554 (9th Cir. 1988) ("*Local 433 1988*"). Those criteria have been summarized by the Supreme Court as follows: "(1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer." *Local 761*, 366 U.S. at 677. In analyzing whether a union has complied with the *Moore Dry Dock* standards, the Board may find the conduct unlawful "where there is independent evidence that the union had an unlawful secondary objective to enmesh the neutral employer in the primary dispute." *Local 560, Int'l Bhd. of Teamsters*, 360 NLRB 1067, 1068 (2014) ("*County Concrete*").

**2. Substantial evidence supports the Board’s finding that the picketing failed to comply with the fourth *Moore Dry Dock* criterion because the picketers’ handbills betrayed their secondary object**

When employees picket at a common situs, such as the office building in this case, “the failure of a picketing union to comply with any one of the *Moore Dry Dock* criteria gives rise to a strong, albeit rebuttable presumption that the picketing had an unlawful secondary object.” *Serv. Emps. Union, Local 87*, 312 NLRB 715, 744 (1993), *enforced mem.*, 103 F.3d 139 (9th Cir. 1996). Here, the Board found that the employees’ picketing did not meet *Moore Dry Dock*’s fourth criterion “because it failed to clearly disclose that the dispute was with [the Companies].” (ER 5.) *See Local 761*, 366 U.S. at 677; *Moore Dry Dock*, 92 NLRB at 549. The employees’ participation in the picketing was, therefore, unprotected by the Act, and the Companies could lawfully discharge them. (ER 2.) Substantial evidence supports that finding.

The picketers’ handbills betrayed their secondary object. Thus, although their October 29 handbills identified Preferred as their employer, the handbills also called on KGO Radio, a neutral employer whose offices the employees cleaned, “to *take corporate responsibility* in ensuring that *their* janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation

for asserting their rights.” (ER 243 (emphasis added).) Moreover, in larger font, their handbills asked readers to join the picket line “outside the offices of KGO [R]adio,” a neutral employer. (ER 243.)

For handbills that supposedly identified Preferred as the primary employer, their language oddly targeted neutral KGO Radio. Moreover, the handbills identified Preferred by name just once and Ortiz Janitorial not at all, while naming KGO Radio three times. Thus, the handbills noted that the employees cleaned KGO Radio’s offices, “call[ed] on KGO Radio to take corporate responsibility in ensuring” better wages and benefits for “their janitors,” and asked the public to join the picket line “outside the offices of KGO Radio.” (ER 3; ER 243.) By these statements, the handbills distributed by the picketers “led the public to believe that KGO—who was not involved in the dispute—was their employer and had the ability to adjust their working conditions.” (ER 5.)<sup>7</sup>

Given the ambiguity created by the handbills, the Board reasonably found that the employees failed to “clearly disclose” that their dispute was with Ortiz

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<sup>7</sup> Similarly, the handbills distributed on November 2 named KGO Radio and Cumulus Media as “major” tenants and requested their help “in getting Preferred Building Services to listen to our demands and not ignore us.” (ER 5 n.19; ER 244.) Again using larger font, those handbills also asked readers to join the picket line “outside the offices of KGO [R]adio.” (ER 244.) These handbills mentioned tenants KGO Radio or Cumulus Media four times but named Preferred only twice and Ortiz Janitorial not at all. (ER 244.)

Janitorial rather than the neutral building tenants. In making that determination, the Board appropriately considers whether the wording on handbills and signs “that the premises picketed were encompassed in the labor dispute . . . reveal[s] a design to affect some aspect of those neutral business operations.” *Bldg. Trades Council (Salem)*, 163 NLRB 33, 36 (1967), *enforced mem.*, 388 F.2d 987 (9th Cir. 1968). Here, the handbills’ wording revealed such a design.

The Union’s suggestion (Br. 27 n.5, 40) that the handbills themselves were protected as “communication that informs neutral parties about their working conditions” overlooks the fact that the handbilling here was combined with picketing. While Section 8(b)(4) of the Act does not proscribe “peaceful handbilling, unaccompanied by picketing,” *Edward J. DeBartolo Corp. v. Gulf Coast Trades Council*, 485 U.S. 568, 583-84 (1988), when it accompanies unlawful secondary picketing, handbilling “is the equivalent of the picketing itself and is unprotected by the Act.” *Local 732, Teamsters*, 229 NLRB 392, 400 (1977). Thus, the Board appropriately relied on the language of the handbills to determine that the picketing had an unlawful secondary objective.

Contrary to the Union’s assertion (Br. 26), the Board has not held that the fourth *Moore Dry Dock* criterion “is generally unmet only” when picket signs or handbills fail to identify the primary employer at all. There are certainly cases

where the picket signs identify the primary and the Board has still found the fourth *Moore Dry Dock* criterion to be unmet. For instance, in *Building Trades Council (Salem)*, even though the signs identified *only* the primary, the Board found they failed to meet the fourth *Moore Dry Dock* criterion and unlawfully targeted neutral building tenants. *Id.* at 34. And in *Local 767, Laborers*, the Board found that picket signs, which identified both the neutral and the primary and claimed that they “lower[ed] the standards” of the union, evinced an unlawful secondary objective. 209 NLRB 586, 592 (1974), *enforced*, 512 F.2d 991 (D.C. Cir. 1975) (table).

*Pacific Northwest District Council of Carpenters*, cited by the Union (Br. 25-26), is not to the contrary. There, the Board found that the picketing did not violate Section 8(b)(4) because the signs at issue named the primary employer but not the neutrals. The signs were “clear” that the union “did not have a dispute with the neutrals.” 339 NLRB 1027, 1029. Thus, the Board found “no ambiguity in the message conveyed by the signs,” *id.*, unlike the handbills used in the picketing here.

*Pacific Northwest* also shows, contrary to the Union’s claim (Br. 28), that the Board does not require “lawyerly precision” in sign-writing. Instead, the Board simply requires that unions provide “clear” signs or handbills whose messages

contain “no ambiguity.” *Pac. NW Dist.*, 339 NLRB at 1029. The Union’s handbills in this case, which placed considerably more emphasis on KGO Radio than Preferred (and failed to name Ortiz Janitorial at all), were ambiguous and did not “clearly disclose” that the dispute was with the primary employers. (ER 5.) Accordingly, the Union failed to rebut the “strong” presumption that the objective of its picketing was secondary in nature and thus unprotected. (ER 5.)

**3. Even if all of the *Moore Dry Dock* factors had been met, independent evidence shows that the picketers had a prohibited cease-doing-business objective**

Even if the Union’s handbills had fully complied with the *Moore Dry Dock* criteria, that would not end the inquiry. The Board, with the approval of this Court and its sister circuits, has long held that “the totality of a union’s conduct in a given situation may well disclose a real purpose to enmesh neutrals in a dispute, despite literal compliance with the *Moore Dry Dock* standards.” *Local No. 441, IBEW (“Rollins Commc’ns”)*, 222 NLRB 99, 101 (1976) (internal quotation marks and citation omitted), *enforced mem.*, 569 F.2d 160 (D.C. Cir. 1977). *Accord Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 597 (9th Cir. 1982); *Local 433 1979*, 598 F.2d at 1157; *NLRB v. Nat’l Ass’n of Broad. Emp. & Technicians, AFL-CIO, Local 31*, 631 F.2d 944, 950-51 (D.C. Cir. 1980). Considering the totality of the circumstances to determine whether a union

“demonstrated an impermissible secondary intent” is not only acceptable, the Board “is required” to do so. *United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada, Local 32, AFL-CIO v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990).<sup>8</sup>

Here, the Board reviewed the totality of the Union’s conduct and concluded that “independent evidence [showed] that an object of the picketing was impermissible.” (ER 5.) In making this finding, the Board appropriately relied on interactions the Union and employees had with Harvest and several building tenants.

Thus, a few days after the October 29 picketing, the employees met with Union President Miranda and reported that tenants were “upset by what they had learned” during the picketing. Their discussion of the neutral building tenants’ reactions to the picketing supports the Board’s finding that the Union’s protests had a prohibited secondary objective. (ER 3; SER 19-20.) In another case

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<sup>8</sup> The assertion by Amici that the Court has “condemned” the independent evidence rule as “without foundation” is simply incorrect. (A. 12.) Far from supporting that assertion, the cases it cites state the opposite. *See United Ass’n of Journeymen*, 912 F.2d at 1110 (“In determining whether the Union demonstrated an impermissible secondary intent, the Board is required to view the totality of the circumstances”); *Local 433 1988*, 850 F.2d at 554 (“notwithstanding a violation of the *Moore Dry Dock* standards . . . the ultimate question which must be answered is whether the General Counsel has carried his burden of establishing an unlawful purpose on the part of the union”).

involving janitors demonstrating outside a building with neutral tenants, the Board found that “[t]here could be no plainer acknowledgement of a secondary intent” than a union organizer’s statement during a radio interview that the neutral tenants were “upset” about and “sympathetic” toward the demonstrations. *Serv. Emps. Int’l Union, Local 525*, 329 NLRB 638, 680 (1999), *enforced mem.*, 52 F. App’x 357 (9th Cir. 2002).

The Board also relied on statements made by the Union and employees during and after a meeting with Harvest Properties’ building manager, Ben Maxon—a meeting they had demanded during the November 19 protest. (ER 189.) At the meeting, the Union told Maxon “they were going to keep showing up” until Harvest—a neutral in the employees’ dispute—“made changes, more specifically to the wage [rates]” paid by the primary employer. (ER 3; ER 215.) Union President Miranda also warned Maxon that Ortiz’s continued presence at the building was “inappropriate” given what Harvest had known about his behavior since the October 29 picketing. The Union’s pressure on neutral Harvest succeeded: Maxon responded that Harvest intended to replace Preferred with a unionized contractor and would ban Ortiz from the building while Preferred conducted an investigation. Maxon’s announcement of a new unionized cleaning contractor provoked a “happy” reaction from the employees, indicating that they

expected Harvest to take action to improve their working conditions.<sup>9</sup> (ER 3; ER 216-17, SER 17-18.)

Thus, the Union's threat to continue picketing unless Harvest, a neutral, raised the janitors' wages to \$15 per hour provides evidence of a secondary intent, even if the picketing met the *Moore Dry Dock* standards. After all, Union President Miranda "expressly admitted the Union's additional intention to picket a neutral business." *Local 560, Int'l Bhd. of Teamsters*, 360 NLRB 1067, 1070 (2014) ("*County Concrete*"). Either Miranda wanted Harvest to raise the employees' wages, which it had no direct power to do, or she "wanted . . . a commitment" that Ortiz "would be removed from the jobsite as a quid pro quo for removing the pickets." *Rollins Commc'ns*, 222 NLRB at 100-01.

As in *Rollins*, where the union agreed to remove its picket line if the neutral met its demands, Miranda's statement showed the Union was requiring a neutral, Harvest, to "modify its existing business relationship with the primary employer." *Id.* at 101. That demand "although arguably requiring less than a total cancellation of the business relationship, is enough disruption of an existing business

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<sup>9</sup> Under California law, cleaning contractors must offer employment to the incumbent janitors. (ER 217.) Given Harvest's promise to replace Preferred with a unionized contractor, incumbents could end up with unionized jobs cleaning this property.

relationship to constitute a ‘cease doing business’ object within the meaning of Section 8(b)(4)(B) of the Act.” *Id.*

A video, filmed by Living Wage Coalition Co-Director Frias for YouTube and the Coalition’s public-access television show, further demonstrates that the employees’ meeting with Harvest Business Manager Maxon had a secondary objective. In the video, which records the picketing and employee statements after the meeting with Maxon, Employee Useda announces to the picketers that “the negotiations were successful and we gained a victory . . . the person that we wanted to leave, it seems has been let go.” What she “like[d] most,” Useda told the crowd, was “that “Lauren [Squeri] from Preferred was present [at the meeting with Harvest] and saw that we’re not playing.” (ER 3; GCX 79 at 7:53.) In her remarks, employee Mendoza explained that they “spoke with the [Harvest] building manager [Maxon] and he suspended our employer and promised there will be changes and respect for us.” (ER 3; GCX 79 at 10:20.) Relying on this evidence, the Board reasonably concluded that the employees had a prohibited secondary objective.

The Board’s finding accords with similar cases enforced by this Court. For example, in a prior case involving the same union, the Court affirmed the Board’s findings that union and employee statements “further illustrated the secondary

nature of [the union's] conduct.” *Serv. Employees Union, Local 87*, 312 NLRB 715, 746 (1993), *enforced mem.*, 103 F.3d 139 (9th Cir. 1996). The Board relied on evidence comparable to the evidence here: a demonstrator’s statement that the picketing would continue until the neutral building manager employed a unionized janitorial contractor, *id.* at 746, and a handbill that asserted the building management used a nonunion janitorial contractor and “implored tenants to inform the building management how ‘displeased’ they were over this ‘scam,’” *id.* at 744 n.91, 745.

#### **4. The Union fails to rebut the strong evidence of its secondary objective**

Attempting to rebut this strong evidence of a secondary object, the Union makes several arguments that miss the mark. Thus, the Union incorrectly interprets Section 8(b)(4) as only prohibiting secondary conduct aimed at a total cessation of business. *See Union Br. 31* (arguing that employees did not seek “to force the tenants or manager of 55 Hawthorne to cease doing business with Preferred and [Ortiz Janitorial] entirely.”). To the contrary, the Supreme Court has long recognized that any reading of “the statute as requiring that the union demand nothing short of a complete termination of the business relationship between the neutral and the primary employer . . . is too narrow.” *Burns & Roe*, 400 U.S. at 304. Rather, the cease-doing-business requirement is met where “the foreseeable

result of secondary activity will be more than a ‘slight’ disruption of business relations.” *Local 85*, 454 F.2d at 878-79. Thus, conduct aimed at forcing a neutral to pressure a primary employer to change its labor policies is “unmistakably and flagrantly secondary” within the meaning of Section 8(b)(4)(ii)(B) of the Act. *Burns & Roe*, 400 U.S. at 304. Under this well-established law, the employees’ handbills and other statements by them and the Union show a secondary objective in violation of Section 8(b)(4) of the Act.

Contrary to the Union’s further suggestion (Br. 25), the picket signs’ disclaimer that the dispute was only with the “cleaning contractor” (ER 412) does not immunize the picketing from a finding of secondary objective. Miranda’s threat—that the picketing would continue unless Harvest raised employees’ wages—directly contradicted the signs’ disclaimer and “further[ed] the Union’s effort to coerce [Harvest] to cease doing business” with Preferred and Ortiz. *County Concrete*, 360 NLRB at 1070. The Board has not generally “credited similar disclaimers in the face of circumstances suggesting that the disclaimer is merely a legal cover.” *Warshawsky & Co. v. NLRB*, 182 F.3d 948, 954 (D.C. Cir. 1999). Certainly the circumstances here—Miranda’s threat to continue picketing until Harvest raised employees’ wages—indicate the disclaimer was “merely a legal cover.” Thus, the Board reasonably determined that the disclaimer “does not

provide a safe harbor given the independent evidence of a secondary object.” (ER 5 n.19.)

**C. The Court Lacks Jurisdiction To Consider the Union’s Arguments that the Picketing Was Not Coercive**

The Union, seconded by its Amici, argues that the Board erred in finding that the picketing was coercive. But under Section 10(e) of the Act, the Court lacks jurisdiction to consider this claim because the Union failed to make its argument to the Board at the appropriate time under the Board’s procedures. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Nor can the Amici avoid the jurisdictional bar of Section 10(e) by raising issues the Union failed to preserve below. *See Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998) (“To the extent that the amicus raises issues or make[s] arguments that exceed those properly raised by the parties, [the court] may not consider such issues”); *Am. Dental Ass’n v. Shalala*, 3 F.3d 445, 448 (D.C. Cir. 1993) (explaining that the Court “do[es] not address . . . contentions raised by amicus curiae . . . [that] are beyond the scope of the issues raised below by the appellants”). Simply put, because the Union failed to challenge the coercion finding at the appropriate time

under the Board's procedures and does not identify any extraordinary circumstances to excuse this failure, the Court is barred from considering the Union or Amici's challenges to that finding.

The appropriate time to challenge the coercion finding would have been after the judge issued her decision. At that point, the parties had the right to file exceptions with the Board. 29 C.F.R. §102.46(a). But as the Board noted in its decision, no party filed an exception to the judge's coercion finding. (ER 4 & n.13, 19.) When parties fail to except to a judge's finding, the Board adopts it "and all objections and exceptions must be deemed waived for all purposes." 29 C.F.R. §102.48(a).<sup>10</sup>

Not until after the Board issued its Decision and Order did the Union, which had not participated in the proceeding before the judge, belatedly attempt to raise the coercion issue in a motion for reconsideration. (ER 39-56.) It is settled, however, that the Board does not consider arguments raised for the first time in such a motion absent extraordinary circumstances. *See* 29 U.S.C. §160(e); 29 C.F.R. §102.48(c). Although the judge ultimately ruled in the Union's favor, that fact "does not constitute extraordinary circumstances" under the Act to excuse its

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<sup>10</sup> *See also* 29 C.F.R. §102.46(f) (any matter "not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding").

failure to except to the adverse coercion finding. *NLRB v. R.J. Smith Constr. Co.*, 545 F.2d 187, 192 (D.C. Cir. 1976). Because the Union failed to identify any extraordinary circumstances warranting reconsideration, the Board denied the motion. (ER 1, citing 29 C.F.R. § 102.48(c)(1).)

The Court will not overturn the Board's denial of a motion for reconsideration unless the Board abused its discretion. *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1300 (9th Cir. 1991). The Union makes no attempt to present such a showing; indeed, it does not even "fairly raise a challenge to the Board's denial of its motion for reconsideration." *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1135 (11th Cir. 2008).

Nor could it. As the Supreme Court has explained, "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

*United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Accord *NLRB v. Se. Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428, 432 (9th Cir. 1982).

Accordingly, a party must present its arguments "in a procedurally valid way."

*Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008).

Here, the Union's claim, presented in its motion for reconsideration, came "too late." *Id.* Accord *Lutheran Home at Moorestown*, 334 NLRB 340, 340 (2001)

(employer that failed to file exceptions or cross-exceptions was “precluded from raising the issue directly by a motion for reconsideration”).

In any event, the “core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is . . . the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite.” *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797, 802 (2010). *Accord Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1212 (9th Cir. 2005) (“Section 8(b)(4) “clearly proscribe[s] . . . ‘ambulatory picketing’ of secondary businesses”) (quoting *DeBartolo*, 485 U.S. at 587). There can be no question that the picketing here was coercive under this standard. After all, the picketing included patrolling in circles with signs, chanting slogans in a call-and-response with a megaphone, and drumming. Indeed, some passers-by were forced to walk in the street to avoid the protest. (ER 4 n.13, 19; ER 138a, GCX 79 at 4:49, 4:58, & 5:07.) Given this evidence, the judge did not err in finding the picketing to be coercive within the meaning of Section 8(b)(4) of the Act, and the

Union failed to argue, much less demonstrate, that the Board abused its discretion by adopting the judge's unchallenged finding.

**D. Based on Its Finding that the Employees' Conduct Was Unprotected, the Board Had a Rational Basis for Dismissing the Complaint Without Further Analyzing the Employees' Discharges under *Wright Line* or Deciding Whether the Companies Were Joint Employers**

As the Board explained, all of the Section 8(a)(1) and (3) unfair labor practices alleged in the complaint “occurred in reaction to the employees’ picketing activity, including cancelling contracts and discharging, threatening, interrogating, and surveilling the employees.” (ER 2.) Because the alleged violations “all occurred as a result of the illegal picketing, such unfair labor practice allegations must be dismissed.” *Rapid Armored Truck Corp.*, 281 NLRB 371, 387 (1986). Given the evidence and Board findings establishing the employees’ unlawful secondary objective, the Board’s decision to dismiss the unfair-labor-practice complaint in its entirety had a rational basis. *See* cases cited above at pp. 18-19, 21.

Moreover, given the Board’s finding that the picketing had an unlawful secondary object, the Board did not need to decide whether Preferred and Ortiz Janitorial were joint employers, contrary to the Union’s claim (Br. 46-58). As the Board explained, if Preferred and Ortiz Janitorial were not joint employers, then

“the picketers plainly manifested a prohibited object, as they were employed only by [Ortiz Janitorial] but targeted Preferred (among others).” (ER 5 n.18.) And if they were joint employers, “the picketing still had a prohibited secondary object,” (ER 5 n.18), for the reasons shown above.

Contrary to the Union’s further claim (Br. 55), given the unprotected nature of the employees’ conduct, the Board had no reason to analyze the Companies’ motives for discharging them under the test set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *approved in NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, of course, it must first be shown that the employees engaged in protected activity. Here they did not. Instead, as shown above, because the employees’ picketing was coercive and had a secondary objective, it violated Section 8(b)(4) of the Act. Accordingly, the employees engaged in unprotected conduct for which they could be lawfully discharged. (ER 6.)

As the Tenth Circuit explained in *National Packing Co. v. NLRB*, 352 F.2d 482 (10th Cir. 1965), a case cited by the Board (ER 4), if the picketing violated Section 8(b)(4), the employees “should not be able to use the Act to compel reinstatement after the discharge which followed the picketing.” 352 F.2d at 485. *Accord Rapid Armored Truck*, 281 NLRB at 387 (employer was “justif[ied] in its

refusal to reinstate all” employees who participated in unlawful picketing). Furthermore, if “an object” of the picketing was to pressure neutral employers, even if not the sole object, the demonstrations were unlawful. *Denver Bldg.*, 341 U.S. at 689. Thus, contrary to the Union (Br. 56), whether *National Packing* happened to involve an employer with a “mixed-motive” for discharging its employees is of no moment.

In any event, the administrative law judge made explicit findings—crediting employee testimony—that Ortiz told Mendoza and Banegas he discharged them because they were “making noise. They were making a scandal.” (ER 29; ER 221, Tr. 581-82.) The judge found that the Companies made “[e]xplicit statements,” including “two admissions” by Ortiz that “employees were fired for taking part in the demonstrations.” (ER 31 & n.76.) Thus, Ortiz’s failure to tell the employees their demonstrations were “unlawful[]” does not, as the Union suggests (Br. 57), immunize the employees from the consequences of their secondary picketing.

In short, the law is clear: when employees participate in unlawful picketing, they lose the protection of the Act and may be discharged by their employer. Because the employees here engaged in unlawful secondary picketing and lost the protection of the Act, the Board did not need to conduct a *Wright Line* analysis to

determine the Companies' motive for discharging them, and it had a rational basis for dismissing the unfair-labor-practice complaint.

**E. Because the Union Failed To Raise Its First Amendment Arguments to the Board at the Appropriate Time, the Court Lacks Jurisdiction To Consider Them**

**1. The Union failed to raise its First Amendment argument at the appropriate time**

In its opening brief, the Union, supported by its Amici, belatedly argues that “the Board’s broad construction” of Section 8(b)(4) to include picketing that the Union incorrectly characterizes as a “non-coercive demonstration” would “create an unnecessary conflict” with the First Amendment. (Br. 41, A. 7.) But the Union failed to make this argument at the time appropriate under the Board’s rules and regulations, instead raising it for the first time in a motion for reconsideration. As with its challenge to the coercion finding (*see* pp. 39-40), that was too late. The Board does not consider arguments raised for the first time in a motion for reconsideration absent extraordinary circumstances, which the Union makes no attempt to show. *See* 29 C.F.R. §102.48(c). Accordingly, under Section 10(e) of the Act, the Union’s claims are jurisdictionally barred. 29 U.S.C. § 160(e). *See also* cases cited above at p. 38. Furthermore, the Amici cannot cure these jurisdictional defects because an amicus cannot circumvent Section 10(e) by expanding the scope of the appeal and raising issues not properly presented by the

parties below.<sup>11</sup> *See Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998); *Am. Dental Ass'n v. Shalala*, 3 F.3d 445, 448 (D.C. Cir. 1993).

That the Union prevailed before the administrative law judge does not excuse its failure to raise all issues and defenses to the Board at the appropriate time. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 n.10 (1979); *NLRB v. L & B Cooling, Inc.*, 757 F.2d 236, 240 (10th Cir. 1985); *NLRB v. R.J. Smith Constr. Co.*, 545 F.2d 187 (D.C. Cir. 1976); *NLRB v. Cast-A-Stone Prods. Co.*, 479 F.2d 396, 397-98 (4th Cir. 1973). Here, the Union could have raised its First Amendment defense before the administrative law judge,<sup>12</sup> in cross-exceptions to the judge's recommended decision,<sup>13</sup> or in an answering brief to the Companies' exceptions, which specifically challenged the lawfulness of the picketing. The Union took none of those actions, unlike the Board's General Counsel, who filed cross-

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<sup>11</sup> In addition, the Court does not generally consider issues "raised only by an amicus." *United States v. Gementera*, 379 F.3d 596, 607 (9th Cir. 2004) (internal quotation marks and citation omitted). Additional issues not properly before the Court because they were raised solely by the Amici include a challenge to the Board's independent evidence "rule" (A. 12), and a claim that the Board's 70-year-old *Moore Dry Dock* decision "compel[s] speakers to alter their message" contrary to recent Supreme Court precedent (A. 11).

<sup>12</sup> *JLL Rest., Inc.*, 347 NLRB 192, 195 (2006), *enforced*, 325 F. App'x 577 (9th Cir. 2009) (arguments not raised to the judge are "untimely raised and thus waived").

<sup>13</sup> As explained in the Board's regulations, "[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding." 29 C.F.R. §102.46(f).

exceptions (but made no mention of the First Amendment). Instead, the Union chose not to participate in the proceedings at all, and instead waited until after the Board had already issued its decision.

The Union suggests that it had no reason to raise a First Amendment defense because Preferred and Ortiz Janitorial “never contended that they fired the workers for engaging in secondary picketing.” (Br. 56-57 & n.17.) To the contrary, during the hearing Preferred argued that the video of the demonstration showed “secondary pressure, secondary picketing” in violation of Section 8(b)(4) of the Act. (SER 16.) In addition, in its exceptions to the judge’s decision, Preferred again argued that the employees “engaged in unlawful and unprotected . . . secondary picketing.” (ER 60.) And in its brief in support of those exceptions, Preferred argued that the Union engaged in unlawful secondary picketing by telling Maxon, the property manager for 55 Hawthorne, “they would not leave the[] property until the wages of the janitors increased to \$15 per hour,” and “[b]y identifying high-profile tenants such as KGO by name in their picket signs and calling on them to ‘take corporate responsibility’ for alleged abuse of employees.”<sup>14</sup> (SER 46-47.) Thus, the Union was on clear notice of Preferred’s

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<sup>14</sup> The Union is therefore mistaken that Preferred “never even argued” that the demonstrations violated Section 8(b)(4) until its reply brief in support of its exceptions. (Br. 57.)

secondary-picketing defense and had ample opportunity to counter that defense in cross-exceptions and an answering brief, well before the Board issued its decision. *Parkwood*, 521 F.3d at 410. The Union failed to do so.

That the Union’s argument is a constitutional one does not qualify as an extraordinary circumstance. “No procedural principle is more familiar . . . than that a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). *Accord Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008).

## **2. The Supreme Court and this Court have long held that Section 8(b)(4) of the Act does not violate the First Amendment**

Not only does the Court lack jurisdiction to consider the Union’s First Amendment challenge, the question has been definitively settled. The Supreme Court has held that the First Amendment does not protect coercive secondary picketing. In 1980, the Supreme Court rejected the claim, raised by the Union here (Br. 41-46), that the application of Section 8(b)(4)(ii)(B) to secondary picketing violated the First Amendment. *NLRB v. Retail Clerks Local 1001*, 447 U.S. 607, 616 (1980) (“*Safeco*”). In so holding, the Court found “no reason to depart from [its] well-established understanding” that “picketing in furtherance of [such]

unlawful objectives” did not offend the First Amendment. *Id.* (quoting *Int’l Bhd. of Elec. Workers, Local 501*, 341 U.S. 694, 705 (1951) (“*IBEW*”). Accordingly, the Court held that Section 8(b)(4)(ii)(B) “imposes no impermissible restrictions upon constitutionally protected speech.” *Safeco*, 447 U.S. at 616 (citing *IBEW*, 341 U.S. at 699-700).

Through Section 8(b)(4) of the Act, Congress struck a “delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.” *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring). *Accord Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 226 (1982) (“*Allied Int’l*”). Given the “careful balancing of interests” reflected in the statute, the Court has “consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment.” *Id.*

The Union suggests (and Amici explicitly argue) that more recent Supreme Court decisions, such as *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015);<sup>15</sup> *Sorrel*

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<sup>15</sup> 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. 135 S. Ct. at 2224.

*v. IMS Health, Inc.*, 564 U.S. 552 (2011);<sup>16</sup> and *Snyder v. Phelps*, 562 U.S. 443 (2011),<sup>17</sup> have called *Allied International* and *Safeco* into question. (Br. 43-45, A. 7-8, 20.) They rely on those cases to argue that Section 8(b)(4)(ii)(B) is subject to strict scrutiny, because it purportedly discriminates against speech based on content, speaker identity, or viewpoint.

Notably, the Union and Amici cite no case supporting their view that the earlier Supreme Court cases involving Section 8(b)(4) have, in essence, been overruled. Their oversight is unsurprising, given this Court’s precedent in a trilogy of recent cases, which make it crystal clear that the Supreme Court decisions remain binding law upholding the constitutionality of applying Section 8(b)(4)(ii)(B) to prohibit coercive, secondary picketing. Indeed, in its most recent decision, this Court rejected another union’s “strict scrutiny” argument that under *Reed*, speech proscribed by Section 8(b)(4)(i)(B) is protected by the First Amendment. *See NLRB v. Int’l Ass’n of Bridge, Structural, Ornamental &*

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<sup>16</sup> *Sorrel* addressed the constitutionality of a state law restricting the sale, disclosure, and use of pharmacy records. 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.

<sup>17</sup> *Snyder* addressed a First Amendment challenge to a state-law tort action brought against church members who picketed and displayed offensive signs near a funeral. 562 U.S. at 448-50. The Court held that the picketers’ speech, while offensive, was entitled to First Amendment protection. *Id.* at 457-59.

*Reinforcing Ironworkers Union, Local 229*, \_\_\_ F.3d \_\_\_, 2019 WL 5539505, at \*3 (9th Cir. Oct. 28, 2019). In doing so, this Court found it “highly unlikely” that *Reed* “limited or implicitly overruled the detailed analysis of the NLRA” conducted by the Supreme Court in *IBEW* (which the Supreme Court relied on in *Safeco*). *Id.* Simply put, this Court was “not persuaded that *Reed* can carry the weight that [the union] ascribes to the decision.” *Id.* Further, in *NLRB v. Int’l Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433*, the Court rejected an argument similar to the Union and Amici’s in this case, and held that because the Act regulates conduct, not speech, “[t]he restrictions on speech addressed by *Reed* are not implicated by compliance with § 8(b)(4)(ii)(B).” 891 F.3d 1182, 1197 (9th Cir. 2018). And in *NLRB v. Teamsters Union Local No. 70*, the 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].” 668 F. App’x 283, 284 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2214 (June 5, 2017). The Court also 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). Because the Union and Amici cite no case to

show that the legal landscape related to Section 8(b)(4) has changed, this Court is not “free to disregard the Supreme Court’s picketing-specific jurisprudence.” *Id.*<sup>18</sup>

Moreover, the Supreme Court has instructed that, “[i]f a precedent of this 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 this Court the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks and citation omitted). *Accord Local 229*, slip op. 9; *Teamsters*, 668 F. App’x at 284 (“*Reed*, in result and rationale, does not necessarily undermine [the Supreme Court’s picketing] cases. Therefore, we are not free to disregard the Supreme Court’s picketing-specific jurisprudence”). As shown, *Safeco* is the Supreme Court “case which directly controls” here, and it remains binding precedent. *Agostini*, 521 U.S. at 237.

The Union and Amici’s First Amendment arguments primarily hinge on their waived claim that the picketing was not coercive. (Br. 41-45, A. 6, 15.) As shown above, however, those issues are jurisdictionally barred from court review. Moreover, their content-based speech restriction arguments simply do not apply

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<sup>18</sup> To the extent that Union and Amici seek to overturn *Local 433* and *Teamsters Union Local No. 70*, “only a panel sitting en banc may overturn existing Ninth Circuit precedent.” *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995).

here: “for First Amendment purposes, picketing is qualitatively different from other modes of communication.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 311 n.17 (1979) (internal quotation marks and citation omitted).

Picketing is subject to regulation because it “involves elements of conduct as well as the communication of ideas,” while patrolling, like that here, “is not constitutionally protected.” *Miller v. United Food & Commercial Workers Union, Local 498*, 708 F.2d 467, 471 (9th Cir. 1983).<sup>19</sup>

Nor does the Union carry the day with its suggestion that the employees’ “political speech about matters of public concern (workplace sex harassment and a minimum wage initiative) . . . sits at the heart of First Amendment protection.” (Br. 43.) The Supreme Court has refused to create an exception for political speech. *See Allied Int’l*, 456 U.S. at 225 (recognizing that Congress drafted the

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<sup>19</sup> Amici provide no support for their argument (A. 8-9) that the Court has “recognize[d] that strict or ‘exacting’ scrutiny applies to restrictions on labor speech, including picketing.” The cases cited, *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019), *pet. for cert. filed* (May 24, 2019), *sub nom. Miller v. Inslee*, and *Janus v. American Federation of State, County, & Municipal Employees Council 31*, 138 S. Ct. 2448 (2018), both involve public-sector employees and labor speech, not coercive picketing in the NLRA context. Amici’s reliance (A. 21) on the Court’s decision in *Eagle Point Ed. Assoc. v. Jackson*, 880 F.3d 1097 (2018), is also misplaced. In that case, which involved a Section 1983 action by striking teachers regarding denial of access to school grounds, the Court did not address Section 8(b)(4) and observed that the teachers’ claim was “not contingent on labor laws.” *Id.* at 1108.

prohibition on secondary activities “broadly,” and declining to create a large exception for all “political boycotts”).<sup>20</sup>

In sum, this is not a case about employees merely “stand[ing] on a sidewalk with a sign asking for help,” as Amici would have it. (A. 21.) This is a case in which the Union and employees coercively patrolled in front of a common-situs building, 55 Hawthorne, distributed ambiguous handbills targeting neutral businesses, and threatened to continue the disruptive picketing until another neutral, Harvest, pressured the Companies to make changes to their wages and benefits. Section 8(b)(4) of the Act reflects a delicate balance between labor rights and the rights of neutral businesses not to be enmeshed in primary labor disputes, and the Supreme Court has upheld the constitutionality of the balance struck. Unless or until the Supreme Court ever revisits that settled precedent, Section 8(b)(4) and its prohibition on coercive secondary activity remain the law of the land.

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<sup>20</sup> While the sexual harassment experienced by the employees was “abhorrent,” as the Board noted (ER 6 n.21), the topic of their protest does not affect the analysis. Congress intended to proscribe all coercive secondary action, whether “good” or “bad.” *Allied Int’l*, 456 U.S. at 225 n.23 (quoting 93 Cong. Rec. 4198 (1947) (testimony of Senator Taft)).

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment denying the Union's petition for review.

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National Labor Relations Board  
November 2019

## **STATEMENT OF RELATED CASES**

As required by Ninth Circuit Rule 28-2.6, Board counsel respectfully notify the Court that there are no related cases currently pending in this Court.

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

SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 87	)	
	)	
Petitioner	)	
	)	
v.	)	No. 19-70334
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent	)	20-CA-149353
	)	
and	)	
	)	
PREFERRED BUILDING SERVICES, INC.	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,503 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/David Habenstreit  
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Dated at Washington, DC  
this 1st day of November, 2019

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

SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 87	)	
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	)	Board Case No.
Respondent	)	20-CA-149353
	)	
and	)	
	)	
PREFERRED BUILDING SERVICES, INC.	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/David Habenstreit  
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Dated at Washington, DC  
this 1st day of November, 2019

## **STATUTORY AND REGULATORY ADDENDUM**

**STATUTORY AND REGULATORY ADDENDUM**  
**TABLE OF CONTENTS**

Except for the following, all applicable statutes and constitutional provisions are contained in the Union’s opening brief:

**National Labor Relations Act (“the Act”), 29 U.S.C. § 151, et seq.**

Section 8(b)(7) (29 U.S.C. § 158(b)(7)) ..... ii  
Section 10(a) (29 U.S.C. § 160(a)) ..... iii  
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29 C.F.R. § 102.48(c)(1) .....v

## THE NATIONAL LABOR RELATIONS ACT

### Section 8(b)(7) of the Act (29 U.S.C. § 158(b)(7)) provides:

It shall be an unfair labor practice for a labor organization or its agents—

\* \* \*

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective- bargaining representative, unless such labor organization is currently certified as the representative of such employees:

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

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

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

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

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

\* \* \*

(e) 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. 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.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner 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; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

## THE BOARD'S RULES AND REGULATIONS

**§102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.**

(a) *Exceptions and brief in support.* Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any party may (in accordance with Section 10(c) of the Act and §§102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section.

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(f) *Failure to except.* Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

**29 C.F.R. § 102.48. No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.**

(a) *No exceptions filed.* If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

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(c) *Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of

the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.