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July 9, 2020

VIA CM/ECF

Molly C. Dwyer

Clerk of Court

U.S. Court of Appeals for the Ninth Circuit

P.O. Box 193939

San Francisco, CA 94119-3939

Re: *SEIU Local 87 v. NLRB*, No. 19-70334 (Argument Scheduled Sept. 16, 2020, 9:30 a.m., San Francisco)
Notice of Supplemental Authority: *Barr v. Am. Ass'n of Political Consultants*, _ U.S. __, _ S.Ct. __, 2020 WL 3633780 (July 6, 2020)

Dear Ms. Dwyer:

Petitioner SEIU Local 87 hereby notifies the Court of the Supreme Court's recent decision in *Barr v. Am. Ass'n of Political Consultants*, _ U.S. __, _ S.Ct. __, 2020 WL 3633780 (July 6, 2020).

Barr considers the circumstances under which laws create content-based restrictions on speech subject to strict First Amendment scrutiny. Justice Kavanaugh's plurality opinion explains that strict scrutiny applies wherever a law "on its face" draws distinctions based on the message a speaker conveys." *Id.* at *5 (plurality op.) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)); *see also id.* at 21 (Gorsuch, J., concurring in part) (agreeing that law was content-based). The opinion confirms that speaker-based restrictions reflecting a content preference are also subject to strict scrutiny. *Id.* at *5 (plurality op.). And it makes

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clear that the fact that a speech restriction is linked to certain economic or commercial activity does not insulate it from strict scrutiny. *Id.*

Here, the Board construed Section 8(b)(4) to prohibit peaceful picketing because of the content of picketers' message and its impact on listeners. *Barr* supports SEIU Local 87's argument that this construction is in substantial tension with the First Amendment. Opening Br., ECF Dkt. No. 27, at 41-45; Reply Br., ECF Dkt. No. 64, at 23-24. It likewise supports SEIU Local 87's argument that the Board (and this Court) must choose a narrower construction of Section 8(b)(4) to avoid serious First Amendment problems. Well-established Supreme Court and Ninth Circuit precedents require such avoidance. *See* Opening Br., ECF Dkt. No. 27, at 20; Reply Br., ECF Dkt. No. 64, at 29.

Respectfully submitted,

/s/P. Casey Pitts

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cc: Counsel of Record (via CM/ECF)