



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**

Appellate and Supreme Court Litigation Branch  
Washington, D.C. 20570

July 31, 2020

Molly C. Dwyer  
Clerk, U.S. Court of Appeals  
for the Ninth Circuit  
PO Box 193939  
San Francisco, CA 94119-3939

Re: *Service Employees International Union  
Local 87 v. NLRB*, 9th Cir. No. 19-70334  
Board Case No. 20-CA-149353

Dear Ms. Dwyer:

This letter responds to the July 9, 2020 letter that SEIU submitted pursuant to Rule 28(j) notifying the Court of the recent Supreme Court decision in *Barr v. American Association of Political Consultants*, 140 S.Ct. 2335, 2346 (2020), which held that the government-debt exception to a ban on robocalls was content-based and therefore subject to strict scrutiny. SEIU argues, as it did in its brief, that the Board's interpretation of Section 8(b)(4) of the National Labor Relations Act (NLRA) is similarly a content-based restriction on speech subject to strict scrutiny. But the Court emphasized that *Barr* "concerns only robocalls to cell phones" and did not "expand existing First Amendment doctrine." *Id.* at 2347.

*Barr*, therefore, does not change settled Supreme Court and Circuit precedent establishing the principle that NLRA Section 8(b)(4)(ii)(B)'s restriction on secondary picketing "imposes no impermissible restrictions upon constitutionally protected speech." *NLRB v. Retail Clerks Local 1001*, 447 U.S. 607, 616 (1980). *Accord NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 941 F.3d 902, 906 (9th Cir. 2019) (*petition for reh'g pending*). (*See* NLRB Br. 48-54.) Nor does it help SEIU overcome the jurisdictional bar imposed by Section 10(e) of the NLRA, which prevents the Court from considering the First Amendment arguments that SEIU failed to raise before the Board at the appropriate time under the Board's procedures. 29 U.S.C. §160(e). (*See* NLRB Br. 45-48.)

Very truly yours,

/s/ David Habenstreit

David Habenstreit

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NATIONAL LABOR RELATIONS BOARD

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cc: all counsel (via CM/ECF)