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ELIZABETH VISSERS
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September 15, 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)
Response to Notice of Supplemental Authority: *NLRB v. Ironworkers Local 229*, 941 F.3d 902 (9th Cir. 2019)

Dear Ms. Dwyer,

This letter responds to the Board's notice of supplemental authority, Dkt. 74, citing this Court's denial of the petition for rehearing in *NLRB v. Ironworkers Local 229*, 941 F.3d 902 (9th Cir. 2019).

Contrary to the Board's contentions, that denial does not bear on the issues here. *Local 229* held that a union's constitutional challenge to subsection (i) of Section 8(b)(4) was foreclosed by *Electrical Workers v. NLRB*, 341 U.S. 694 (1951). But this matter involves subsection (ii), which was not at issue in *Local 229* or *Electrical Workers*.

In fact, the *Local 229* opinion expressly *distinguished* subsection (ii) decisions as involving "a different provision of the statute." *See* 941 F.3d at 906. The panel relied on this difference in explaining why its holding was consistent

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with *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), which recognized that “a broad ban against peaceful picketing” would “collide with the guarantees of the First Amendment,” and instructed that subsection (ii) must be construed to avoid such First Amendment conflicts wherever possible. *Id.* at 575, 578 (citation omitted).¹

Applying that constitutional avoidance rule, the Court has held that subsection (ii) does not preclude peaceful picketing calling for a consumer boycott of a subset of a business’s goods, *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 (Tree Fruits)*, 377 U.S. 58, 71-72 (1964), but that subsection (ii) constitutionally prohibits picketing requesting a boycott of the entire business, *NLRB v. Retail Store Employees Union Local 1001 (SafeCo)*, 447 U.S. 607 (1980). The workers here did not request any boycott, so their picketing was lawful and constitutionally protected under *Tree Fruits*. See Opening Br., Dkt. 27, at 38-40.

Respectfully submitted,

/s/P. Casey Pitts

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¹ *Local 229* relies on *Warshawsky & Co. v. NLRB*, 182 F.3d 948 (D.C. Cir. 1999), which explained that the two provisions are treated differently under the First Amendment because “the conduct sought by a union that directly *induces* or encourages a secondary strike is *itself unlawful* under §8(b)(4)(i).” *Id.* at 952. The protest here urged no activity that would itself be unlawful.

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