No. 19-70334

IN THE 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,
Intervenor

On a Petition for Review of a Decision of the National Labor Relations Board,
Case No. 20-CA-149353

OPENING BRIEF OF PETITIONER SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87

NICOLE G. BERNER
CLAIRE PRESTEL
JOHN M. D'ELIA
Service Employees International Union
1800 Massachusetts Avenue, NW
Washington, D.C. 20036
Phone: (202) 730-7468

STACEY M. LEYTON
P. CASEY PITTS
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Phone: (415) 421-7151

Attorneys for Petitioner Service Employees International Union Local 87

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioner Service Employees International Union Local 87 has no parent corporation or any stock held by any publicly held corporation.

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INTRODUCTION

In fall 2014, workers jointly employed by two janitorial contracting companies protested peacefully on the public sidewalk outside an office building where they worked. The workers sought to raise awareness regarding their poor working conditions, including egregious sex harassment on the job by a supervisor who, for example, told a worker that she would make more money if she slept with him. During their demonstrations, the workers appealed to the public and to the building's tenants and manager to support their cause but never asked anyone to boycott their employers or anyone else. In retaliation for the workers' speech activities, the janitorial contractors threatened and then terminated their employment.

After a lengthy hearing that produced an extensive record, an Administrative Law Judge held that the employers had violated the workers' rights to engage in "concerted activities for the purpose of … mutual aid and protection" under Section 7 of the National Labor Relations Act, 29 U.S.C. §157. On review, however, the National Labor Relations Board held that the *workers*—not the employers—had violated federal labor law. In reaching this conclusion, the Board did not disturb any of the ALJ's credibility determinations or overturn the ALJ's finding that the employers had threatened and terminated the workers in response

to their protests. Instead, the Board ruled that the workers had violated Section 8(b)(4) of the Act, 29 U.S.C. §158(b)(4), thereby forfeiting all of the Act's protections.

Section 8(b)(4) was enacted to prohibit certain "secondary boycotts," in which workers who have a dispute with their employer (the "primary" in labor parlance) use conduct so extreme as to be "threatening or coercive," *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1211 (9th Cir. 2005), in an attempt to force a neutral employer (called a "secondary") to "cease doing business with" the primary employer. 29 U.S.C. §158(b)(4)(ii)(B). The Supreme Court and this Court have both held that Section 8(b)(4) must be construed narrowly to avoid penalizing workers for constitutionally protected speech in violation of the First Amendment.

The Board's holding that the workers' demonstrations violated Section 8(b)(4) contravenes settled Supreme Court, Ninth Circuit, and Board precedent. The Board misapplied its own standard for determining whether picketing at a location where both primary and secondary employers are present is entitled to a presumption of lawfulness. The Board further erred in concluding that the two elements necessary for a Section 8(b)(4) violation—i.e., (1) an intent to force secondary parties to "cease doing business" with their employer, and (2)

"coercive" conduct—were met. As a result of these and other errors, the Board radically expanded Section 8(b)(4) beyond its narrow scope and created an unnecessary conflict between that provision and the First Amendment.

Accordingly, the Board's decision should be reversed.

STATEMENT OF JURISDICTION

This case is before the Court on a petition by Service Employees International Union Local 87 for review of the Board's August 28, 2018 decision, reported at 366 NLRB No. 159, and the Board's October 31, 2018 denial of the Union's Motion for Reconsideration. The Board had subject matter jurisdiction over the proceeding below pursuant to 29 U.S.C. §160(a). The Board's order and denial of the Motion for Reconsideration are final for all parties.

This Court has jurisdiction to review the Board's final order pursuant to 29 U.S.C. §160(f). The Union filed its petition for review on February 7, 2019; there is no time limit on filing such petitions.

ISSUE PRESENTED AND STANDARD OF REVIEW

The issue presented in this petition is whether the Board erred in concluding that workers who were fired in response to their concerted efforts to address sexual harassment and otherwise improve their working conditions violated Section 8(b)(4) and thereby forfeited the Act's protections, where the Board's broad

construction of Section 8(b)(4) is inconsistent with precedent and the First Amendment.

This Court reviews the Board's interpretation of Section 8(b)(4) de novo because unduly broad constructions of that provision create a "significant risk" of First Amendment violations and because "constitutional decisions are not the province of the [Board]." *Overstreet*, 409 F.3d at 1209. The Board's factual findings are upheld if supported by substantial evidence. 29 U.S.C. §160(f); *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286, 291 (9th Cir. 2011). The ALJ's factual and credibility findings should be given effect "unless 'the clear preponderance of *all* the relevant evidence' [demonstrates] that they are incorrect." *Id.* at 296 (citing *Standard Dry Wall*, 91 NLRB 544, 545 (1950)).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are reproduced in the Statutory Addendum.

STATEMENT OF THE CASE

I. Factual Background

A. Preferred and OJS's contracts to clean 55 Hawthorne

In 2012, Preferred Building Services ("Preferred") contracted to provide janitorial services to 55 Hawthorne Street in San Francisco and then subcontracted

that work to Ortiz Janitorial Services ("OJS"). *See* ER 246-63; *see also* ER 8. In 2014, Balbina Mendoza, Yunuen Useda, and Joel Banegas were employed as janitorial workers cleaning offices at 55 Hawthorne. *See* ER 2. The workers understood themselves to be employees of Preferred. *See* ER 14, 68, 110, 137.

B. The workers' meetings to discuss working conditions

Rafael Ortiz, OJS's owner, engaged in pervasive sexual harassment of the 55 Hawthorne janitorial workers. In September 2014, for example, after Useda raised concerns about the workload at 55 Hawthorne, Ortiz responded that the prior supervisor had paid workers more because "he was going to bed with a co-worker" and that if Useda wanted a situation like that, "[Ortiz] could pay up to 20 an hour." *See* ER 17, 111-13. During that same month, Ortiz responded to Mendoza's request for a paycheck advance by suggesting that she could have the advance if she went to bed with him, telling Mendoza "that his wife has given him permission to stick his dick in any rear end but that he had to use a condom." ER 17, 77-79. On a separate occasion, after Banegas informed Ortiz that Mendoza had left work early due to illness, Ortiz responded, "Oh, so you got her pregnant already?" ER 80, 138; *see also* ER 17, 220.

Mendoza and Useda, later joined by Banegas, met with the San Francisco Living Wage Coalition ("Coalition") to seek the Coalition's assistance in

addressing this sexual harassment. ER 2, 17, 81-82, 114, 138, 159, 345-46. At the Coalition's suggestion, the workers also met with Olga Miranda, president of SEIU Local 87. *See* ER 17, 83, 115, 347. The workers told both the Coalition and Miranda about their intolerable working conditions, including sexual harassment, and decided to demonstrate in an effort to improve those conditions. ER 116.

C. The October 29 demonstration

The workers' first protest occurred in front of 55 Hawthorne Street on October 29, 2014. ER 240-42. Useda, Mendoza, and Banegas participated, as did members of the Coalition and the Union. *See* ER 161, 187-88. Some protesters carried placards with slogans including "PREFERRED BUILDING SERVICES UNFAIR!," "WE PREFER NO MORE SEXUAL HARASSMENT," and "WE PREFER A Living Wage." *See* ER 2-3, 348-68. Some placards bore the logo of SEIU as well as a disclaimer reading, "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." *See* ER 18, 410-12. Other placards urged readers to "Vote Yes on Prop J to Raise the Minimum Wage." ER 366.

Some protesters handed out leaflets that bore the name and contact information of the Coalition and informed readers that the employees "work for

Preferred Building Services which cleans the offices of KGO Radio." *See* ER 3, 243. The leaflets detailed the workers' complaints about their working conditions, including sexual harassment, risk of injury, lack of paid sick days, and insufficient workers' compensation. *See id.* The leaflets also read: "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," and urged readers to "pass Prop J … to raise the city minimum wage." *Id.*

Shortly after the October 29 protest ended, Ortiz called Mendoza to tell her that he was "with Lauren [Squeri]" (Preferred's account manager at 55 Hawthorne, ER 176) "and with Robert [Squeri]" (another Preferred manager), and that Mendoza "was not going to be working anymore." ER 85. When Mendoza and Banegas reported for their janitorial shift that evening, Ortiz informed them that if they continued to protest they would lose their jobs. *See* ER 22, 141-42.

Two days later, Mendoza and Banegas had a conversation with Ortiz and his wife, Veronica. ER 86, 143-45. Veronica Ortiz told the workers that they "didn't know with whom [they] were ... dealing with [sic], that Preferred had lawyers and millions and that we should be thankful because they were giving us work." ER 87. Veronica Ortiz also threatened to sue Banegas. ER 25-26, 143. Rafael Ortiz

asked Banegas about the harassment allegations in the workers' leaflets and said that Preferred demanded that the workers publicly apologize or they would be fired. ER 25. Around that time, Ortiz informed Useda that her work at three offices she normally cleaned had been suspended because "he was upset … because of the picket." ER 26, 127.

Following the October 29 demonstration, the workers noticed significantly increased criticism of their job performance. *See* ER 88, 145. Useda's responsibilities were cut and her paychecks were withheld. ER 127, 162, 264. Ortiz asked for employment verification documents from Banegas and Mendoza that he had not previously requested. *See* ER 24-25, 31, 87, 149.

Ortiz also confronted another employee, Claudia Tapia, to ask if she was one of the workers who had complained about sexual harassment. ER 27, 203. Tapia had experienced Ortiz's harassment, including his offer to give her longer breaks if she accompanied him to a strip club, but she had not participated in the protest. ER 194-98, 397-99. After the confrontation with Ortiz, however, Tapia joined Useda, Mendoza, and Banegas for a meeting with the Coalition. ER 89-90, 199-200. During that meeting, the workers made plans for a second demonstration. *Id*.

D. The November 19 demonstration

The workers' second protest took place in front of 55 Hawthorne on November 19, 2014. ER 3, 240. Useda, Mendoza, Banegas, and Tapia were joined by representatives of the Coalition and the Union. ER 3, 164, 189. The protesters carried the same signs that they had used during the October 29 demonstration except their signs no longer referenced Proposition J, which had already been approved by voters. *See* ER 404-09.

The protesters also distributed handbills that bore photographs of Mendoza, Banegas, Useda, and Tapia and included the Coalition's name and contact information. ER 244. The handbills read:

> We want our voices to be heard.
>
> 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 and Cumulus Media as the major tenants to help in getting Preferred Building Services to listen to our demands and not ignore us.
>
> Join us for a picket line outside the offices of KGO radio.

Id.

While the demonstration was ongoing, Ben Maxon, building manager for 55 Hawthorne and an employee of the building's owner, Harvest Properties, Inc. ("Harvest"), emailed Pete Dellanini, a Preferred manager, to ask "what [wa]s being done about the protest currently going on" in front of the building. ER 394-96. Maxon emailed Dellanini to learn "why [the demonstration] was occurring as well as what [Preferred was] doing to remedy the situation." ER 213.[1]

Later that day, Maxon met with Miranda, a Coalition representative, and one of the protesting workers and informed them that Ortiz would no longer be allowed into the building pending an investigation into the workers' allegations. *See* ER 164-65, 190, 211-12, 217. Maxon testified that the protesters had not asked him to ban Ortiz from the building but that he had made the decision to do so of his own volition. ER 20, 212, 215, 217. Maxon also testified that even before the protests he had decided that Harvest would likely replace Preferred with a different company in the near future. ER 216.

[1] Maxon had also corresponded with Squeri in the weeks following the October 29 demonstration and testified that he "didn't feel that Preferred had done their diligence" and was "not pleased with the way that Preferred was handling the[] protests." ER 213-14, 218.

Later that same day, Preferred manager Dellanini notified Maxon by email that *Preferred* was terminating the contract to provide janitorial services at 55 Hawthorne and at another building, 631 Howard, and that Preferred's last day of work would be December 19, 2014. ER 394; *see also* ER 4.

When Mendoza arrived for her Preferred shift at another building on November 19, a security officer informed her that she would not be working that day and asked her to wait in the lobby for Ortiz. *See* ER 98. When Ortiz arrived, he gave Mendoza an envelope containing her check and said, "Now you're happy that's what you wanted." ER 29, 98-99. Likewise, when Banegas arrived for his shift, Ortiz told him "to just leave everything and that [Banegas] was fired." ER 30, 148. When Banegas asked why, Ortiz responded, "Because you're making noise and you're making the company, Preferred Building Service [sic], look bad." *Id.*

E. Events after November 19

The next day, Miranda (president of SEIU Local 87) called Ortiz to ask why he had fired Mendoza. ER 100. Ortiz responded, "because [the workers] wanted the union" and "Mrs. Lauren [Squeri] did not want to see us there anymore." *Id.*; *see also* ER 191.

On December 11, Ortiz texted Tapia to inform her that December 12 would be her last day. *See* ER 201, 400-03. When Tapia asked why, Ortiz responded: "The contract is over. I think you know that's why I was taken out, because you wanted to have the union." *Id.*; ER 32.

II. Procedural background

A. ALJ proceedings

The Union filed an unfair labor practice charge against Preferred on April 1, 2015, and a second amended charge against Preferred and OJS on May 27, 2015. ER 428-29. The amended charge alleged that Preferred and OJS had engaged in "unlawful and coercive surveillance of employees" and "threatened employees and subsequently terminated them because they engaged in union and/or protected concerted activity." ER 428.

After an investigation, the General Counsel filed a complaint alleging that Preferred and OJS had committed a number of unfair labor practices prohibited by the National Labor Relations Act ("NLRA" or "the Act"). *See* ER 419-27. The General Counsel alleged that Preferred and/or OJS had violated Section 8(a)(1), 29 U.S.C. §158(a)(1), which prohibits employer interference with Section 7 rights, by (among other things) telling the workers not to return to work after the first protest, surveilling the protests, demanding employment reverification in response to the

protests, threatening to retaliate against the workers for protesting, firing Mendoza and Banegas in response to their protests, terminating the 55 Hawthorne contract in response to the protests, and failing to offer new employment opportunities to Tapia and Useda. ER 421-24. The General Counsel also alleged that Preferred and OJS had violated Section 8(a)(3), 29 U.S.C. §158(a)(3), which prohibits discriminatory discharges based on union activity, by firing the workers for participating in the protests and for the purpose of dissuading other workers from organizing similar protests or otherwise attempting to organize in their workplace. ER 423-24.

ALJ Mary Cracraft conducted a hearing from March 7 through April 29, 2016. ER 63, 226. Fifteen witnesses testified, including the fired workers and representatives from Preferred, OJS, Harvest, the Coalition, and the Union. *See generally* ER 65, 95, 121, 134, 154, 172, 184, 208, 228. The ALJ admitted more than 100 exhibits into evidence. *See, e.g.*, ER 209. At the hearing, Preferred contended that the workers had "lost the protection" of the NLRA because, inter alia, the protest may "have violated an unspecified portion of Section [] 8(b)(4) of the Act." ER 413-14. The ALJ issued an order finding no merit in Preferred's affirmative defense and explaining that "the unclean hands doctrine in equity does not operate against a charging party because Board proceedings are not for the

vindication of private rights but are brought in the public interest to effectuate the purposes of the Act." ER 414-15.

The ALJ issued her decision on September 9, 2016. ER 2. The ALJ concluded that the testimony of Useda, Mendoza, Banegas, Tapia, and Rosa Franco (another OJS worker) was generally credible, ER 7, as was the testimony of Ben Maxon, ER 20. Judge Cracraft found that the testimony of Rafael and Veronica Ortiz was generally not credible. ER 7. She also found that Preferred was the workers' joint employer given the degree of control it exercised. ER 15.

The ALJ further found that the workers were engaged in concerted activity protected by Section 7 when they met with the Coalition to discuss wages and working conditions, sought assistance from the Union, and protested. ER 18-19. In reaching that conclusion, the ALJ rejected the employers' contention that the workers had engaged in unlawful secondary activity in violation of Section 8(b)(4)(B), finding that there was "no evidence that a secondary objective existed." ER 19-20. The ALJ also found that the Board's "*Moore Dry Dock*" standard for determining whether picketing at a "common situs" permissibly targets a primary employer was "clearly met." ER 20.[2] A common situs is a location where both

[2] In *Moore Dry Dock*, the Board adopted a standard for determining whether picketing impermissibly targets a neutral secondary in situations where the site of

primary and secondary employers are present, and if the *Moore Dry Dock* criteria are met, then worker picketing at a common situs is entitled to a presumption of lawfulness.

After concluding that the workers' conduct constituted protected concerted activity, the ALJ found that Preferred and OJS had committed numerous violations of Section 8(a)(1). The ALJ found that Ortiz had violated the Act by telling Mendoza that she was "not going to be working anymore," by reducing Useda's responsibilities, by telling workers (in order to threaten and intimidate them) that OJS could lose the 55 Hawthorne contract because of their concerted activity, by informing Mendoza that her dismissal was a response to her participation in the protests, and by informing other workers that Banegas and Mendoza were fired for engaging in concerted activity. ER 29-30. Similarly, the ALJ found that Veronica Ortiz had violated Section 8(a)(1) by threatening Banegas with reprisal and by reminding Useda that she had been fired previously, and that Ortiz and Squeri had

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workers' dispute with their primary employer involves "the premises of a secondary employer," such that "the only way to picket that *situs* is in front of the secondary employer's premises[.]" *See Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549-51 (1950); *Electrical Workers v. NLRB*, 366 U.S. 667, 677, 680 (1961) (approving *Moore Dry Dock* criteria, while counseling against applying them "mechanical[ly]" to declare conduct illegal).

violated Section 8(a)(1) by photographing workers as they engaged in protected concerted activity. ER 26, 28, 29.

The ALJ also concluded that both OJS and Preferred had violated Sections 8(a)(1) and 8(a)(3) of the Act by discriminatorily firing employees for participating in protected concerted activity. The ALJ found that Mendoza and Banegas were fired in direct response to their participation in the protected demonstrations and that Preferred's decision to end its contract at 55 Hawthorne (resulting in the other workers' terminations) was intended to, and did, chill union activity. *See* ER 31, 34.[3]

B. Board proceedings

The General Counsel and Preferred submitted exceptions to the ALJ's decision to the Board. Preferred contended, among other things, that the workers' conduct was not protected because the workers had engaged in "unlawful and unprotected recognitional and secondary picketing, and unprotected malicious defamation." ER 59-61d.

On August 28, 2018, the Board issued its decision reversing the ALJ and dismissing the complaint in its entirety. ER 2. The Board found that the ALJ had

[3] The ALJ rejected several other charges included in the General Counsel's complaint. *See* ER 24-25, 35.

erred in preventing Preferred from presenting evidence in support of its affirmative defense that the workers' conduct violated Section 8(b)(4) because if it had, the workers had "lost the protection of the Act." ER 4 (citing *National Packing Co. v. NLRB*, 352 F.2d 482 (10th Cir. 1965)).

The Board then concluded that the workers' October 29 and November 19 demonstrations at 55 Hawthorne violated Section 8(b)(4)(ii)(B). ER 5. Notwithstanding all the materials at the protests that explicitly identified only Preferred as the workers' employer and the subject of their dispute, the Board ruled that the workers' demonstrations were not entitled to the *Moore Dry Dock* presumption of lawfulness because the workers had confused the public about who their employer was. *Id.* In making this determination, the Board relied solely on a single use of the word "their" in leaflets in which the workers said that they "work for Preferred Building Services which cleans the offices of KGO Radio" and then that "We are calling on KGO radio to take corporate responsibility in ensuring that *their* janitors receive higher wages, dignity on the job, respect, …."

The Board went on to hold that even if the *Moore Dry Dock* criteria had been satisfied, the November 19 meeting, where union president Miranda told Maxon "it was 'inappropriate' that Ortiz was still working" at 55 Hawthorne and that the protests would continue until conditions improved, provided independent

evidence that the workers had an unlawful purpose of forcing secondaries (the 55 Hawthorne building manager and tenants) to stop doing business with their employers (which would of course have endangered the workers' own jobs). *See* ER 5-6. According to the Board, evidence that the protesters were "happy" Maxon was considering switching to a union contractor and that tenants of the building were upset by the protests further supported its finding of a prohibited secondary object. ER 6.

The Union moved for reconsideration on September 25, 2018, explaining that the Board's application of Section 8(b)(4)(ii)(B) was incorrect and in conflict with the First Amendment. ER 39-56. The Board denied reconsideration on October 31, 2018. ER 1. The Union filed its petition for review on February 7, 2019. ECF Dkt. #1.

III. Relevant constitutional and statutory background

The NLRB ruled that the workers violated Section 8(b)(4) of the Act, 29 U.S.C. §158(b)(4)(ii)(B), which makes it an "unfair labor practice" for a union:

> (4) … (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where … an object thereof is–
>
> …
>
> (B) forcing or requiring any person … to cease doing business with any other person …: *Provided*, That nothing contained in this clause

> (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

Id.

Section 8(b)(4) was prompted by congressional concern regarding coercive union tactics that can effectively force neutral employers to stop doing business with other entities involved in a labor dispute. *See, e.g.*, *NLRB v. Operating Engineers Local 825 (Burns and Roe, Inc.)*, 400 U.S. 297, 302-03 (1971). In *Burns and Roe*, for example, the Supreme Court found that a union violated Section 8(b)(4) by planning and implementing a strike that shut down an entire construction project in order to coerce the construction contractor (the "secondary") into assisting the union in resolving a dispute with one of the project's subcontractors (the "primary" employer). *Id.* at 305.

Section 8(b)(4) does not, however, impose "a broad policy against secondary boycotts." *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 98, 100 (1958). Instead, it "describes and condemns" only "specific union conduct directed to specific objectives." *Id.* at 98. In particular, a violation of Section 8(b)(4)(ii) requires proof that (1) a union or its agents impermissibly targeted a neutral "secondary" with the goal of "forc[ing]" that party to "cease doing business with" another person (known in labor law as a prohibited "secondary object") and (2) in pursuing this objective, the union or its agents engaged in coercive conduct. *SEIU Local 87*

(*Trinity Bldg. Maint. Co.*), 312 NLRB 715, 742-743 (1993), *enf'd*, 103 F.3d 139 (9th Cir. 1996).

To avoid the "serious constitutional questions" that would arise if Section 8(b)(4) were applied broadly to prohibit protected speech, Section 8(b)(4) is applied to activity that *may* be protected by the First Amendment only where its text or legislative history provide the "clearest indication" that Congress intended to prohibit the conduct at issue. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577, 588 (1988); *Overstreet*, 409 F.3d at 1208-10.[4] The Board and the courts must "take care not to define the category of proscribed picketing more broadly than clearly intended by Congress." *Carpenters Local 1506*, 355 NLRB at 802.

SUMMARY OF ARGUMENT

In ruling that the workers' protests violated NLRA Section 8(b)(4), the Board misapplied its own precedent and the Act. The Board's interpretation and application of Section 8(b)(4), if allowed to stand, will create a conflict between

[4] *See also Carpenters Local 1506*, 355 NLRB 797, 797 (2010) (construing Section 8(b)(4)(B)(ii) in manner consistent with Board's obligation "to seek to avoid construing the Act in a manner that would create a serious constitutional question"); *UFCW Local 1996*, 336 NLRB 421, 427 (2001) (adopting interpretation of Section 8(b)(4)(B) that "has the virtue of averting the need to decide the First Amendment issues raised").

that provision and the First Amendment. For these and other reasons, the Board's decision should be reversed.

The Board initially erred by refusing to apply a presumption of lawfulness to the workers' protests under *Moore Dry Dock*. The workers' demonstrations met all of the *Moore Dry Dock* criteria, including that the workers expressly disclosed that their dispute was with Preferred, ER 348-68, 410-12, and the Board's reliance on a single use of the word "their" to conclude otherwise was contrary to both common sense and well-established case law. *See Pac. Nw. Dist. Council of Carpenters*, 339 NLRB 1027, 1029 (2003); *NLRB v. Ironworkers Local 433*, 850 F.2d 551, 556 (9th Cir. 1988); *see also infra* Section I.A.

The Board further erred in concluding that the workers' protests (1) had the objective of forcing secondary parties to "cease doing business" with their employer and (2) involved "coercive" conduct, which are the essential elements of a Section 8(b)(4) violation. As to (1), the evidence cited by the Board showed only that the workers sought to pressure Preferred and OJS to end sexual harassment and improve their working conditions (using speech protected by the First Amendment)—*not* that the workers sought to force the building manager or tenants to "cease doing business" with anyone. *See infra* Section I.B. As to (2), the Board was mistaken in concluding that the workers' peaceful protests constituted

coercive conduct as required by Section 8(b)(4) (which, if it prohibited non-coercive conduct, would violate the First Amendment). *See infra* Section I.C. The Supreme Court has emphasized that Section 8(b)(4) does not apply to picketing that, like the protests here, does not seek to dissuade anyone from entering a business nor create any substantial risk of confrontation, threats, or intimidation. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 63 (1964).

The Board's construction and application of Section 8(b)(4) not only contravenes precedent but also creates an unnecessary conflict with the First Amendment by imposing a content- and speaker-based restriction on union speech. Section 8(b)(4) must be construed narrowly to avoid such a conflict whenever a narrow construction is "plausible" as an interpretation of Congress's intent. *Overstreet*, 409 F.3d at 1208-12. Construing Section 8(b)(4) not to apply to the workers' protests here is plausible and, in fact, the only reasonable interpretation of the statute. *See infra* Section II.

When the Board's erroneous construction of Section 8(b)(4) is set aside, there can be no dispute that Preferred and OJS, in threatening and retaliating against the workers, violated Sections 8(a)(1) and 8(a)(3) of the Act. *See infra* Section III. The Board's contrary holding must be reversed.

Finally, even if this Court were to *affirm* the Board's construction of Section 8(b)(4) (which it should not), the Board's decision still should be reversed. Impermissible retaliation at a minimum played a role in the employers' actions, and the Board failed to apply its own standard for evaluating employer liability in "mixed motive" cases, *Wright Line*, 251 NLRB 1083, 1089 (1980). The record makes it indisputable that Preferred and OJS cannot satisfy their burden under that standard. *See infra* Section IV.

For all these reasons, the petition for review should be granted and the Board's decision overturned with instructions that the Board (1) find that Preferred and OJS violated Sections 8(a)(1) and 8(a)(3) and (2) order appropriate relief.

ARGUMENT

I. The Board misapplied Section 8(b)(4) in a manner that disregards its narrow scope.

In reversing the ALJ's decision, the Board did not disagree with the ALJ's conclusion that Preferred and OJS retaliated against and fired the workers for engaging in concerted activity to improve their employment conditions. *See infra* Section III. Instead, the Board concluded that the workers forfeited the Act's protections because their demonstrations were intended to coerce secondary parties—the manager and tenants of 55 Hawthorne—to terminate their business relationships with Preferred and OJS, in violation of Section 8(b)(4)(ii)(B).

The Board erred in reaching that conclusion. As an initial matter, the workers' protests were entitled to a presumption of lawfulness under *Moore Dry Dock*, and the Board erred in refusing to apply that presumption. Equally important, *neither* of the statutory requirements for finding an 8(b)(4) violation—(1) impermissible targeting of a secondary employer with a cease-doing-business objective and (2) coercive conduct—were met. The Board's interpretation of Section 8(b)(4) as forbidding the workers' protests will, if allowed to stand, put 8(b)(4) at odds with the First Amendment and must be rejected for that reason as well.

A. The workers' protests were entitled to a presumption of lawfulness under *Moore Dry Dock*.

Determining whether an 8(b)(4) violation has occurred at a common situs can be difficult because both primary and secondary parties are by definition present. To aid in making that determination, the Board has over many years applied what are known as the *Moore Dry Dock* criteria to common-situs picketing. If the *Moore Dry Dock* criteria are satisfied, worker activity is entitled to a presumption of lawfulness.

Under *Moore Dry Dock*, common-situs picketing is presumptively lawful if:

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at

> the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

92 NLRB at 549 (footnotes omitted).

There is no question that the workers' protest satisfied the first three *Moore Dry Dock* criteria, *see* ER 20, and the Board did not conclude otherwise. Contrary to the Board's decision, however, however, the fourth criterion—whether the workers "disclosed clearly that the[ir] dispute [was] with the primary employer"—was also easily satisfied. Among other things, the workers' signs said "PREFERRED BUILDING SERVICES UNFAIR" and expressly stated that they were "in a labor dispute with the cleaning contractor at [55 Hawthorne]." ER 2-3. The leaflets that the workers handed out during the demonstration likewise stated that the workers "work for Preferred Building Services." ER 3.

These disclosures were more than sufficient under the Board's own *Moore Dry Dock* precedents. The Board has previously recognized that references to neutral parties on a union's signs or other materials do *not* undermine otherwise clear language identifying the target of workers' protests. *See Pac. Nw. Dist. Council of Carpenters*, 339 NLRB at 1029 (references to neutral trade shows occurring at convention center did not undermine union's express identification of contractor working at center as subject of labor dispute). As the Board explained

in *Pacific Northwest*, the fourth criterion is generally unmet only when—unlike here—workers' signs "fail[] to identify the primary target at all." *Id.* (citing *SEIU Local 32B-32J*, 250 NLRB 240, 244-45, 247-48 (1980)); *see also, e.g.*, *IBEW Local 59*, 135 NLRB 504, 505 (1962) (fourth criterion satisfied where workers did not "specifically name" employer that was subject of dispute, but stated that "it was the 'Electrical work' on the project that was considered unfair," and primary employer was only one performing such work); *Linbeck Constr. Corp. v. NLRB*, 550 F.2d 311, 319 (5th Cir. 1977) (fourth criterion not satisfied where union covered sign identifying primary employer).

Nonetheless, and contrary to this precedent, the Board concluded that the fourth *Moore Dry Dock* requirement was not satisfied in this case because the workers distributed leaflets at the October 29 demonstration that—after clearly stating that the protestors "work[ed] for Preferred Building Services" and explaining the relationship with KGO Radio, *i.e.*, that Preferred "cleans the offices of KGO Radio—called on KGO radio to help ensure that "their janitors" worked in good conditions. ER 3, 5. The Board's discussion focused entirely on the leaflet's

single use of the word "their," concluding that the word "led the public to believe that KGO ... was [the workers'] employer."[5]

That ruling was wrong. There is no evidence that any members of the public jumped to the conclusion that the workers were employed by KGO Radio, nor would there have been any reasonable basis for doing so in light of the workers' repeated and explicit identifications of Preferred as their employer, as well as the workers' additional explanation that they had a dispute only with the janitorial contractors and were not seeking a building boycott, and that KGO Radio was a Preferred customer. The workers' single use of the word "their" when viewed in this context made no claim of a legal employment relationship with KGO Radio. Instead, the reasonable understanding of that word was that the workers, through their employer Preferred, provided janitorial services to KGO's offices and so were "KGO's janitors" in that sense—much as anyone might refer to someone who cleans their home or office as "their" cleaning person without necessarily implying a legal employment relationship.

[5] As explained *infra* Section I.B, the workers' request of KGO Radio would be lawful *even if* the word "their" created this confusion because the workers never asked KGO to "cease doing business" with Preferred or OJS. Employees are free to engage in communication that informs neutral third parties about their working conditions and asks those parties to take action—provided that the action requested is not that the third parties "cease doing business" with the primary employer(s).

Recognizing this and similar realities, both the Board and this Court have previously rejected the contention that workers must phrase their materials with a lawyerly precision that perfectly captures the legal distinction between primary and secondary employers. *See Carpenters Local 1506*, 355 NLRB at 810-11 (rejecting argument for such a requirement on banners informing public of "labor dispute"). A "requirement that union representatives parrot particular words or phrases, or announce an intention to comply with particular legal formulae" ignores the "informal, non-legalized reality of day-to-day labor relations" and the "long-established tenet of labor law that dealings between union and management should not be held to the rigid formalistic rules that are appropriate to other areas of law." *Ironworkers Local 433*, 850 F.2d at 556. Requiring such precision also contradicts the core First Amendment principles that must guide interpretation and application of Section 8(b)(4), *see supra* at 20, including the principle that statutes should not be interpreted to impose difficult-to-comply-with rules that are likely to chill protected speech. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (content-based speech regulations create substantial risk that protected speech will be improperly chilled).

Moreover, even if the word "their" *had* created any confusion as to the identity of the workers' employer or the subject of their labor dispute, that word

was used in connection with KGO Radio only on leaflets distributed as part of the workers' October 29 action. The workers were fired after the *November 19* demonstration, not the October 29 protest. No matter what impression the word "their" on the October 29 leaflets might have created, those leaflets could not render unprotected their later demonstration. *See, e.g.*, *Bldg. & Constr. Trades Council*, 222 NLRB 1276, 1280-82 (1976) (27-day hiatus sufficient to render second round of picketing lawful); *Retail Clerks Local 1357*, 252 NLRB 880, 887-89 (1980) (29-hour hiatus sufficient to render second round of picketing lawful).

Thus, the Board misapplied its own test for determining whether the workers' protests were entitled to a presumption of lawfulness.

B. No other evidence supported the Board's finding of a secondary object.

In addition to misapplying *Moore Dry Dock*, the Board erred in finding "independent" evidence of a prohibited "secondary object," i.e., evidence that the workers intended to force neutral parties to "cease doing business" with Preferred and OJS.

Importantly, Section 8(b)(4)(ii) is violated only when a union or its agents intend to force a neutral/secondary to take specific, enumerated actions, including, as relevant here, "ceas[ing] ... business with" another person. *See, e.g.*, *Trinity Bldg. Maint. Co.*, 312 NLRB at 743 ("[A] cease dealing with or doing business

with object is, of course, required for finding a violation ….").[6] Under the Act, activity intended "to educate consumers, secondary employers, or secondary employees, and even prompt them to action—so long as the action is not [a specifically prohibited action]—is lawful." *Sw. Regional Council of Carpenters*, 356 NLRB 613, 615 (2011). In addition, a "boycott voluntarily engaged in by a secondary employer for his own business reasons … is not covered by the statute." *Carpenters Local 1976*, 357 U.S. at 98-99.[7]

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[6] *See also* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. Pa. J. Lab. & Emp. L. 905, 917 (2005) ("[E]ach type of conduct set forth in subsection (i) and in subsection (ii) by itself does not constitute an unfair labor practice under section 8(b)(4)(B). The conduct must have a subsection (B), or secondary object, to be unlawful under the section."); *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* §22.I, at 22-3 (John E. Higgins Jr. et al. eds., 7th ed. 2017) ("By enacting Section 8(b)(4)(B), Congress has prohibited some, but far from all, forms of secondary strikes and picketing."). The two other prohibited objects of union coercion set forth in Section 8(b)(4)(ii)(B) are not at issue here.

[7] Of course, activity targeting *primary* employers is not prohibited by Section 8(b)(4). In fact, such activity is affirmatively protected by the Act, even though it may seriously affect neutral third parties, and even though it may coerce secondary employers to take action, so long as that is not the *object* of the activity. *See, e.g.*, *Steelworkers v. NLRB*, 376 U.S. 492 (1964); *Electrical Workers v. NLRB*, 366 U.S. 667 (1961). Section 8(b)(4) thus does not apply to "'primary picketing' … aimed at all those approaching the situs [of the labor dispute] whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt"—even though such picketing can substantially affect the business of those neutral, third-party suppliers or customers. *Steelworkers*, 376 U.S. at 499; *see also National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 627

Here, while the evidence shows that the workers sought to pressure Preferred and OJS to end sexual harassment and improve their working conditions, there is no evidence whatsoever that the workers sought to force the tenants or manager of 55 Hawthorne to cease doing business with Preferred and OJS entirely, which could have cost the workers their jobs. None of the placards carried by the protesters demanded that the tenants or manager of 55 Hawthorne terminate their contracts with Preferred and OJS, and the slogans they chanted ("Up with the union, down with exploitation," ER 157) did not include such a demand. Nothing in the language of the workers' leaflets suggested that the workers sought to force KGO radio to cease doing business with Preferred, OJS, or anyone else. On the contrary, the workers' leaflets asked for the building tenants' assistance in getting Preferred to address their concerns about their working conditions—assistance the tenants could not provide if they stopped doing business with Preferred.

Similarly, none of the evidence cited by the Board supports finding a prohibited cease-doing-business object. The Board initially cited the fact that the workers told Maxon, who was employed by building owner Harvest, that they wanted changes in their working conditions. But of course asking for better

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(1967) ("[H]owever severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective.").

working conditions is not the same as asking Harvest to stop doing business with Preferred or OJS entirely (which might well have left them with no work at all).[8]

Next, the Board relied on the fact that the workers informed Harvest that they would continue protesting if their concerns remained unaddressed. But Section 8(b)(4) does not prohibit unions from informing secondary employers of the reasons why they are picketing a primary employer or from stating that they will continue picketing at that common site until their dispute with the primary employer has been resolved. *See NLRB v. Servette, Inc.*, 377 U.S. 46, 57 (1964) (union's "threat to engage in protected conduct" was "itself protected"); *Plumbers Local 32 v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990) (union's threat to secondary employer to picket common site was lawful where there was no evidence that the picketing would be "conducted in an unlawful manner"); *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429, 435-36 (D.C. Cir. 2007) (same); *Ironworkers Local 433*, 850 F.2d at 555 (Section 8(b)(4) "does not reach informing

[8] To be sure, as discussed *infra* Section I.C, the workers *could* have asked Hawthorne or building tenants to boycott Preferred and OJS—or could even have called for a boycott of the building or its tenants—so long as they did so in a non-coercive manner. *See DeBartolo*, 485 U.S. at 588 (union handbills asking shoppers to boycott mall until it agreed to use construction contractors who paid fair wages and benefits did not violate Section 8(b)(4)). But here the workers did not make such demands, meaning that the Board's 8(b)(4) analysis fails even before reaching the second, coercion element required to establish a violation.

secondary employers of, or 'threatening' them with, picketing of primary employers, including primary employers scheduled to work at a common situs."). The Board's reliance on the workers' statements that they would continue picketing as evidence of improper motive cannot be squared with these precedents.

The Board also cited the fact that when meeting with Maxon, union president Miranda suggested it would be "inappropriate" for Rafael Ortiz to remain on site. Again, however, suggesting that a supervisor who has engaged in repeated sexual harassment should not continue to supervise the same employees on a day-to-day basis is not the same as demanding the cancellation of contracts with OJS and Preferred. Miranda never asked Harvest to terminate its contracts with either company and, even if she had, her statements as an independent union president would not necessarily prove that the workers themselves wanted the same result.

Nor does the fact that the workers were "happy" about the response of the building's manager, or that tenants were "upset" by the protests, prove impermissible motive. The workers could be "happy" that their protests have moved others to some action without that emotion showing that the workers intended to force Harvest to cease doing business with their employers.[9] As to the

[9] For example, workers engaged in lawful primary picketing outside the restaurant where they work might be "happy" if they learned that another business

tenants' reactions, primary activity often has a "severe … impact … on neutral [parties]," but that impact does not transform it "into activity with a secondary objective." *National Woodwork Mfrs. Ass'n*, 386 U.S. at 627. As this Court has explained, "[t]he protection of on-site speech extends to the emotive impact of speech." *Overstreet*, 409 F.3d at 1212 (citation omitted).

Further undermining the Board's secondary-motive analysis is the fact that, according to the evidence, Harvest did not cease doing business with Preferred because of any worker demand; on the contrary, it was *Preferred* that terminated its contract with Harvest. The facts also show that Harvest chose on its own to investigate Ortiz's conduct without the protesters having demanded that step. As any responsible property manager would do after learning that workers may have suffered sexual harassment on site, "Harvest Properties building manager Maxon … sought an investigation into the allegations on the picket signs *of his own volition*." ER 20 (emphasis added).[10] Harvest made the independent decision to ban Ortiz from the building pending its investigation, and its manager testified that the workers and Union did not ask him to do so. Additionally, Harvest had begun

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had decided not to hold its holiday party at the restaurant while the labor dispute was ongoing, but that would not make the second business an unlawful target of its picketing.

[10] Preferred did not take exception to this finding by the ALJ.

searching for a unionized contractor "[e]ither *before* or around the time of the picketing" and there was "no evidence to connect this search to the picketing.". ER 6, 20 n.39 (emphasis added).

In short, there was no evidence whatsoever that any of the workers sought to force Harvest or any of the building tenants to cease doing business with Preferred or OJS. In the absence of any evidence of such a secondary object, the Board erred in finding a Section 8(b)(4) violation.

C. The Board erred in concluding that the workers' demonstrations involved coercive conduct.

Even if the Board had not erred with respect to its *Moore Dry Dock* analysis and in otherwise applying Section 8(b)(4)'s "secondary object" element, the Board's decision still should be rejected because the workers did not engage in the coercive conduct required to find a violation of 8(b)(4).[11]

Section 8(b)(4)'s purpose is to prohibit the "isolated evil" of labor organizations exerting *coercive* pressure on neutral employers to compel them to become involved in a primary labor dispute. *See Tree Fruits*, 377 U.S. at 63;

[11] As *Overstreet* explains, the Supreme Court has relied on this "coercive conduct" element to uphold Section 8(b)(4) against First Amendment challenge. 409 F.3d at 1210-11. The Court has reasoned that Section 8(b)(4) violations involve both "conduct and communication," and that Congress may outlaw coercive union conduct because "it is the conduct element rather than the particular idea being expressed" that is being regulated. *Id.* (citations omitted).

Overstreet, 409 F.3d at 1212. "Not just any conduct will trigger section 8(b)(4)'s proscription: The conduct must be threatening, coercive, or restraining…. [M]ore than mere persuasion is necessary to prove a violation of §8(b)(4)(ii)(B)[.]" *Clark v. City of Seattle*, 899 F.3d 802, 811 (9th Cir. 2018) (quotations and citations omitted); *see also Electrical Workers*, 366 U.S. at 672 (Section 8(b)(4) is implicated only where "some third party who has no concern in" the relevant labor dispute faces union "sanctions"). "[A] union is free to approach an employer to persuade him" even to engage in a boycott "so long as [the union] refrains from the specifically prohibited means of coercion …." *Carpenters Local 1976*, 357 U.S. at 99; *see also id.* at 98-99 ("A boycott voluntarily engaged in by a secondary employer for his own business reasons … is not covered by the statute.").

In this case, the Board incorrectly applied Section 8(b)(4) to peaceful, non-threatening conduct fully protected by the First Amendment. The leaflets distributed by the workers and the messages the workers conveyed were certainly an effort to persuade those who saw them, including the building manager and tenants, that the workers' cause was just and that Preferred and Ortiz should be urged to change their practices. Efforts to persuade are protected not prohibited, however, and cannot form the basis for an 8(b)(4) violation. *See Carpenters Local 1976*, 357 U.S. at 98-99. The workers also had a First Amendment right to gather

on the public sidewalks in front of the building to convey their message to the public and to the building's tenants and manager. *See Overstreet*, 409 F.3d at 1211.

Presumably, the Board deemed the workers' conduct coercive because, in labor parlance, the workers were "patrolling" —i.e., walking in circles and carrying signs in front of the building. But that does not mean the workers were engaged in the type of "picketing" that federal labor law deems coercive and subject to regulation when aimed at a secondary employer.

"[N]ot all patrolling constitutes picketing in the statutory meaning of that term." *Chicago Typographical Union No. 16 (Alden Press, Inc.)*, 151 NLRB 1666, 1669 (1965); *see also id.* ("[P]atrolling and the carrying of placards … alone does not *per se* establish that 'picketing' in the sense intended by Congress was involved."). In an effort to construe the Act in a manner that could survive constitutional scrutiny, the Board and courts have long recognized that union picketing/patrolling involves the kind of threat, restraint, or coercion governed by Section 8(b)(4) only if it creates a "*confrontation* between the picketers and those entering the worksite." *Carpenters Local 1506*, 355 NLRB at 802 (emphasis added). Even if it involves patrolling with signs, union conduct that is merely persuasive rather than threatening or coercive does not violate the Act. *See id.*

("This element of confrontation has long been central to our conception of picketing for purposes of the Act's prohibitions."); *Overstreet*, 409 F.3d at 1211 (finding no "picketing" prohibited by Section 8(b)(4) where there was nothing "about the [union] members' behavior that could be regarded as threatening or coercive—no taunting, no massing of a large number of people, no following of the Retailers' patrons"); *NLRB v. Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964) (explaining that "picketing" requires "a confrontation in some form between union members and the employees, customers, or suppliers who are trying to enter the employer's premises" and "an element of intimidation resulting from the physical presence of the pickets or the heritage of the union line tainted with bloodshed and violence").

There is no evidence that the demonstrations at issue here created the kind of confrontation or involved the kind of intimidation or other coercion necessary to bring them within the scope of Section 8(b)(4) and to permit their prohibition notwithstanding the First Amendment. The Supreme Court has held that Congress may constitutionally outlaw picketing that encourages consumers to boycott a secondary employer's entire business because the call for a total boycott creates an inherent likelihood of intimidation or confrontation between picketers and potential customers. *See NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S.

607, 616 (1980). But at the same time the Court has recognized that picketing that does *not* seek to dissuade anyone from entering a business is qualitatively different and not the kind of conduct Congress sought to regulate through Section 8(b)(4). *See Tree Fruits*, 377 U.S. at 63; *see also Sheet Metal Workers Local 15*, 491 F.3d at 437-38 (explaining that coercion may not be "defined so broadly as to crimp the free speech guarantee of the First Amendment," and concluding that "mock funeral" in which participants neither interfered with nor confronted patrons of business was not prohibited by Section 8(b)(4)); *Alden Press*, 151 NLRB at 1669 (finding no coercion where union's activity "was not designed to dissuade customers or others from patronizing the establishments in the area being paraded" or "to halt deliveries or to cause employees to refuse to perform services").

In this case, the picketers' signs specifically stated that they were "NOT calling for a boycott" of 55 Hawthorne. *See* ER 3, 410-12. Far from suggesting that anyone should refrain from entering 55 Hawthorne, the workers' purpose of informing the building's major tenants of their concerns and requesting its assistance would be served only if individuals who encountered the demonstration *entered* the building and conveyed the workers' concerns. Indeed, there was no evidence that the workers' protests dissuaded anyone from entering 55 Hawthorne.

Furthermore, the demonstrating workers put no economic pressure whatsoever on the tenants of 55 Hawthorne. At no point did the Preferred employees seek to induce employees of KGO or Cumulus Media to cease work, nor did they attempt to "shut off all trade with" KGO, Cumulus, or other 55 Hawthorne tenants. *Safeco*, 447 U.S. at 612. Passersby would have had no way of knowing that KGO or Cumulus Media had any connection to the demonstration unless they took a leaflet (handbilling that was itself protected under the Act), and the leaflets, like the placards, stated that the demonstrating employees "work for Preferred Building Services" and identified Preferred as the object of the dispute. ER 243. The workers' conduct is thus not at all comparable to the forms of economically coercive conduct to which Section 8(b)(4) has previously been applied. *See, e.g.*, *Burns and Roe*, 400 U.S. at 305 (union's strike shut down construction project to coerce neutral construction contractor into assisting union in dispute with subcontractor).

Also relevant is the fact that both KGO and Cumulus Media are broadcasting organizations rather than retail businesses driven by consumer foot traffic. A demonstration in front of their offices, without more, is not "reasonably calculated to induce customers not to patronize" them. *Safeco*, 447 U.S. at 610; *see Alden Press*, 151 NLRB at 1669.

Because the "picketing" at issue here did not amount to coercion "designed to dissuade customers or others from patronizing the establishments in the area being paraded, nor was it intended to halt deliveries or to cause employees to refuse to perform services, and it did not in fact produce such results," it was fully protected by the Act and by the First Amendment. *Alden Press*, 151 NLRB at 1669. The Board erred in concluding that the workers' peaceful, non-coercive picketing violated Section 8(b)(4).

II. As construed by the Board, Section 8(b)(4) would violate the First Amendment.

As explained in Section I *supra*, there is no evidence that the workers' demonstrations had the purpose of coercing any secondary party to cease doing business with Preferred or OJS, and the Board's holding that the workers' protests violated Section 8(b)(4) must therefore be reversed. If that holding is allowed to stand, moreover, the Board's broad construction and application of Section 8(b)(4) to the workers' non-coercive demonstration would create an unnecessary conflict between that provision of the Act and the First Amendment.

The First Amendment protects workers' right (as it protects everyone's right) to engage in peaceful public protest. In the labor context, the Supreme Court has emphasized that the First Amendment and the NLRA protect non-coercive requests (such as in leaflets and meetings) that secondary employers "mak[e] a

business judgment to cease dealing with the primary employer." *Servette*, 377 U.S. at 54; *see also Sw. Regional Council of Carpenters*, 356 NLRB at 615. Likewise, this Court recognized in *Overstreet* that unions have a First Amendment right to gather in front of a business in order to "shame" retailers who contract with non-union contractors "and, by extension, … members of the public who patronize them." 409 F.3d at 1212. As *Overstreet* explains, "[I]ndividuals ordinarily have the constitutional right to communicate their views in the presence of individuals they believe are engaging in immoral or hurtful behavior. Peaceful and truthful discussion designed to convince others not to engage in behavior regarded as detrimental to one's own interest, or to the public interest, is fully protected speech." *Id*. at 1211 (citation omitted).

That the workers in this case also "picketed" does not change the analysis. The picketing at issue is not meaningfully distinguishable from other forms of expressive activity that both the Supreme Court and the Board have held are outside the scope of Section 8(b)(4)'s prohibition. *See Tree Fruits*, 377 U.S. at 72 (peaceful picketing targeting sale of particular product not prohibited by Section 8(b)(4)); *Carpenters Local 1506*, 355 NLRB at 802 (display of stationary banner not prohibited by Section 8(b)(4)); *Overstreet*, 409 F.3d at 1215-16 (same); *DeBartolo*, 485 U.S. at 588 (handbilling not prohibited by Section 8(b)(4)); *Sheet*

Metal Workers Local 15, 491 F.3d at 440 (distribution of leaflets and holding of mock funeral not coercive). The U.S. Supreme Court has held that picketing itself involves expressive activity protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (nonviolent picketing in support of boycott of certain merchants was "a form of speech or conduct … entitled to protection under the First and Fourteenth Amendments"); *Carey v. Brown*, 447 U.S. 455, 460 (1980) ("peaceful picketing on … public streets and sidewalks" constituted "expressive conduct that falls within the First Amendment's preserve"); *Thornhill v. Alabama*, 310 U.S. 88, 103-05 (1940) (invalidating picketing prohibition that infringed "the effective exercise of the right to discuss freely industrial relations"); *Tree Fruits*, 377 U.S. at 63 ("[A] broad ban against peaceful picketing" would "collide with the guarantees of the First Amendment.").

The workers here were engaged in political speech about matters of public concern (workplace sex harassment and a minimum wage initiative)—speech that sits at the heart of First Amendment protection. The Board held the speech unlawful because the workers asked the building's tenants and manager to support them, but to the extent KGO or Harvest felt pressured to act, that pressure arose from the disturbing and thereby persuasive power of the workers' *message*—not from any threatening or confrontational conduct. *Snyder v. Phelps*, 562 U.S. 443,

458 (2011) (First Amendment protected church's "upsetting" and "contempt[uous]" picketing). But it is a "basic First Amendment principle[]" that "[s]peech remains protected even when it may 'stir people to action,' 'move them to tears,' or 'inflict great pain.'" *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 576 (2011) (citing *Snyder*, 562 U.S. at 460-61); *id.* ("[T]he fear that speech might persuade provides no lawful basis for quieting it."). This principle applies with full force to picketing: "In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime." *Id.* at 577.

Indeed, the only difference between the workers' activities and the events in cases like *Claiborne Hardware* and *Carey* is the content of the workers' speech. If Section 8(b)(4) is interpreted to prohibit workers and unions from engaging in peaceful picketing that urges "secondary" parties to act, while picketing either for other purposes or by other groups for the same purpose (including as part of a secondary boycott) is permitted, then Section 8(b)(4) would impose a content- and speaker-based restriction on expressive activity in violation of the First Amendment. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *see also*

Carpenters Local 1506, 355 NLRB at 797 ("Governmental regulation of nonviolent speech … implicates the core protections of the First Amendment.").

Content-based speech restrictions are of course subject to strict scrutiny, as are speaker-based restrictions designed to promote the government's content preferences. *See Reed*, 135 S.Ct. at 2227, 2230-31; *Sorrell*, 564 U.S. at 565 (heightened scrutiny applies where government "impose[s] a specific, content-based burden on protected expression"). As construed by the Board, Section 8(b)(4) could not satisfy that level of scrutiny. The government has no compelling interest in restricting workers' or a union's peaceful expressive activity, and any interest in protecting neutral employers from coercion could be achieved through means far less restrictive of First Amendment-protected expression. Even if Congress could constitutionally restrict some inherently coercive forms of picketing—such as intimidating, threatening, and confrontational picketing calling for the complete boycott of the picketed business—it could not prohibit the peaceful appeals for support and assistance at issue here.

In sum, if the Board's construction of Section 8(b)(4) is correct, then the statute is unconstitutional. Rather than reach that result, the proper course is to construe Section 8(b)(4) in a plausible manner that avoids serious constitutional questions. *See Overstreet*, 409 F.3d at 1208-10. Interpreting Section 8(b)(4) not to

apply to the workers' demonstrations here is not only plausible, but is also the better reading of the statute. The Court should therefore reject the Board's incorrect and overly broad construction of Section 8(b)(4) and hold instead that Section 8(b)(4) did not prohibit the workers' expressive activity at 55 Hawthorne.

III. Preferred and OJS threatened and retaliated against their employees for engaging in protected, concerted activity to improve their working conditions.

For the foregoing reasons, the Board erred in concluding that the workers' demonstrations were prohibited by Section 8(b)(4). When the Board's erroneous 8(b)(4) ruling is set aside, it is clear, as the ALJ held, that Preferred and OJS committed numerous violations of Sections 8(a)(1) and 8(a)(3).

A. Preferred and OJS jointly employed the workers at 55 Hawthorne.

There is no dispute that OJS employed the janitorial workers at 55 Hawthorne. The ALJ also correctly determined that Preferred was their joint employer, and the Board did not question that finding.

Entities are joint employers for purposes of the National Labor Relations Act "'if they share or codetermine those matters governing the essential terms and conditions of employment,'" including matters "such as hiring, firing, disciplining, supervising and directing employees as well as wages and hours …. the number of workers, controlling scheduling, … and determining the manner and method of

work." ER 14-15 (quoting *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB 1599, 1613 (2015), *aff'd in part*, *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018)).

Preferred jointly employed OJS's janitorial workers under that standard, as the ALJ explained:

> [E]mployees of OJS performed services under Preferred's actual control and direction and were hired, fired, and disciplined by Preferred. Further, the credible evidence indicates that Preferred and OJS shared or codetermined hours, scheduling, assignment of work, and determination of the manner and method of work. Finally, at times both OJS and Preferred held out OJS employees as Preferred employees.

ER 15. As the ALJ recognized, ER 15, Preferred employee Lauren Squeri's role in disciplining Useda and Mendoza; Preferred's determination of the number of janitorial workers to be used by OJS, the hours they worked, the tasks they performed, and the frequency of those tasks; and Squeri's supervision of the workers' "manner and method of work performance" were more than sufficient to establish Preferred's joint employer status. *See* ER 10-12; *see also* ER 69-71, 74-76, 193, 264-67, 338-40, 342-44, 369-93, 418.[12]

[12] The degree of control exercised by Preferred over the janitorial workers at 55 Hawthorne would also easily satisfy the standard set forth in proposed regulations redefining the joint employer standard to require that the "putative joint employer … possess and actually exercise substantial direct and immediate control over the

B. Preferred and OJS fired the workers for engaging in protected, concerted activity.

Having determined that OJS and Preferred jointly employed the workers at 55 Hawthorne, the ALJ also correctly found that Preferred and OJS threatened and retaliated against the workers for engaging in protected, concerted activity in violation of NLRA Section 8(a)(1) and discriminated against the workers to discourage union membership in violation of NLRA Section 8(a)(3). ER 17-35.

Workers engage in "concerted activities for … mutual aid and protection," 29 U.S.C. §157, when they "seek to improve terms and conditions of employment or otherwise improve their lot as employees," *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), including by "trying to protect themselves" from dangerous or "uncomfortable" working conditions, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). *See also Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, at *8 (2014) (worker acted "for the purpose of mutual aid or protection in soliciting her coworkers' assistance in complaining to management about an incident of alleged sexual harassment").

Neither the Board nor Preferred disagreed with the ALJ's correct decision that, in coming together to discuss and protest their working conditions, the

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employees' essential terms and conditions of employment." 83 Fed. Reg. 46681, 46686 (Sept. 14, 2018).

workers engaged in concerted activity for their mutual aid and protection. Their conduct had the purpose of "improv[ing] their lot as employees." *Eastex*, 437 U.S. at 565. In both seeking the support of the Coalition and the Union and participating in the October 29 and November 19 demonstrations, the workers sought to gain better wages, sick pay, workers compensation, and protection against sexual harassment. *See, e.g.*, ER 21.

The evidence further demonstrated that Preferred and OJS threatened and retaliated against the workers for engaging in this protected, concerted activity.

First, Ortiz's firing of Mendoza and Banegas due to their participation in the November 19 demonstration violated Sections 8(a)(1) and 8(a)(3). Firing workers for participating in protected Section 7 activity is a quintessential violation of Act. *See, e.g.*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 825 (1984); *Washington Aluminum*, 370 U.S. at 12-13. Indeed, merely *stating* that workers have been fired due to their protected activity constitutes a Section 8(a)(1) violation, as such statements reasonably "tend[] to restrain or coerce employees in the exercise of the rights guaranteed them" by the Act. *Local Union No. 38, United Ass'n of Journeymen*, 306 NLRB 511, 518 (1992); *see also* ER 28-29.

The evidence that Mendoza and Banegas's participation in the protests motivated the employers' decision to fire them is indisputable. Ortiz fired

Mendoza and Banegas on the day of the demonstration and told Banegas that he was being fired "because you're making noise and you're making the company, Preferred Building Service [sic], look bad." ER 148. The following day, when Miranda asked Ortiz why Banegas and Mendoza had been fired, Ortiz responded that "Ms. Lauren" had asked him to let them go "because [the workers] wanted the union." ER 100, 191.

Mendoza's and Banegas' firings also violated Section 8(a)(3)'s prohibition against discriminatory discharges intended to discourage union activity. An adverse employment decision violates Section 8(a)(3) when protected conduct is "a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB at 1089. The ALJ correctly found that "the protected activity of Mendoza and Banegas was a motivating factor in their discharges" and that the alternative justifications offered by their employers were pretextual. ER 31.[13]

Preferred likewise violated the Act by terminating its contract at 55 Hawthorne—resulting in Tapia, Useda, and other 55 Hawthorne workers losing their jobs—in direct response to the workers' protected activity, thereby chilling the exercise of Section 7 rights. *See* ER 400-02; *see also* ER 34. Preferred made the decision to terminate the 55 Hawthorne contract approximately one hour after

[13] Neither OJS nor Preferred took exception to this finding. *See* ER 59-61d.

the November 19 demonstration began, and has never disputed that the workers' concerted activity was the reason for the contract's cancellation. *See* ER 59-61d, 394; *see also* ER 201, 400-03 (text message to janitorial worker stating that contract ended "because [the workers] wanted a union"). Preferred's contract termination had its intended chilling effect: After the contract ended, workers at several other Preferred-serviced buildings reported that they were interested in the benefits of a union but were afraid they would lose their jobs if they attempted to organize. *See* ER 103-05.

Because Preferred's termination of the 55 Hawthorne contract was a response to the workers' protected conduct and chilled the exercise of Section 7 rights, it violated Section 8(a)(1). Likewise, Preferred's decision to close part of a business to chill concerted worker activity constituted a discriminatory employment decision prohibited by Section 8(a)(3). *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 (1965).

In addition to finding that the workers' firings violated Sections 8(a)(1) and 8(a)(3), the ALJ correctly found numerous other violations of the Act. For example, the ALJ found, and the Board did not disagree, that Rafael and Veronica Ortiz retaliated against the workers following their October 29 demonstration. *See* ER 25-26. Rafael Ortiz repeatedly threatened workers with reprisal if they

continued to engage in concerted activity. He warned Mendoza that she was "not going to be working anymore" because of her participation in the demonstration, ER 85; told Mendoza and Banegas that if they continued to protest they would lose their jobs, ER 141; and told workers that OJS would lose the 55 Hawthorne contract because of the demonstration, ER 221. Likewise, Veronica Ortiz's pointed claim that "Preferred had lawyers and millions" and that workers should be "thankful" to have work constituted a threat to retaliate. *See* ER 26, 87. Furthermore, Rafael Ortiz unlawfully told Useda that her working conditions had changed because of her participation in the October 29 demonstration. ER 26, 127.

Lauren Squeri also violated Section 8(a)(1) by unlawfully surveilling the November 19 demonstration. *See* ER 146-47, 166; *see also* ER 29, 57-58, 223. "In the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate," *Kallmann v. NLRB*, 640 F.2d 1094, 1098 n.5 (9th Cir. 1981), and "the photographing of union activity during an organizational campaign tends to create fear among employees of future reprisal," *Cal. Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998). "Thus, it chills an employee's freedom to exercise his section 7 rights." *Id.* The ALJ correctly found that Lauren Squeri's surveillance tended to chill protected activity. ER 29.

IV. Even if the workers' demonstrations had violated Section 8(b)(4), the Board's failure to apply the proper legal framework governing mixed-motive cases would require reversal.

For the reasons already given, this Court should reverse the Board's decision: The workers' expressive activity did not violate Section 8(b)(4), the Board's contrary holding creates unnecessary conflict with the First Amendment, and Preferred and OJS committed numerous violations of the Act. But even if unlawful secondary picketing *had* occurred, the Board's decision should still be reversed because at least some conduct that was indisputably protected (separate and apart from the 55 Hawthorne protests) also motivated the employers' actions, and the Board failed to apply its well-established legal framework for evaluating liability in such a "mixed-motive" situation.

As the ALJ explained in findings left undisturbed by the Board, the concerted activities that led Preferred and OJS to fire the workers included "meeting[] with [the Coalition] to discuss their wages and working conditions," "joining together with other employees and with [the Coalition] and [the Union] to improve their wages and working conditions," and "seek[ing] assistance from the Union." ER 17-19, 31. Evidence that these activities played a significant role in the firing decisions was extensive. When Miranda asked Ortiz why he fired the workers, for example, Ortiz responded that "it was because they *wanted a union*

and Lauren [a Preferred account manager] did not want to see any of them anymore." ER 29.[14]

When both protected and unprotected conduct play a role in prompting an employer to take adverse action, the Board applies the mixed-motive analysis articulated in *Wright Line*, 251 NLRB 1083 (1980). Under *Wright Line*, if the General Counsel shows that protected conduct was a motivating factor in an adverse employment decision, the employer must then show that the same decision would have been made absent the protected conduct. *Id.* at 1089.[15] In *St. Joseph Hospital*, for example, the Board held that *Wright Line* must be applied to determine the legality of a suspension motivated by both unlawful picketing and protected, concerted activity (published statements criticizing an employer). 260

[14] In addition, Ortiz texted a worker stating that the Preferred contract was terminated "because you wanted to have the union," ER 32; "told Useda that because the employees asked the Union for help, he had lost all his jobs," ER 34; and expressed animus about the workers' having sought help from the union, ER 28. Ortiz also interrogated and threatened workers about statements regarding his harassment in their leaflets, and threatened workers to be "careful" in going to the Union and the Coalition. ER 25, 28.

[15] The *Wright Line* framework comports with federal precedent governing mixed-motive cases pursued under 42 U.S.C. §1983 and Title VII. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (alleged First Amendment violation); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), *superseded by statute*, 42 U.S.C. § 2000e-2(m) (alleged Title VII violation).

NLRB 691, 693 (1982). Applying that framework, the Board found that the employer had carried its rebuttal burden where the evidence showed that the employer's "main concern" in suspending the worker "related solely to the illegal nature of the [picketing]." *Id.*

Notwithstanding the evidence that Preferred and OJS fired and otherwise retaliated against the workers for protected conduct other than their purportedly unlawful picketing, the Board failed to apply or even mention *Wright Line*, and that failure constitutes reversible error. *See Lawson Co. v. NLRB*, 753 F.2d 471, 476 (6th Cir. 1985) (reversing Board decision because it failed to apply *Wright Line* in adjudicating mixed motive case). Reversal in such circumstances is warranted regardless whether the Board's ultimate conclusion is supported by substantial evidence. *See MCPC Inc. v. NLRB*, 813 F.3d 475, 490 (3d Cir. 2016).

The primary authority the Board cited in support of its decision to dismiss the charges against Preferred and OJS was *National Packing Co. v. NLRB*, 352 F.2d 482 (10th Cir. 1965). But that decision in no way justified the Board's failure to apply *Wright Line*. In *National Packing*, the Tenth Circuit held that the Board was required to consider an employer's defense of its decision to fire picketers who it alleged were engaged in "recognitional" picketing that violated Section 8(b)(7).

Id. at 484-85.[16] But *National Packing* was not a mixed motive case, and has no bearing here, where there is extensive evidence that Preferred and OJS fired the workers for protected conduct other than their purportedly unlawful picketing, and where Preferred and OJS never suggested that the workers were fired due to the "secondary" rather than "primary" nature of their picketing.

In most cases, the proper remedy for a failure to apply *Wright Line* is to remand to the Board. But the record here demonstrates that Preferred and OJS cannot possibly meet their burden of proving that they would have fired the workers absent their protected conduct. Indeed, in failing to apply *Wright Line*, the Board implicitly conceded as much.

Unlike the employer in *St. Joseph Hospital*, the "main concern" of Preferred and OJS was not "related solely to the illegal nature of the demonstration." 260 NLRB at 693. On the contrary, there is no evidence that Preferred and OJS were *at all* concerned about the allegedly secondary nature of workers' protests when they engaged in illegal retaliation. OJS and Preferred never contended that they fired the workers for engaging in secondary picketing; in fact, they never even

[16] Unlawful recognitional picketing occurs when a union pickets to force an employer to recognize the union as its employees' representative and either a different union already serves as representative, or a union election occurred within the last 12 months, or the picketing union fails to request an election within a reasonable time after commencing picketing. 29 U.S.C. §158(b)(7).

argued that the 55 Hawthorne protests violated Section 8(b)(4) until Preferred submitted its reply brief in support of its exceptions to the ALJ's decision.[17] As the ALJ noted, "there is not a shred of evidence that [the employers] relied on the asserted unlawfulness of [workers'] demonstrations … as grounds for discharging Mendoza and Banegas." ER 31. The ALJ properly rejected the employers' Section 8(b) defenses as "an after-thought" premised on concerns that "were not utilized in determining whether to discharge Mendoza and Banegas." *Id.*

Employers should not be allowed to escape liability for their unfair labor practices by invoking post hoc rationalizations that did not actually motivate their decisions. *See In re Faurecia Exhaust Sys., Inc*., 355 NLRB 621, 622 (2010) (holding that even if worker had engaged in unprotected conduct, employer's *reliance* on that conduct was pretext, and firing was actually motivated by protected union solicitation). Thus, even if the workers' demonstrations were unlawful, this Court should still set aside the Board's decision and order that the charges against Preferred and OJS be sustained. *See, e.g.*, *Healthcare Emps.*

[17] In its original supporting brief regarding its exceptions, Preferred argued that the Union and the workers had "engaged in unlawful secondary picketing" by protesting at buildings *other than* 55 Hawthorne at various points *after* the workers had been fired. *See* ER 57-58.

Union, Local 399 v. NLRB, 463 F.3d 909 (9th Cir. 2006) (concluding, after review of record, that employer could not satisfy its *Wright Line* burden).

CONCLUSION

For the foregoing reasons, the NLRB's decision should be reversed with instructions to sustain the charges against Preferred and OJS and order appropriate relief.

Respectfully submitted,

Dated: August 19, 2019 By: /s/P. Casey Pitts

STACEY M. LEYTON
P. CASEY PITTS
Altshuler Berzon LLP

NICOLE G. BERNER
CLAIRE PRESTEL
JOHN M. D'ELIA
Service Employees International Union

Attorneys for Petitioner Service Employees International Union Local 87

STATEMENT OF RELATED CASES

Petitioner is not aware of any other related case pending in this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATUTORY ADDENDUM

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U.S. Const., amend. I, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 7 of the Act, 29 U.S.C. §157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) of the Act, 29 U.S.C. §158(a), provides in relevant part:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

…

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Section 8(b)(4) of the Act, 29 U.S.C. §158(b)(4), provides in relevant part:

(b) Unfair labor practices by labor organization

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

…

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is–

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with

> any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
>
> (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution[.]