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LABOR LAW—LABOR'S FIRST AMENDMENT RIGHTS MAY REST ON THE HAUNCHES OF A RAT: 29 U.S.C. § 158(b)(4)(ii)(B) AND THE SECONDARY BOYCOTT RULE

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> *But you and we should say what we really think, and aim only at what is possible, for we both alike know that into the discussion of human affairs the question of justice only enters where there is equal power to enforce it, and that the powerful exact what they can, and the weak grant what they must.*[1]

INTRODUCTION

Organized labor is fighting for its collective life.[2] Congressional impotence, ossified labor laws, and a National Labor Relations Board that is more interested in protecting corporate interests than in allowing working Americans an equal footing, have all led to this current demise.[3] However, recent years have witnessed the development of organized labor's new and innovative economic tool to bring attention to a labor dispute or to protest unjust social conditions.[4] The tactic involves displaying a large rubber rat, twenty to thirty feet in height, across the street from a secondary

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1. Thucydides, *The History of Thucydides Book V*, *in* 2 HISTORIANS OF GREECE 207, 296 (T.M. Alexander ed., Benjamin Jowett trans., 1909). The above quote occurred as part of a justice debate between the Athenian Army and the weaker, overmatched island-state of Melos prior to an invasion in which the entire Melian population was either murdered or enslaved. *Id.* at 294-305. During negotiations, the Athenians demanded unconditional surrender to enslavement. *Id.* at 295. The Melians responded by appealing to the much vaunted Athenian sense of social and moral justice. *Id.* The Athenians countered with the aforementioned retort, which articulates a theory of justice that continues presently. *Id.* at 296. This Machiavellian doctrine of justice has proven to be a sad prophecy in the course of human relations, and unfortunately remains acutely prevalent to this day—a doctrine that abdicates justice as a moral right and turns it into something that the powerful grant to the weak if it serves them. *See id.* at 294-306; *see also* STANLEY ROSEN, PLATO'S REPUBLIC: A STUDY 43 (2005).

2. Max Fraser, *Beyond the Labor Board*, NATION, Jan. 21, 2008, at 6, 6-8; *see also* Press Release, Bureau of Labor Statistics, Union Membership in 2007 (Jan. 25, 2008), http://www.bls.gov/news.release/union2.nr0.htm (stating that private sector union membership is down to 7.5%).

3. Fraser, *supra* note 2, at 6-8.

4. *See* Alan Feuer, *Labor's Huge Rubber Rat, Caught in a Legal Maze*, N.Y. TIMES, Dec. 28, 2005, at B1; *see also* Jessica Marquez, *Unions' Inflatable Rat an Endangered Species*, WORKFORCE MGMT., Sept. 9, 2005, http://www.workforce.com/section/00/article/24/15/94.html.

employer that is doing business with a company with whom the union has a labor dispute with.[5] The iconography of the rat display not only allows the unions a powerfully succinct announcement of a labor dispute—but does so with a viscerally eye-catching symbol that demands public attention.

For example, imagine that a labor organization has a labor dispute with Company A (a company that employs nonunion employees and pays below-scale wages for the industry). Further imagine that Company A is working for a "neutral" employer, Company B (e.g., installing an air conditioning unit). The labor organization will position the rat outside of Company B's place of business to bring attention to the labor dispute with Company A, and to persuade the general public not to do business with either Company A or Company B.[6] The rat might have a sign attached, perhaps stating, "Company A is Unfair to Working People because . . . ." In addition, the labor organization will also have one or two members standing in front of the rat with handbills that further articulate the dispute. The hope is that the rat will draw attention to the handbillers, thus allowing more information to be disseminated to the public.[7] This makes it difficult for Company A to continue doing business as usual within the community. Union organizers have stated that people are more inclined to ask questions about the campaign when a giant rat is located at the scene.[8]

The issue that this Note analyzes is whether the peaceful display of an inflatable rubber rat by organized labor at a neutral employer, for the purposes of disseminating information concerning a labor dispute with a business partner of that employer, is a violation

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5. *See, e.g.*, Laborers' E. Region Org. Fund, 346 N.L.R.B. 1251 (2006); Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal I*), 346 N.L.R.B. 199, 200 n.3 (2006), *enforcement denied and remanded*, 491 F.3d 429 (D.C. Cir. 2007).

6. This example is an amalgamation of two recent cases in which unions have used the rat in labor disputes. The facts have been altered to bring to light the sole issue of this Note, which is primarily the use of the rat, not the supplemental activity that arose in these cases. *See generally Laborers' E. Region Org. Fund*, 346 N.L.R.B. at 1251; *Sheet Metal I*, 346 N.L.R.B. at 200 n.3. In addition, it should be noted that if the union displayed the rat at the primary employer's place of business, such conduct would be legal pursuant to the "area standards" exception. *See generally* 2 SECTION OF LABOR & EMPLOYMENT LAW, AM. BAR ASS'N, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1569-81 (Patrick Hardin et al. eds., 4th ed. 2002) [hereinafter THE DEVELOPING LABOR LAW] (discussing area standards parameters).

7. *See* Feuer, *supra* note 4; Marquez, *supra* note 4.

8. *See* Feuer, *supra* note 4; Marquez, *supra* note 4; *see also Laborers' E. Region Org. Fund*, 346 N.L.R.B. at 1261 (stating that union officials testified that the use of the rat was to articulate a labor dispute or "aid in protesting social issues.").

of the secondary boycott provision of the National Labor Relations Act (Act or NLRA) or, conversely, is protected as an exercise of free speech under the First Amendment of the U.S. Constitution.[9]

The National Labor Relations Board (NLRB or Board)[10] has had two recent opportunities to pass judgment on the lawfulness of the display.[11] On both occasions, the Board found that the unions were participating in other proscribed conduct, thus allowing the question of the display to go unanswered.[12] It is worth noting that in both cases, the NLRB's General Counsel and the Administrative Law Judges (ALJ) found the display to violate § 158(b)(4).[13] Recently, the General Counsel was forced to abandon one of those claims in light of a review by the Court of Appeals for the D.C. Circuit.[14] However, because the D.C. Circuit's decision in *Sheet*

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9. U.S. CONST. amend. I; 29 U.S.C. § 158(b)(4)(ii)(B) (2000).

10. The NLRB is the governing administrative agency that rules on cases involving the NLRA, effectively creating labor law in the United States. It is made up of a five-member panel appointed by the President. BRUCE S. FELDACKER, LABOR GUIDE TO LABOR LAW 9 (4th ed. 2000). However, Board decisions may be appealed to the circuit court of appeals. The terms of a circuit decision are binding upon the Board only for that particular case. Because of the lack of uniformity within circuit decisions, the Board is not obligated to accept these decisions as precedent. THE DEVELOPING LABOR LAW, *supra* note 6, at 2597-98.

11. *See Sheet Metal I*, 346 N.L.R.B. at 200 n.3; *Laborers' E. Region Org. Fund*, 346 N.L.R.B. at 1253. Recently the D.C. Circuit reviewed the Board's enforcement order in *Sheet Metal I* and remanded the case back to the Board for a decision on issues not addressed. Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB (*Sheet Metal II*), 491 F.3d 429, 440 (D.C. Cir. 2007).

12. *Sheet Metal I*, 346 N.L.R.B. at 200 n.3; *Laborers' E. Region Org. Fund*, 346 N.L.R.B. at 1253.

13. In both of the most recent rat cases, the ALJs followed lockstep with the General Counsel's legal theory that the rat is coercive and a form of "signal picketing," which supported the unfair labor practice charge. *See Laborers' E. Region Org. Fund*, 346 N.L.R.B. at 1265 (ALJ Davis's ruling that the display is proscriptive because it "would reasonably be understood by the employees as a signal or request to engage in a work stoppage" (quoting Teamsters Local 122, 334 N.L.R.B. 1190, 1191 (2001))); *see also Sheet Metal I*, 346 N.L.R.B. at 206 (holding that the display of the rat violates § 158(b)(4)(ii)(B) because of its "coercive" nature, thus interfering with business of the secondary employer).

14. *See* General Counsel's Statement of Position to the Nat'l Labor Relations Bd. at 8, Sheet Metal Workers Int'l Ass'n, Local 15 v. NLRB, 346 N.L.R.B. 199 (2006) [hereinafter Position Statement] (on file with the Western New England Law Review) (acquiescing that the rat display did not violate the Act in *this instance* because the Board must "accept the court's opinion as the law of the case"). While the D.C. Circuit did not rule specifically on the legality of the rat, it was clear that the General Counsel interpreted the court's decision (and dicta) as allowing the peaceful display under § 158(b)(4)(ii)(B)—*at least within the jurisdiction of the D.C. Circuit. Id.* As a result, the General Counsel advised the Board that the display of the rat would be upheld in the D.C. Circuit. Thus the charges against it should be dismissed. *Id.* at 9-13. Whether or not the Board decides to accept this recommendation is yet to be determined at the

Metal Workers' International Ass'n, Local 15 v. NLRB is not binding precedent on the Board, and given the divergent opinions within the General Counsel's office, the issue of whether the display of the rat has First Amendment protections remains unanswered with regard to Board law.[15]

This novel tactic of displaying a rat at a secondary employer's place of business has been brought in response to a bourgeoning workforce crisis in this country. Union membership is at an all time low, and workers (union and nonunion alike) are working longer hours and increasing their production—but being paid less.[16] As a result, corporations are enjoying one of the greatest eras of profitability in the history of capitalism, given that "wages and salaries now make up [the] lowest share of [the] nation's gross domestic product since the government began recording" this information.[17]

This Note makes three propositions: First, the use of the rat does not violate the Act. The display of the rat is neither picketing in the traditional sense of the word, nor is it "signal picketing," a tactic that secretly communicates to other union members that a picket line is present, thus instructing employees of the secondary

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publishing of this Note. Further, whether the General Counsel will decide to revive its previous theory concerning the illegality of the rat in another case or more specifically in another circuit remains to be seen.

15. *Compare Sheet Metal I*, 346 N.L.R.B. at 200 (using expansive language to determine what constitutes picketing), *and* Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Nat'l Labor Relations Bd., to Roberto Chavarry, Reg'l Dir., Region 13, Nat'l Labor Relations Bd. (Feb. 2, 2006) [hereinafter Advice Memorandum], *available at* http://www.nlrb.gov/shared_files/Advice%20Memos/2006/13-CC-2584.pdf ("[A] rat is a well-known symbol of a labor dispute and is a signal to third persons that there is an invisible picket line they should not cross."), *and* 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, 924 (2005) (discussing that the NLRB's General Counsel believes that the use of the rat is proscribed), *and* Tzvi Mackson-Landsberg, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1521 (2006) (stating that the NLRB's General Counsel has filed charges against unions that have used the rat), *with Sheet Metal II*, 491 F.3d at 438-39 (calling into question the Board's legal reasoning concerning what is constitutes picketing and coercive behavior); *and supra* note 14 and accompanying text.

16. *See* Steven Greenhouse & David Leonhardt, *Real Wages Fail to Match a Rise in Productivity*, N.Y. TIMES, Aug. 28, 2006, at A1, *available at* 2006 WLNR 14867117 (Westlaw) (noting that current wages do match inflation rates and represent the "lowest share of G.D.P. on record: 45.3%"); Dan Hurley, *Today's Labor Woes Echo Through U.S. History*, CINCINNATI POST, Sept. 1, 2006, at C1, *available at* 2006 WLNR 15376385 (Westlaw); *see also* Bureau of Labor Statistics, *supra* note 2 (stating that private sector union membership is down to 7.5%).

17. *See* Greenhouse & Leonhardt, *supra* note 16.

employer not to cross.[18] Second, the rat is an expressive symbol of speech because it articulates a labor dispute. Thus any suppression of the display would violate the union's First Amendment rights secured under the Constitution.[19] Finally, the rat exemplifies a vital balancing mechanism in a radically disparate situation, and finding that the rat violates the Act would be contrary to the pursuit of industrial peace and justice—the cornerstones of American labor policy.[20]

Part I.A will begin with a brief look at the history and purpose of the Act. Part I.B will examine the secondary boycott provision of the statute in an attempt to understand the activities that Congress intended the Act to prohibit. Thereafter, Parts I.C-E will explore the tenuous relationship that exists between the NLRA and the First Amendment. Part I will start with an examination of the Supreme Court's understanding of labor picketing in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760* (*Tree Fruits*).[21] It will culminate with the Court's articulation of handbilling in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council* (*DeBartolo II*).[22]

As part of this exploration, Part I.E will also examine the way in which the Court's most recent use of the constitutional avoidance doctrine has only furthered the confusion of understanding how the First Amendment is applied to organized labor's use of picketing and the dissemination of information. Concluding the background portion, Part II will illustrate what symbols are considered to be speech and why.

Finally, through examining other related symbolic speech cases, Part III.A will propose that the display should be judged us-

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18. These are the central themes that the General Counsel and the ALJs rely on in both of the most recent rat cases. *See Laborers' E. Region Org. Fund*, 346 N.L.R.B. at 1264-65; *Sheet Metal I*, 346 N.L.R.B. at 206 (holding the coerciveness of the activity to be more dispositive than the signal effect); *see also supra* note 13 and accompanying text.

19. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

20. *See* Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 142 (2003); Richard N. Block et al., *An Introduction to the Current State of Workers' Rights*, *in* JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 1, 2 (Richard N. Block et al. eds., 2006).

21. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 377 U.S. 58, 59-61 (1964).

22. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 575 (1988).

ing the strict-scrutiny analysis due to the inherent political nature of the speech and that any suppression would amount to an improper restriction of the content of the speech. In conclusion, Parts III.B-D will illustrate, unequivocally, the legality of the display under § 158(b)(4)(ii)(B) of the NLRA through case law, statutory construction, and policy initiatives under the Act.

I. THE EVOLUTION OF THE SECONDARY BOYCOTT: LABOR'S STRUGGLE TO KEEP PACE

A. *The History and Purpose of the National Labor Relations Act of 1935*

The NLRA, also known as the Wagner Act, was passed in 1935 amid a national political and economic crisis.[23] In an era of economic dissolution, upheaval, strife, and violence, Senator Robert Wagner introduced a bill that attempted to bring justice to the working people and, consequently, industrial peace to the United States.[24] Though wildly unpopular with the corporate power structure, Senator Wagner understood that "[d]emocracy cannot work unless it is honored in the factory as well as the polling booth; [workers] cannot be truly free in body and in spirit unless their freedom extends into places where they earn their daily bread."[25]

While desire for industrial and social peace was the genesis of such radical legislation, the Act also represented an attempt to infuse a semblance of equality into the relationship between the commercial power structure and the American worker.[26] Corporate avarice, substandard wages, and poverty provided fertile ground for Communist revolutionaries. Therefore, one could speculate that the passage of the Act was, in some ways, an attempt to "de-commodify" the labor force, thus offering the American worker some justice, surplus labor value, and bargaining power against the back-

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23. WALTER E. OBERER ET AL., CASES AND MATERIALS ON LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY 99 (5th ed. 2002).

24. *See generally* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 23 n.2, 34 (1937) (discussing how one purpose of the Act was to promote industrial justice and "seek to make appropriate collective action of employees an instrument of *peace rather than of strife*" (emphasis added)). The Act was largely enacted, in the midst of the Great Depression, to allow workers the right to collectively organize as a means to quell not only economic dissolution but also the "mounting strike crisis" in American labor. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 19-29 (1950).

25. Block et al., *supra* note 20, at 1 (quoting Senator Robert Wagner).

26. *See* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316-17 (1965).

drop of an overwhelmingly powerful corporate policy arrangement.[27] Justice Stewart articulated this point concisely, stating that the "primary purpose of the [NLRA] was to redress the perceived imbalance of economic power between labor and management."[28]

Prior to the Wagner Act, workers possessed no tangible rights to form unions or collectively bargain.[29] While the NLRA has undergone numerous changes throughout its history, its basic purpose remains intact: to restore competitive balance to an area of inherent disparity and to promote industrial peace and justice.[30]

B. *The Curse of § 158(b)(4)(ii)(B)*

One of the more challenging endeavors for labor law scholars and practitioners is the interpretation of the secondary boycott provision of the NLRA, codified at 29 U.S.C. § 158(b)(4)(ii)(B).[31] Much of this difficulty stems from the fact that the Act does not articulate exactly what a secondary boycott is or the types of union conduct concerning secondary employers are specifically prohibited.[32] Instead, the Act provides tortured and vague language that attempts to regulate union conduct as it pertains to secondary activity involving a neutral employer.[33]

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27. *See* IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 71 (1975); HENRY PELLING, AMERICAN LABOR 126-27 (1960). *See generally* KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (Friedrich Engels ed., Samuel Moore trans., 1888) (1848), *reprinted in* THE COMMUNIST MANIFESTO AND OTHER WRITINGS 7, 7-28 (George Stade ed., 2005). At the risk of oversimplifying Marxist theory, it was posited that the unorganized "incoherent mass" of workers would eventually rise to revolution, thus breaking the chains of industrialized enslavement. However, the codification of the NLRA that allowed workers to collectively bargain gave workers a state-sanctioned increase value of their surplus labor possibly not envisioned by Marx and Engels in *The Communist Manifesto*. *See id.*

28. *Am. Ship Bldg. Co.*, 380 U.S. at 316.

29. FELDACKER, *supra* note 10, at 2-3; OBERER ET AL., *supra* note 23, at 99-100. Prior to the NLRA, the Railway Labor Act recognized the right of employees to form unions and bargain collectively, but only extended those rights to railway and airline employees. *See* FELDACKER, *supra* note 10, at 2-3.

30. *Am. Ship Bldg. Co.*, 380 U.S. at 316; OBERER ET AL., *supra* note 23, at 99-100.

31. *See* Bock, *supra* note 14, at 905-07.

32. *Id.* at 907-08. Additionally, it should be noted that the proceeding examination in no way is an attempt at comprehensive examination of this section of the statute. Such an endeavor is the sole subject of numerous scholarly writings. This Note tries to untangle the matrix of § 158(b)(4)(ii)(B) only enough to analyze the use of the inflatable rat as a means of disseminating information to the public at large. Admittedly there are a multitude of corollaries that one could embark on given this scenario—those are left to other scholars, for a different day.

33. The relevant section of the Act states:

(b) Unfair labor practices by labor organization

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

In trying to define the contours of a secondary boycott, Judge Learned Hand's description remains one of the more concise definitions:

> "The gravamen of a secondary boycott . . . is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has *no concern in it*. Its aim is to compel him to stop [doing] business with the employer in the hope that this will induce the employer to give in to his employees' demands."[34]

Applying § 158(b)(4)(ii)(B) to union conduct toward a secondary employer has not been a simple task for either the NLRB or

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> . . .
> (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—
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> > . . .
> > (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 . . . ;
> > . . .
>
> . . . *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 . . . .

29 U.S.C. § 158(b)(4) (2000).

34. Howard Lesnik, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1363 (1962) (emphasis added) (quoting Int'l Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950)). With all due respect to the venerable Judge Hand, this statement is archaic and misleading. To say that an employer has no concern or responsibility in the type of people it hires offers a veil of protection that appear incongruous with the goal of the NLRA of establishing industrial peace. Should a secondary employer be abrogated of responsibility when its employees are committing illegal or immoral acts?

the courts.[35] Stated in its simplest form, § 158(b)(4)(i) prohibits unions from "engaging in a strike or other form of work stoppage; and . . . inducing or encouraging certain individuals to do the same thing."[36] Section 158(b)(4)(ii) makes it unlawful "to threaten, coerce or restrain any person" in the course of business of the secondary employer.[37] However, if the aim of the union conduct is to "force or require one person to cease doing business with another person," and that person is a neutral employer, such activity will usually be held to violate the Act if a neutral employer is involved.[38]

Section 158(b)(4)(ii) was added in 1959 as part of the Labor-Management Reporting and Disclosure Act (also known as the Landrum-Griffin Act).[39] The Landrum-Griffin Act was enacted primarily to close "loopholes" left open by the previous version of the statute, which allowed picketing at secondary sites with the target being supervisors and customers.[40] Fundamentally, the Supreme Court has interpreted the amendments to protect neutral employers from being dragged into labor disputes that are not of their own making.[41]

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35. *See* DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 251-52 (2d ed. 2005).

36. *See* Bock, *supra* note 14, at 917.

37. 29 U.S.C. § 158(b)(4)(ii)(B). Basically, the first section of § 158(b)(4)(i) pertains to union conduct that appeals to the neutral company's employees, other unions, workers, delivery people, etc. not to deal with the secondary employer. *See also* Bock, *supra* note 14, at 913-16. For there to be violation of § 158(b)(4)(i), the union conduct must, in some way, overtly call or signal for a work stoppage by employees of the secondary employer. While § 158(b)(4)(i) primarily concerns appeals to workers associated with the secondary employer, § 158(b)(4)(ii)(B) encompasses everyone else that engages in business with the secondary employer. *Id.*

38. Lee Modjeska, *The* Tree Fruits *Consumer Picketing Case—A Retrospective Analysis*, 53 U. CIN. L. REV. 1005, 1007 (1984).

39. *Id.*; *see also* THE DEVELOPING LABOR LAW, *supra* note 6, at 49-50, 58-59.

40. Prior to 1959, prohibited activity only applied to statutorily defined employees and employers. *See* Bock, *supra* note 14, at 913. Moreover, the previous § 158(b)(4)(ii)(A) did not proscribe any type of activity pertaining to supervisors, management, or the general public. *See id.* at 917; *see also* THE DEVELOPING LABOR LAW, *supra* note 6, at 1627 (discussing Senator Kennedy's comments that the main goal of the Landrum-Griffin amendments was to close loopholes left open for secondary boycotts in the Act).

41. *See* Modjeska, *supra* note 38, at 1008 ("The section embodies 'the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.'" (quoting NLRB v. Denver Bldg. & Constr. Trades Council (*Gould & Preisner*), 341 U.S. 675, 692 (1951))).

In addition to closing the loopholes that allowed unions to picket, strike, or boycott secondary employers, Congress also attempted to preserve organized labor's ability to communicate labor disputes to the public at large.[42] In doing so, Congress attached a publicity proviso to try to curb potential constitutional questions that would inevitably arise as a result of proscribing all activity at a secondary location.[43]

The proviso allows "truthful handbills and similar forms of publicity—but not picketing—[to] be employed [by unions] to inform consumers generally" that products subject to a labor dispute are being distributed by the secondary employer.[44] However, publicity allowed under the proviso is subject to several limitations. These include the requirement that publicity must not "'*have an effect of inducing*' an employee, other than an employee of the primary employer, to refuse to perform his or her duties."[45] Moreover, the publicity used to articulate a labor dispute cannot be "threaten[ing], coerc[ive] or restrain[ing]" to "any person" doing business with the secondary employer.[46]

The aforementioned amendments and proviso are the result of much debate, which may explain why the language and history of the provision have been subject to such varying interpretations.[47] There are a multitude of circumstances that could potentially challenge the interpretation of "threaten, coerce, or restrain."[48] In relation to § 158(b)(4)(ii)(B), defining what violates the Act—specifically the idioms "handbill" and "picket"—has been the cause of much confusion and litigation.[49]

In essence, the plain wording of § 158(b)(4)(ii)(B) protects secondary employers from most types of picketing. This includes interfering with employees of the secondary employer and discouraging consumers with picket lines.[50] As Professor Modjeska points out, "The clear congressional understanding appears to have

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42. THE DEVELOPING LABOR LAW, *supra* note 6, at 1628.

43. *Id.*

44. *Id.* at 1629.

45. *Id.* (emphasis added).

46. *See id.* at 1630 (quoting 29 U.S.C. § 158(b)(4)(ii)); *see also* OBERER ET AL., *supra* note 23, at 403.

47. *See* Bock, *supra* note 14, at 907-16 (discussing the various amendments and provisos added by Congress and the difficulty of defining secondary boycott).

48. 29 U.S.C. § 158(b)(4)(ii).

49. *See generally* Bock, *supra* note 14, at 918-24 (discussing the difficulties of labor practitioners dealing with § 158(b)(4)(ii) issues).

50. *See* Modjeska, *supra* note 38, at 1031-32.

been that the mere existence of a consumer picket line imposed a threat of business loss that would tend to restrain and coerce the secondary employer, thereby exerting pressure on the secondary to cease doing business with the primary employer."[51] Because picketing has been generally interpreted as being restraining and coercive to the secondary employer, consumer picketing at a secondary employer has been prohibited, with the exception of very limited circumstances.[52] What constitutes a picket line as well as the constitutionality of such a proscription will be explored in the ensuing sections.[53]

This is not to say that the union cannot publicly disseminate issues of a labor dispute with a primary employer at a secondary site pursuant to § 158(b)(4)(ii)(B).[54] In the seminal case of *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council* (*DeBartolo II*), the Supreme Court examined a situation in which union members distributed informational handbills to shopping mall customers that detailed the specifics of a labor dispute with a company doing construction inside the complex.[55] The secondary employer (the mall) filed an unfair labor practice petition alleging that the handbilling was proscribed conduct under § 158(b)(4)(ii)(B).[56] The Court, however, rejected this argument, and held that peaceful handbilling did not rise to the level of being coercive, threatening, or restraining under the language of the statute.[57] *DeBartolo II* held that such a proscription had the potential to raise serious First Amendment concerns; thus, it chose to avoid those concerns by assuming that Congress intended not to prohibit peaceful handbilling at secondary sites.[58] Herein lies the curse of

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51. *Id.* at 1032.

52. There are some types of consumer picketing allowed at secondary sites. The Court in *Tree Fruits* allowed consumer picketing constrained only to the struck product in limited situations. *Id.* at 1005. This case will be explored in more detail in the subsequent section. *See infra* Part I.C.1.

53. *See* discussion in *infra* Part I.D.

54. *See generally* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 575-76 (1988) (holding that peaceful handbilling at the mall did not rise to level of picketing).

55. *Id.* at 570-71. For an in-depth discussion of *DeBartolo II* see *infra* Part I.E.1.

56. *Id.* at 571-72.

57. *Id.* at 578. The Court used the proviso merely as a clarifying agent and not the foundation, which allowed handbilling. *See* Bock, *supra* note 14, at 923.

58. *DeBartolo II*, 485 U.S. at 575; *see also* Overstreet v. United Bhd. of Carpenters and Joiners of Am., Local Union No. 1506, 409 F.3d 1199 (9th Cir. 2005); Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of* DeBartolo, 1990 WIS. L. REV. 149, 171 (1990).

§ 158(b)(4)(ii)—that is, attempting to predict which behavior trips the "coercive" hatch-door within the statute and, thus, turns speech into proscriptive conduct.

C. Tree Fruits *to* Safeco*: The Evolution of Consumer Picketing and the Tension with the First Amendment*

1. *Tree Fruits*

In 1964 the Supreme Court was confronted with a consumer picketing case that, by all accounts, should not have been as remarkable as it turned out to be.[59] In *Tree Fruits*, the union picketed a grocery chain that sold the apples of the company with which it was engaged in a labor dispute.[60] The union distributed handbills, carried picket signs, and peacefully asked that customers not buy the struck product.[61] The Board read the statute and the proviso literally and found "that such picketing always threatens, coerces or restrains the secondary employer."[62] However, in a "virtuoso performance," the Court held that § 158(b)(4)(ii)(B) "was not intended to proscribe all peaceful consumer picketing at secondary sites."[63] Within the calculus of the majority's decision was Justice Brennan's "concern" that such an outright "ban against peaceful

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59. *See* Modjeska, *supra* note 38, at 1005-06.

60. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 377 U.S. 58, 59-61 (1964). Union officials for Local 760 called a strike against the Tree Fruits Labor Relations Committee Inc. *Id.* at 59-60. To call attention to its labor dispute with the company, the union called for a consumer boycott of the apples that Tree Fruits was selling. *Id.* In consequence, the union peacefully picketed and distributed handbills to consumers at Safeway grocery stores urging customers not to purchase Tree Fruits apples. *Id.* at 61.

61. *See* Modjeska, *supra* note 38, at 1012-13. It should be added that the union only requested consumers not to buy Tree Fruits apples. *Id.* at 1012. The picketers made no attempt to block entrances or intimidate employees of Safeway not to work. *Id.* at 1013. In fact, at locations in which stores were located at the end of a parking lot, the union picketed and handbilled from the public sidewalks to further lessen intimidation. *Id.* at 1013-14; *see also* THE DEVELOPING LABOR LAW, *supra* note 6, at 1634.

62. *Tree Fruits*, 377 U.S. at 62. The section of the statute that the Board read literally was subsection B. *Id.* at 59 (citing 29 U.S.C. § 158(b)(4)(ii)(B)). Section 158(b)(4) states, in pertinent part, that "[n]othing contained in . . . paragraph [4] 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." 29 U.S.C. § 158(b)(4) (emphasis added). Consequently, the Board interpreted the statute and the legislative history to ban any consumer picketing at secondary sites. *Tree Fruits*, 377 U.S. at 61-62.

63. Modjeska, *supra* note 38, at 1006, 1015; *see also Tree Fruits*, 377 U.S. at 72 ("[I]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892))).

picketing might collide with the guarantees of the First Amendment."[64]

The Court examined the legislative history of the Landrum-Griffin Act and concluded that, despite the language, the congressional debates did "not reflect with requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites."[65] What Congress *did seek* to prohibit was the "isolated evil" of using the picket line to persuade customers to stop trading with the secondary employer, thus forcing it to cease doing business with the primary target.[66] Because the union was only concentrating its campaign against Tree Fruits Company's apples, and because it was not asking Safeway customers or employees to completely boycott the store, the activity did not fall within what Congress sought to proscribe.[67] Because there was no attempt to shut off all trade with the secondary employer, the Court "distinguished 'peaceful consumer picketing to shut off all trade' . . . which creates 'a separate dispute with the secondary employer,' from picketing that 'only persuades his customers not to buy the struck product' and is closely confined to the primary dispute."[68] This "unity of interest" versus the "primary boycott" distinction is the theoretical hinge that the Court relies upon in creating an exception for consumer picketing of a struck product.[69]

Coupling the statutory language that allows "publicity, *other than picketing*" with Senator John F. Kennedy's explanation of the committee compromise (which appears to follow lock-step with the statute), leaves one puzzled as to why the Court chose its strained and attenuated syllogistic path.[70] Senator Kennedy clarified that the purpose of adding the proviso to the statute was to protect

> "[T]he right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor *and* to refrain from trading with a retailer who sells such goods. . . . We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but were able to persuade them to agree that the union shall be free to

64. *Tree Fruits*, 377 U.S. at 63.

65. *Id.*

66. *Id.*

67. *See* Modjeska, *supra* note 38, at 1014.

68. THE DEVELOPING LABOR LAW, *supra* note 6, at 1634-35; Modjeska, *supra* note 38, at 1016.

69. *See* Modjeska, *supra* note 38, at 1016-17.

70. 29 U.S.C. § 158(b)(4) (2000) (emphasis added).

> conduct informational activity short of picketing. In other words . . . *all publicity short of having ambulatory picketing* . . . ."[71]

However, Justice Black's concurrence in *Tree Fruits* gives insight into the motive behind such creative statutory construction.[72] In his opinion, Justice Black agreed with the dissent that the wording of the statute is clear in that it "forbid[s] the striking employees of one business to picket the premises of a neutral business where the purpose of the picketing is to persuade customers . . . not to buy goods supplied by the struck employer."[73] Justice Black diverged from this path and aligned with the majority, suggesting that such a blanket prohibition of consumer picketing would most certainly violate the First Amendment in that it "abridges freedom of speech and press."[74]

Moreover, the concurrence analogized *Tree Fruits* to *Thornhill v. Alabama*, in which the Court struck down a statute that banned all picketing because "[t]he sweeping and inexact terms of the ordinance disclose[d] the threat to freedom of speech inherent in its existence."[75] While Justice Black acquiesced to the notion that picketing involves a semblance of conduct,[76] he also recognized that it is infused with constitutionally protected speech.[77] In cases where regulation of the former will likely impede the latter, "it is the duty of the courts . . . 'to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights' of speech and press."[78]

The concurrence furthers the argument by stating:

> Even *assuming that the Federal Government has power to bar* or otherwise regulate patrolling by persons on local streets or adjacent to local business[es] . . . it is difficult to see that the section in question intends to do anything but prevent dissemination of in-

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71. *Tree Fruits*, 377 U.S. at 70 (second emphasis added) (quoting 105 CONG. REC. S16,414 (daily ed. Sept. 3, 1959) (statement of Sen. Kennedy), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1432 (1959) [hereinafter 2 NLRB]).

72. *See* Modjeska, *supra* note 38, at 1016-18 (showing the attenuation between the majority, concurring, and dissenting opinions).

73. *Tree Fruits*, 377 U.S. at 76 (Black, J., concurring).

74. *Id.*

75. *Id.* at 77 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

76. *Id.*

77. *Id.*

78. *Id.* at 78 (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).

> formation about the facts of a labor dispute—a right protected by the First Amendment.[79]

If the picketers advocated unlawful action, or if the government argued that the speech should be minimally regulated, there might have been more leniency in the analysis from the concurring voice of the Court.[80]

In sum, the *Tree Fruits* majority understood the serious constitutional implications of proscribing all consumer picketing and, despite the wording of §158(b)(4)(ii)(B), fashioned a creative path of least resistance to avoid them.[81] In doing so, the majority and the concurrence of the Court expressed an awareness of the existing constitutional pitfalls that lie in wait should the Court enjoin all consumer picketing at a secondary site.

2. *Safeco*

Twenty-four years after *Tree Fruits*, the Court revisited the secondary consumer product-picketing issue in *NLRB v. Retail Store Employees Union, Local 1001* (*Safeco*). In *Safeco* the union had a labor dispute with the Safeco Title Insurance Company.[82] The union picketed the local title companies that did business with Safeco.[83] While the case seemed very similar to *Tree Fruits*, the Court distinguished *Tree Fruits* on the ground that five of the companies picketed received over ninety percent of their business from the sale of Safeco insurance.[84]

In a plurality decision, the Court distinguished the allowable struck product in *Tree Fruits* from the struck product in *Safeco*

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79. *Id.* (emphasis added); *see also Thornhill*, 310 U.S. at 102 ("[T]he dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

80. Justice Black opined in his concurring opinion that there was no other reason to prevent the picketers other than silencing their message. *Tree Fruits*, 377 U.S. at 78-79. There were no arguments made that the legislature passed the statute in an attempt to protect the people from breach of the peace or violence. Rather, the section "is aimed at outlawing free discussion of one side of a certain kind of labor dispute and cannot be sustained as a permissible regulation of patrolling." *Id.* at 79.

81. *Id.* at 72 (majority opinion); *see also* Modjeska, *supra* note 38, at 1016. *See generally* OBERER ET AL., *supra* note 23, at 440-41. The editors pose the question of whether the Court chose to alter the meaning of the statute in order to circumvent the more pressing constitutional question.

82. NLRB v. Retail Store Employees Union, Local 1001 (*Safeco*), 447 U.S. 607, 609 (1980) (plurality opinion).

83. *Id.* at 609-10.

84. *Id.* at 609; *see also* Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 85-86 (2002).

where "the struck product constitute[d] the sole or central product of the secondary employer."[85] Noncoercive consumer picketing limited to a struck product (as in *Tree Fruits*), becomes coercive when picketing the struck product forces the neutral company to shut off business with the primary employer embroiled in the labor dispute.[86] Thus, the Court created a new wrinkle in the test for consumer-product picketing; consumer-product picketing will be deemed coercive if it "is 'reasonably calculated to induce customers not to patronize neutral parties at all.'"[87] In cases falling between the factual poles of *Tree Fruits* and *Safeco*, the Court instructed lower courts to examine "whether . . . the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss."[88] This type of analysis is aptly referred to as the "merged-product doctrine."[89]

In his concurrence, Justice Stevens acknowledged that serious constitutional issues lurked beneath the surface of this case, stating, "The constitutional issue, however, is not quite as easy as the plurality would make it seem."[90] Nevertheless, Justice Stevens found the restriction constitutional, stating, "Like so many other kinds of expression, picketing is a mixture of conduct and communication. *In the labor context*, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment."[91]

Cognizant of the delicate balance between the union's First Amendment rights and the desire to protect neutrals from coercion, Justice Stevens focused on the conduct component of the picket,

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85. Modjeska, *supra* note 38, at 1020.

86. The Court held that because this type of action left the neutral employers with no viable choice "between their survival and the severance of their ties with Safeco, the picketing plainly violate[d the] statutory ban on the coercion of neutrals." *Safeco*, 447 U.S. at 615; *see also* THE DEVELOPING LABOR LAW, *supra* note 6, at 1635-36; Fisk, *supra* note 84, at 85-86; Modjeska, *supra* note 38, at 1020.

87. *Safeco*, 447 U.S. at 614 (quoting Retail Store Employees Union, Local 1001, 226 N.L.R.B. 754, 757 (1976), *rev'd*, 447 U.S. 607 (1980)). This explanation by no means attempted to articulate the complexities of deciphering the doctrines associated with product picketing. It only attempted to illustrate the basic evolution of the Court's philosophy regarding consumer picketing and the tension posed by the First Amendment. For a more detailed articulation on the parameters of product picketing, see THE DEVELOPING LABOR LAW, *supra* note 6, at 1634-36.

88. *Safeco*, 447 U.S. at 615 n.11.

89. *See* Bock, *supra* note 14, at 955.

90. *Safeco*, 447 U.S. at 618 (Stevens, J., concurring).

91. *Id.* at 618-19 (emphasis added).

rather than the particular idea being disseminated stating, "'[p]icketing by an organized group is more than free speech, since it involves *patrol* of a particular locality.'"[92] Justice Stevens differentiated between a customer's response to *conduct* and the customer's response to *an idea*, which presumably would be protected by the First Amendment.[93] Justice Stevens leaves open the possibility that expression of an idea and, more pertinently, bringing public attention to that idea (for example, handing out handbills) would be protected under the First Amendment because the activity in question "depends entirely on the persuasive force of the idea."[94]

In sum, *Tree Fruits* and *Safeco* illustrate the struggle the Court faces when trying to define and protect First Amendment rights within the complex sphere of § 158(b)(4)(ii)(B).[95] Moreover, these cases reveal a disparity of analysis as a result of the inherent tension between § 158(b)(4)(ii)(B) and the First Amendment.[96]

D. *Picketing or Speech: Understanding the Parameters*

1. The Board's View

There are distinct inconsistencies in recent Board opinions regarding what types of activity constitute picketing.[97] No case artic-

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92. *Id.* at 619 (emphasis added) (quoting Bakery & Pastry Drivers & Helpers Local 802 of Int'l Bhd. of Teamsters v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring)).

93. In wrestling with the admittedly difficult constitutional question, Justice Stevens stated that

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

Id. at 619 (Stevens, J., concurring) (quoting *Wohl*, 315 U.S. at 776-77 (Douglas, J., concurring)); *see also* THE DEVELOPING LABOR LAW, *supra* note 6, at 1719 (acknowledging the distinction Justice Stevens made pursuant to handbills and picketing).

94. *Safeco*, 447 U.S. at 619.

95. Brian K. Beard, Comment, *Secondary Boycotts After* DeBartolo*: Has the Supreme Court Handed Unions a Powerful New Weapon?*, 75 IOWA L. REV. 217, 221 (1989).

96. Fisk, *supra* note 84, at 85-86; Kohler, *supra* note 58, at 178; Modjeska, *supra* note 38, at 1016-22; *see also* Beard, *supra* note 95, at 221.

97. *See* Laborers' E. Region Org. Fund, 346 N.L.R.B. 1251, 1253 n.5 (2006); Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal I*), 346 N.L.R.B. 199, 200 (2006) (Liebman, Member, concurring in part) (implying that picketing requires a physical or symbolic barrier), *enforcement denied and remanded*, 491 F.3d 429 (D.C. Cir. 2007). These inconsistencies are further exacerbated by the D.C. Circuit's recent implicit reversal of the Board's interpretation of picketing in *Sheet Metal I*. Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB (*Sheet Metal II*), 491 F.3d. 429, 439-40 (D.C. Cir. 2007).

ulates this tension more succinctly than *Sheet Metal Workers Local 15 (Sheet Metal I)*.[98] At issue were the definitional components that give rise to the consequential moniker of picketing.[99] In *Sheet Metal I*, the union was charged with a violation of § 158(b)(4)(ii)(B) because it staged a "mock funeral" in front of a hospital to bring attention to a labor dispute with a construction company working inside the hospital.[100] In addition to the "funeral procession," the union also handed out handbills and displayed the infamous rubber rat on public property.[101] While the Board was unanimous in concluding that the mock funeral procession was an unlawful secondary activity under § 158(b)(4)(ii)(B), there was a divergence in the legal analysis as to why.[102]

Member Liebman found that the procession was unlawful because the four people were engaged in "ambulatory patrolling," thus "effectively creat[ing] a symbolic barrier, a line in front of the entrance way not to be crossed."[103] Relying on the principles articulated in *DeBartolo II*, and more recently by the Ninth Circuit in *Overstreet v. United Brotherhood of Carpenters Local 1506*, Member Liebman opined that there needed to be something "more than mere persuasion" in the delivery of the message—"it also involves the intimidation of the physical or symbolic barrier to the entrance way."[104]

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98. *Sheet Metal II*, 491 F.3d 429. The procedural history of *Sheet Metal* encompasses three distinct decisions of import. The first is from the Eleventh Circuit regarding an injunction, the second from the Board's decision of the unfair labor practice charge, and lastly the most recent D.C. Circuit denial to enforce the Board's order. *See id.* at 438-39.

99. *See Sheet Metal I*, 346 N.L.R.B. at 200 n.3. While the display of the rat was an issue in *Sheet Metal I*, the Board was able pass on the legality given the plethora of union protests. *Id.* Rather, the Board focused on other proscribed behavior in attempting to define picketing. *Id.* at 200.

100. *Id.* at 199. In pertinent part, the union conducted a mock funeral procession (complete with a faux casket and a person dressed as the grim reaper), passed out leaflets, and displayed a large rubber rat on public property. The members actually carried the casket and patrolled back and forth on the property. *Id.* at 199-200.

101. *Id.* at 200 n.3. As previously mentioned, the Board chose not to pass judgment on the rat believing that the other conduct violated § 158(b)(4)(ii)(B) and that there was no need to tackle the more difficult question of the rat. *Id.*

102. The Board found the activity of the funeral procession to be unlawful picketing of a secondary employer, which would induce a severance with the primary. Thus the activity was coercive and a violation of § 158(b)(4)(ii)(B). *Id.* at 200.

103. *Id.* (Liebman, Member, concurring in part) (relying on *Overstreet v. United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005)).

104. *Id.* ("In finding the violation I am guided by the principles set forth in [*DeBartolo II*] and [*Overstreet*]." (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast

The crux of Liebman's reasoning was grounded in the ambulatory conduct of the participants and appeared in the last sentence of her in-part concurrence, where she stated:

> The gravamen of the violation is not that patrollers carried a faux casket and a costumed "grim reaper" figure carrying a sickle, for these expressive displays offer "mere persuasion" and do not serve to erect a physical or symbolic barrier to the Medical Center's entrance. Rather, it is the patrolling itself that erected a barrier to entering the hospital.[105]

In guarded prose, the majority did not agree with Member Liebman's analysis of the situation. In particular, the majority disagreed with the premise that picketing "requires a physical or symbolic barrier."[106] In doing so, the majority cast a broad and noncommittal net in trying to define picketing, stating, "[i]t may be that other conduct, short of a barrier, can be 'conduct' that is picketing or at least 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B)."[107]

2. The D.C. Circuit's Rebuke

Subsequent to the Board's decision in *Sheet Metal I*, the union petitioned the Court of Appeals for the D.C. Circuit for review, and the Board cross appealed for enforcement of its original order.[108] The court disagreed with the Board's conclusion that the conduct of the union was the "functional equivalent of picketing" and denied enforcement of the order, which essentially reversed the Board's decision.[109] The court analogized the conduct of the mock funeral to handbilling, finding that the means employed merely produced a

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Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 575 (1988); *Overstreet*, 409 F.3d 1199)).

105. *Id.*

106. *Id.* (majority opinion).

107. *Id.*; *see also* Timothy F. Ryan & Katherine M. Davis, *Banners, Rats, and Other Inflatable Toys: Do They Constitute Picket Activity? Do They Violate Section 8(b)(4)?*, 20 LAB. LAW. 137, 154 (2004) (positing that the "visceral" message is enough to "dissuad[e] . . . consumer[s] from dealing with neutral employer. As a result, this conduct is clearly most analogous with 'picketing'").

108. Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB (*Sheet Metal II*), 491 F.3d 429, 431 (D.C. Cir. 2007).

109. *Id.* at 438-40. It is important to note that while the Board is obligated to follow the order of the court of appeals in *this* case, *it does not become precedent pertinent to Board law.* In other words, the Board is not obligated to adopt the D.C. Circuit's interpretation of picketing in a subsequent case. *See* THE DEVELOPING LABOR LAW, *supra* note 6, at 2597-98.

persuasive message not to patronize the hospital and nothing more.[110]

The D.C. Circuit held the conduct to be "a combination of street theater and handbilling" and, thus, completely legal under § 158(b)(4)(ii)(B) and the Supreme Court's holding in *DeBartolo II*.[111] The court went on to rebuke any notions that the conduct rose to the level of "signal picketing" or that it "interfered with or confronted patrons entering or leaving the hospital."[112]

Moreover, the D.C. Circuit delineated its holding from Member Liebman's concurrence, opining that the presence of ambulatory patrol *does not* automatically create a symbolic barrier that is the functional equivalent of picketing.[113] In this instance there was no interference, no interruption, and no overt confrontation with patrons. The mock funeral occurred parallel to the front of the hospital, 100 feet from the entrance.[114] The court held that to proscribe this conduct as picketing simply because of the ambulatory patrol of the protesters was irreconcilable with its interpretation of § 158(b)(4)(ii)(B), or the Supreme Court's definition of picketing in *DeBartolo II*.[115] In essence, the court held that the potential effects of the activity are more dispositive than the actual conduct itself. In other words, an ambulatory patrol 100 feet from the entrance of the hospital does not automatically create a symbolic barrier worthy of a picket line.[116]

Finally, the court dispatched with a contrary ruling by the Eleventh Circuit that is—at least on first appearance—in direct opposition with the *Sheet Metal II* decision.[117] Prior to the case being

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110. *Sheet Metal II*, 491 F.3d at 438-40.

111. *Id.* at 437.

112. *Id.* at 438. The court went on to examine whether the conduct was coercive, threatening, or intimidating which would also trigger a § 158(b)(4)(ii)(B) violation. Understanding the consequential First Amendment implications of such a holding, the court analogized to recent abortion clinic protests, and found the conduct to be legal and secondary to First Amendment principles. *Id.* at 438-40. This concept will be explored in subsequent sections. *See infra* Part I.E.3.

113. *Sheet Metal II*, 491 F.3d at 438-40.

114. *Id.* at 432.

115. *Id.* at 438.

116. *Id.* The court did not hold that the conduct could never be picketing, but did bring attention to the fact that in these particular set of facts, there was no interference or confrontation with patrons of the hospital. Therefore, the court could not accept Member Liebman's per se rule concerning ambulatory patrol as it related to picketing. *Id.*

117. The Eleventh Circuit held that it was reasonable to construe that the mock funeral was the functional equivalent of picketing. Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1265 (11th Cir. 2005).

heard by the Board or the D.C. Circuit, a Florida district court granted the Regional Director of the NLRB an injunction, prohibiting the aforementioned conduct because it was the "functional equivalent of picketing." The Court of Appeals for the Eleventh Circuit affirmed that decision.[118] The D.C. Circuit criticized the Board and the Eleventh Circuit for not distinguishing the "ends from the means" and further stated that the conduct "was not the functional equivalent of picketing as a means of persuasion because it had none of the coercive characteristics of picketing, as the Eleventh Circuit itself found."[119] In sum, the answer to this question appears embedded within the dialectic of these two legal analyses.

3. Picketing Under the NLRA—Who's Right?

Before embarking on the daunting task of statutory interpretation, it is worth reiterating that the definition of picketing appears nowhere within the NLRA.[120] Merriam Webster's Dictionary defines picket in pertinent part as "to walk or stand in front of . . . a person posted by a labor organization at a place of work affected by a strike, *also*: a person posted for demonstration or protest."[121] Clearly this definition does little to aid in untangling the legal disposition of this important term of art.

From a historical perspective, the term "picket" is derived from military origins. "The function of 'pickets' in the military sense was to prevent, by force or alarm, the crossing by the enemy of the so-called 'picket line.'"[122] In contrast however, "[p]olitical 'picketing' does not usually have this military function of preventing the crossing of a line; its purpose is more clearly that of publicizing and dramatizing a point of view and of attracting new adherents to it."[123]

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118. *Sheet Metal II*, 491 F.3d at 437 (quoting *Kentov*, 418 F.3d at 1265). In fairness to the Eleventh Circuit, the standard in a § 10(l) hearing is that the judge must have a reasonable basis to determine that the injunction is warranted (a significantly lesser standard than in the present scenario). However, the court's dictum was firmly entrenched in the aforementioned statement. *Id.*; *see also* 29 U.S.C. § 1510(l) (2000).

119. *Sheet Metal II*, 491 F.3d at 437-38. The court furthered the argument by rejecting the assertion that the conduct was coercive and thus illegal under § 158(b)(4)(ii) of the Act. *Id.* at 439. This concept will be explored in detail in subsequent sections. *See infra* Part I.E.1-.3.

120. RAY ET AL., *supra* note 35, at 137.

121. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 937 (11th ed. 2003).

122. OBERER ET AL., *supra* note 23, at 359.

123. *Id.*

In *DeBartolo II*, the Supreme Court gave insight into what types of conduct would classify as picketing in regard to a secondary employer.[124] Realizing that a broad definition of picket or coercion related to a secondary employer would put § 158(b)(4)(ii)(B) in a perilous position by exposing it to potential constitutional violations, the Supreme Court reverted to the legislative history and prior decisions to escape the looming and consequential First Amendment trap.[125]

Returning to its decision in *Safeco*, the *DeBartolo II* Court reiterated that "picketing is 'a mixture of conduct and communication' and the conduct element 'often provides the most persuasive deterrent.'"[126] The Court once again identified picketing as being significantly different than other forms of communication, and further distinguished disseminating a message (such as handbilling or protesting) from picketing because it "depend[s] entirely on the persuasive force of the idea."[127]

In analyzing the statute, the Court interpreted the publicity proviso to *clarify* what Congress meant to regulate in pertinence with § 158(b)(4)(ii)(B).[128] In due course, the Court relied heavily on the legislative history of the proviso and the perceived intention

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124. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 577-79 (1988). Other courts have examined *DeBartolo II*. *See* Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1213-16 (9th Cir. 2005); Benson v. United Bhd. of Carpenters & Joiners of Am., Locals 184 & 1498, 337 F. Supp. 2d 1275, 1277-80 (D. Utah 2004); Kohn v. Sw. Reg'l Council of Carpenters, 289 F. Supp. 2d 1155, 1165-68 (C.D. Cal. 2003); Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal I*), 346 N.L.R.B. 199, 200 (2006) (Liebman, Member, concurring in part), *enforcement denied and remanded*, 491 F.3d 429 (D.C. Cir. 2007).

125. *DeBartolo II*, 485 U.S. at 578.

> The case turns on whether handbilling such as involved here must be held to "threaten, coerce, or restrain any person" to cease doing business with another. . . . But more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B): that section requires a showing of threats, coercion, or restraints. Those words, we have said, are "nonspecific, indeed vague," and should be interpreted with "caution" and not be given a "broad sweep."

Id. (quoting NLRB v. Drivers, 362 U.S. 274, 290 (1960)).

126. *Id.* at 580.

127. *Id.* (quoting NLRB v. Retail Store Employees Union, Local 1001 (*Safeco*), 447 U.S. 607, 619 (1980) (Stevens, J., concurring)).

128. The Court relied on Senator Kennedy's post-conference committee comments. In describing the compromise agreed upon by Congress, Senator Kennedy stated that a "union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of *having ambulatory picketing in front of a secondary site*." *DeBartolo II*, 485 U.S. at 586-87 (quoting 105 CONG. REC. S16,414 (daily ed. Sept. 3, 1959) (statement of Sen. Kennedy), *reprinted in* 2 NLRB, *supra* note 71, at 1432).

that Congress sought to allow "all publicity short of ambulatory picketing in front of a secondary site."[129]

The NLRB, however, has offered various definitions of picketing that appear, at first glance, to be more representative of the facts of each situation, rather than a concrete principle of law.[130] For example, the Board has found picketing when a large number of people, gathered without picket signs, were marching in front of the business handing out handbills.[131] While the Board did not label the conduct as picketing per se, it nevertheless was found to be coercive in that patrons needed to "force" their way through the throng to get inside.[132]

Recently, however, the Board and the Eleventh Circuit have relied on a broad definition of picketing that was formulated by the Board in *United Mine Workers of America, District 2 (Jeddo Coal Co.)*. This definition stated that "[n]either patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather, the essential feature of picketing is the posting of individuals at entrances to a place of

129. *Id.* at 587.

130. *Compare* Chi. Typographical Union No. 16, 151 N.L.R.B. 1666, 1669 (1965) ("One of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises." (quoting NLRB v. United Furniture Workers of Am., 337 F.2d 936, 940 (2d Cir. 1964))), *and* Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal I*), 346 N.L.R.B. 199, 200 (2006) (Liebman, Member, concurring in part) ("[I]t is the patrolling itself that erected a barrier . . ."), *with* United Mine Workers of Am., Dist. 2 (*Jeddo Coal Co.*), 334 N.L.R.B. 677, 686, (2001) ("[N]either patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather, the essential feature of picketing is the posting of individuals at entrances to a place of work.").

131. Serv. Employees Union, Local 87 (*Trinity Maintenance*), 312 N.L.R.B. 715, 742-43 (1993).

132. *Id.* at 743. Groups, varying in size from twenty to seventy persons and comprised of members of a labor organization, who were not carrying placards but who were distributing handbills, marched in an elliptical path immediately in front of the main entrance to an exhibition hall and caused patrons to force their way through in order to enter the building. The Board, while abstaining from labeling the conduct, concluded that it was coercive conduct within the meaning of § 158(b)(4)(ii). *Id.* at 742.

work."[133] This posting, presumably, is the violative "coercing" agent which triggers § 158(b)(4)(ii).[134]

On the other hand, the Ninth Circuit rejected this broad definition in a case involving union members holding a large banner in front of a secondary employer.[135] The court in *Overstreet* stated that the Board was "not entitled to the usual deference accorded the agency, because the statutory question must be answered with the awareness of the line between constitutionally-protected speech and unprotected activity."[136] The *Overstreet* court concluded that the mere presence of the union members did not rise to the level of coerciveness.[137] Moreover, the Ninth Circuit gave the distinct impression that ambulatory picketing is necessary to trip the proverbial trap in secondary pressure cases in which union speech rights are at issue.[138]

An added wrinkle to the determination of what constitutes picketing is the concept of "signal picketing." A typical example of signal picketing occurs when a union stations members or "placards near an entrance—positioned so that anyone approaching can read the printed message."[139] This "signal" is construed as conduct that "induce[s] action by those to whom the signal is given."[140]

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133. *Jeddo Coal Co.*, 334 N.L.R.B. at 686; *see* Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1265 (11th Cir. 2005) (holding that, absent placards, the union's activity of carrying a casket sufficed as picketing). Moreover, the *Kentov* court stated:

> "The important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."

Kentov, 418 F.3d at 1265 (quoting Lumber & Sawmill Workers Local Union No. 2797, 156 N.L.R.B. 388, 394 (1965)).

134. *Jeddo Coal Co.*, 334 N.L.R.B. at 686.

135. Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1214 (9th Cir. 2005).

136. *Id.* Traditionally, the courts give broad deference to the Board's interpretation of the NLRA. However, in matters in which a constitutional issue arises, the level of deference is lessened. *Id.*

137. *Id.* at 1215.

138. *Id.*

139. Serv. Employees Union, Local 87 (*Trinity Maintenance*), 312 N.L.R.B. 715, 743 (1993).

140. *Id.*; *see also* Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 433 v. NLRB, 598 F.2d 1154, 1159 (9th Cir. 1979); NLRB v. Local 182, Int'l Bhd. of Teamsters, 314 F.2d 53, 57-58 (2d Cir. 1963) (holding that picket signs in snow banks constituted a picket line); Teamsters, Local Union No. 688 (*Levitz Furniture Co. of Mo., Inc.*), 205 N.L.R.B. 1131, 1133 (1973).

However, the parameters of signal picketing are much narrower than those of traditional picketing.[141] Signal picketing also occurs when union members covertly send messages to other union members or affiliates and employees of the secondary employer to "engage in an unfair labor practice."[142] The Supreme Court has stated that free speech protections are not applicable because the members are sending a signal to other union members that involves "*more* than mere speech" of which a failure to abide by the signal is "implicitly backed up by sanctions."[143]

The *Overstreet* court declined to expand this definition to include anyone coming in contact with the signal. To do so, opined the court, would be inconsistent with *DeBartolo II* in that handbilling would be classified under the umbrella of signaling, presumably raising constitutional issues.[144] Moreover, using signals traditionally associated with a labor dispute does not rise to the artful level of signal picketing.[145] Words such as "scab" and "rat" have "become 'common parlance in labor disputes,'" and thus have no significance when directed at the general public at large.[146] This seems especially true when suppression of the supposed signal would incite constitutional issues.[147]

In sum, to violate § 158(b)(4)(ii)(B), there must be more than speech and more than the communication of an idea. There must be some conduct that rises to the level of coerciveness.[148] To what

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141. *Overstreet*, 409 F.3d at 1215.

142. *Id.* (quoting NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 690 (1951)); *see also* Local 274, United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., 267 N.L.R.B. 1111, 1114 (1983).

143. *Overstreet*, 409 F.3d at 1215 ("The entire concept of signal picketing thus depends on union employees talking to each other, not the public." (emphasis omitted)); *see also* BRUCE S. FELDACKER, LABOR GUIDE TO LABOR LAW 305-06 (4th ed. 2000).

144. *Overstreet*, 409 F.3d at 1215. This begs the question: Is signal picketing in and unto itself is constitutional? That question, however, is left for different scholars, for a different day.

145. *Id.*

146. *Id.* (quoting Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 283 (1974)); *see also* Tucker v. City of Fairfield, 398 F.3d 457 (6th Cir. 2005) ("The rat has long been used as a symbol of efforts to protest unfair labor practices . . . .").

147. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 575 (1988) ("Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979))).

148. *Id.* at 578. *See generally* NLRB v. Retail Store Employees (*Safeco*), 447 U.S. 607 (1980); NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree*

end such conduct satisfies the parameters of the statute will be explored further in the ensuing section.

E. *Labor's Unique Brand of Speech:* DeBartolo II *and Its Progeny*

1. *DeBartolo II* & Handbilling

In *DeBartolo II*, the Court once again revisited the tension between a union's First Amendment right to call public attention to a labor dispute and neutral party rights in the midst of a labor dispute.[149] The union in *DeBartolo II* had a primary labor dispute with a subcontractor working within the shopping mall, which the DeBartolo Corporation (DeBartolo) owned and operated.[150]

Rather than picket the mall, the union peacefully distributed handbills to customers, asking them not to shop at the mall until its owners promised to pay fair wages and benefits to the construction workers.[151] DeBartolo filed an unfair labor practice charge against the union pursuant to § 158(b)(4)(ii), alleging that the union's activity coerced its customers to shut off all trade with the mall, effectively forcing DeBartolo to cease its business with the construction company.[152]

The Board ultimately found the activity to be coercive under § 158(b)(4)(ii)(B), choosing not to inquire into the constitutional implications of proscribing the union from handbilling.[153] The Eleventh Circuit denied enforcement, holding that the Board's decision raised constitutional doubts pertinent to the union's First

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Fruits), 377 U.S. 58, 71 (1964); Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1265-66 (11th Cir. 2005); *Overstreet*, 409 F.3d at 1214-15 (9th Cir. 2005); Benson v. United Bhd. of Carpenters and Joiners of Am., Locals 184 & 1498, 337 F. Supp. 2d 1275, 1277 (D. Utah 2004); Kohn v. Sw. Reg'l Council of Carpenters, 289 F. Supp. 2d 1155, 1165-67 (C.D. Cal. 2003); Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal I*), 346 N.L.R.B. 199, 200 (2006).

149. *See generally DeBartolo II*, 485 U.S. at 578.

150. *Id.* at 570.

151. *Id.* The Florida Gulf Coast Building and Construction Trades Council (the union) had a labor dispute with H.J. High Construction (High) (a subcontractor hired by H.J. Wilson, the primary contractor). *Id.* The handbills asked customers not to shop at the mall because High paid substandard wages. This practice was a community concern because it decreased economic purchasing power for working people. *Id.* at 571. The handbill specified that it was not "seeking to induce any persons from ceasing work or making deliveries." *Id.* at 570 n.1.

152. *Id.* at 571-72.

153. *Id.*; *see also* Fla. Gulf Coast Bldg. & Constr. Trades Council, 273 N.L.R.B. 1431, 1432 (1985), *aff'd*, 485 U.S. 568 (1988).

Amendment rights, and it construed the statute not to prohibit consumer publicity.[154]

The Supreme Court also rejected the Board's interpretation of the statute, holding, as it did in *NLRB v. Catholic Bishop of Chicago*, that "where an otherwise acceptable construction of a statute would raise constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[155] Therefore, in its most basic form, "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[156]

The Court concluded that the handbills were lawful from several legal angles. First, they truthfully informed the public of a labor dispute.[157] Second, there was no "picketing or patrolling."[158] Finally, the speech in question was given a higher value than commercial speech because it "pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace."[159] The Court continued, stating that such "speech itself is protected by the First Amendment, however these handbills are to be classified."[160] The Court concluded that proscription of handbilling would raise serious constitutional issues and, therefore, construed the statute so that it did not violate the First Amendment.[161]

Further, the Court rejected the Board's argument that the handbills were equally as coercive as a picket line because they inflicted economic harm onto the mall owners.[162] The Court examined the legislative history of the publicity proviso of

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154. *DeBartolo II*, 485 U.S. at 573-74 (citing Fla. Gulf Coast Bldg. & Constr. Trades Council v. NLRB, 796 F.2d 1328, 1328 (11th Cir. 1986), *aff'd*, 485 U.S. 568 (1988)).

155. *Id.* at 575 (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979)). The obvious constitutional issue in *DeBartolo II* was that to proscribe citizens' ability to pass out handbills (secondary to a violation of § 158(b)(4)(ii)) could interfere with their First Amendment speech rights. *Id.*

156. *Id.* (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

157. *Id.*

158. *Id.* at 575-76.

159. *Id.* at 576.

160. *Id.* In its summation, the Court appeared to be wrestling with how to classify the speech stating, "[w]e do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection. The handbills involved here, however, do not appear to be typical commercial speech such as advertising the price of a product." *Id.*

161. *Id.* at 578.

162. *Id.*

§ 158(b)(4)(ii)(B) and found it to be a clarifying tool pertinent to what activity would be tolerated under the statute.[163] The proviso articulates a clear intent from Congress to allow publicity and "[h]ad they wanted to bar any and all non-picketing appeals, through newspapers, radio, television, handbills, or otherwise, the debates and discussions would surely have reflected this intention."[164] In addition to Senator Kennedy's post-committee statements,[165] Congressman Griffin stated that "the bill covered boycotts carried out by picketing neutrals but would not interfere with the constitutional right of free speech."[166] Ignoring the arguable *non sequitur* of this statement, Congressman Griffin nonetheless claimed that activity short of ambulatory picketing will not be deemed coercive pursuant to § 158(b)(4)(ii)(B) despite the economic consequences of the speech.[167]

In short, *DeBartolo II* interprets the statute to prohibit only "ambulatory picketing" in regard to labor disputes with secondary businesses, thus allowing the persuasive force of the union's handbilling activity even if the activity results in adverse economic consequences to a neutral party.[168] As such, the Court returned to its earlier rationale in *Tree Fruits* and *Safeco*,[169] interpreting the "restrain or coerce" clause of § 158(b)(4)(ii)(B) to apply only to narrow circumstances that would not implicate First Amendment concerns.[170]

2. *Overstreet* and *San Antonio*

Recently unions have accentuated their handbilling, not only with large rubber rats, but also with large handheld banners that publicize a labor dispute at a secondary site.[171] This activity has

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163. *Id.* at 582.

164. *Id.* at 584.

165. *See supra* note 71 and accompanying text (Sen. Kennedy's committee comments).

166. *DeBartolo II*, 485 U.S. at 584 (citing 105 CONG. REC. H14,339 (daily ed. Aug. 12, 1959) (statement of Rep. Griffin), *reprinted in* 2 NLRB, *supra* note 71, at 1615).

167. *Id.* at 584-88.

168. *Id.*; *see also* Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1210-12 (9th Cir. 2005).

169. *See supra*, notes 59-96 and accompanying text.

170. *DeBartolo II*, 485 U.S. at 584-87

171. *See Overstreet*, 409 F.3d at 1202; San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1233 (9th Cir. 1997); Benson v. United Bhd. of Carpenters & Joiners of Am. Locals 184 & 1498, 337 F. Supp. 2d 1275, 1276 (D. Utah 2004); Kohn v. Sw. Reg'l Council of Carpenters, 289 F. Supp. 2d 1155, 1159-60 (C.D. Cal. 2003).

been met with a somewhat mixed analysis by the Board and the courts.[172] The General Counsel of the NLRB and various ALJ decisions have interpreted the banners to be coercive under the Act for a variety of reasons.[173]

In contrast to recent ALJ decisions, the courts have generally upheld hand-held banners as a valid, legal, and constitutionally protected form of labor speech, even when displayed at a secondary site.[174] In *Overstreet*, for example, the Court of Appeals for the Ninth Circuit held that because the banners were "stationary, non-interactive and truthful" and, "[i]n light of the First Amendment concerns[,] . . . Overstreet *did not show* a fair chance of proving that the Carpenters' bannering [was] within the scope of the 'threaten, coerce, or restrain' language of § 158(b)(4)(ii)."[175]

Following *Safeco* and *DeBartolo II*, the Ninth Circuit distinguished the stationary handheld banners from illegal picketing, stating that, "The physical conduct of picketing 'involves *patrol* of a particular locality' and the mere 'presence of a picket line' induces certain actions—namely refusing to cross that line."[176] For all practical purposes, the presence of banners lacked any critical conduct that would have prohibited them under the statute.[177] Moreover, the court analogized the banners to the *DeBartolo* handbills as being "mere persuasion" and not the same type of intimidation a cus-

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172. *Compare Overstreet*, 409 F.3d at 1211-12 (holding that banners being held by union members were more akin to the "'mere persuasion'" of handbilling of *DeBartolo II* than "'intimidation of by a line of picketers' in *Safeco*" (quoting *DeBartolo II*, 485 U.S. at 580), *with* Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1265 (11th Cir. 2005) ("[I]t is well-settled that the existence of placards on sticks is not a prerequisite to a finding that a union engaged in picketing."). While not ruling specifically on the inflatable rat, the Eleventh Circuit, in dicta, referred favorably to the ALJ's decision that found the rat to violate § 158(b)(4)(ii)(B). *Id.* at 1266.

173. *See Overstreet*, 409 F.3d at 1203-04 n.7. Currently, all cases regarding "bannering" and the "rat" must be submitted to the Division of Advice with a detailed factual analysis of the case before any charge can be filed. *See, e.g.*, Advice Memorandum, *supra* note 14; *see also* Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1625 n.27 (2007) (stating that there are currently nine bannering cases pending before the Board).

174. *Overstreet*, 409 F.3d at 1204 n.7, 1218; *Benson*, 337 F. Supp. 2d at 1281; *Kohn*, 289 F. Supp. 2d at 1175.

175. *Overstreet*, 409 F.3d at 1218-19 (emphasis added).

176. *Id.* at 1210 (quoting NLRB v. Retail Store Employees (*Safeco*), 447 U.S. 607, 619 (1980) (Stevens, J., concurring)).

177. *Id.* at 1211-12.

tomer would experience from an ambulatory picket line producing a physical or symbolic barrier to the entrance.[178]

While choosing to employ the doctrine of constitutional avoidance of *Catholic Bishop* (thus not ruling specifically whether the banners are pure speech),[179] the *Overstreet* court held that proscription of the banners would raise serious constitutional issues. Therefore, it interpreted the statute to allow them absent any clear prohibition.[180] In dicta, however, the court analogized the banners to other protected forms of speech such as billboards and signage and commented that the "pithiness [of the message] does not remove the banners from the scope of the First Amendment protections."[181] The court maintained that the speech was fully protected because it intended to convey a message of a social importance.[182] The court rejected the argument that an emotional response to the banners removed the speech from the protective umbrella of the First Amendment. It found emotive impact of the words "Shame on Precision" on the banner in *Overstreet* to be comparably akin to that of the "Fuck the Draft" jacket protected in the seminal free speech case *Cohen v. California*. As a result, the court found the banners to be protected speech as well.[183]

As mentioned previously, the *Overstreet* court also rejected the "signal picketing" argument because the banners were not directed specifically at other union members instructing them that a picket line was in existence.[184] Moreover, nonlabor cases have illustrated that the Court is reluctant to censor legitimate speech because of the off chance that an improper audience will hear the speech.[185]

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178. *Id.*

179. *Id.* at 1214 n.18. Traditionally, the courts give broad deference to the Board's interpretation of the NLRA. However, in matters in which a constitutional issue arises, the level of deference decreases. *Id.*

180. *Id.* at 1209-11.

181. *Id.*; *see also* Tucker v. City of Fairfield, 398 F.3d 457, 462 (6th Cir. 2005) (holding that the display of an inflatable rubber rat is protected as symbolic speech). This case is distinguishable because it concerns a city ordinance, *not* a secondary boycott. Nonetheless, it articulates an important point of speech protection. The court refers to the "rat" as a symbol of "unfair labor practices." *Id.*

182. *Overstreet*, 409 F.3d at 1212-13; *see also* Thornhill v. Alabama, 310 U.S. 88, 104 (1940).

183. *Overstreet*, 409 F.3d at 1212. In *Cohen*, the Court stated that "words are often chosen as much for their emotive as their cognitive force." Cohen v. California, 403 U.S. 15, 26 (1971).

184. *Overstreet*, 409 F.3d at 1215-16.

185. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975) (holding that drive-in movies that showed naked bodies could not be censored on the grounds that minors *might* see them while driving by because such censorship unnecessarily abridged

The bannering cases further illustrate the dichotomy between what constitutes picketing and what constitutes coercive behavior under § 158(b)(4)(ii).[186] It is well settled that fraudulent speech does not receive First Amendment protection.[187] In *San Antonio Community Hospital v. Southern California District Council of Carpenters*, the court held that hand-held banners stating "THIS MEDICAL FACILITY IS FULL OF RATS"[188] were unlawful because they misled patrons into believing that the hospital had a rodent problem.[189]

The union argued that the term "rat" has a long history in describing labor disputes involving an "employer who fails to pay prevailing wages or a worker who works for substandard wages."[190] Therefore, the union argued that the statement was in essence correct in that the facility *was* full of rats.[191] Predictably, the court rejected this argument.[192] The context in which the union presented the message was misleading, despite the iconic history of the rat.[193] Constitutional protection would be easily reestablished with some creative and non-misleading wording. For instance, the court stated that handbills[194] or banners that specifically referred *to the employer as the rat* would not be misconstrued as fact.[195]

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the First Amendment rights of those who were legally able to encounter the speech); *Cohen*, 403 U.S. at 26.

186. *See Overstreet*, 409 F.3d at 1213-15; Benson v. United Bhd. of Carpenters & Joiners of Am. Locals 184 & 1498, 337 F. Supp. 2d 1275 (D. Utah 2004); Kohn v. Sw. Reg'l Council of Carpenters, 289 F. Supp. 2d 1155, 1159 (C.D. Cal. 2003). In all these cases the General Counsel, Regional Directors, and the ALJ decisions held that the banners constituted coercive behavior and, thus, violated the statute. *See* Rakosczy, *supra* note 173, at 1624-25 (pointing out the disparate applications of the "picketing test").

187. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *see also* Ryan & Davis, *supra* note 107, at 147-48.

188. San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1236 (9th Cir. 1997).

189. *Id.* at 1236-37. The court held that the hospital had a reasonable chance of meeting the "actual malice" standard that was articulated in *New York Times Co. v. Sullivan*. *Id.* at 1240 (citing *New York Times Co.*, 376 U.S. at 279-80).

190. *San Antonio Cmty. Hosp.*, 125 F.3d at 1236.

191. *Id.*

192. *Id.* at 1236-37.

193. *Id.*; *see also* Tucker v. City of Fairfield, 398 F.3d 457, 460 (6th Cir. 2005) (stating that the "rat" is a symbol "to protest unfair labor practices").

194. Signs that stated, "Don't Help Feed The Rat" that connected the employer as being the "rat" were permissible. Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655, 840 F. Supp. 697, 705 (E.D. Mo. 1993), *aff'd*, 39 F.3d 191 (8th Cir. 1994).

195. *San Antonio Cmty. Hosp.*, 125 F.3d at 1236.

3. The *Sheet Metal* Split (Redux)

a. The Eleventh Circuit

The Eleventh Circuit also explored, albeit cursorily, the tenuous relationship between a union's First Amendment Rights and the secondary boycott provision of § 158(b)(4)(ii)(B).[196] Similar to the Board's eventual opinion, the Eleventh Circuit used an expanded lens to define picketing, thus proscribing the union's activities.[197] As mentioned previously, the union in *Sheet Metal* conducted a mock funeral procession in front of the Brandon Regional Medical Center (the hospital) because of its dispute with an installation contractor and a staffing company working for the hospital.[198] The union distributed handbills to people entering and exiting the hospital that read "Going to Brandon Regional Hospital Should Not be a Grave Decision."[199] The "procession" was a worthy performance complete with a faux casket, grim reaper, and pallbearers along a public sidewalk approximately 100 feet from the hospital's entrance.[200]

Such a performance, however, does not immediately violate § 158(b)(4)(ii)(B), which consists of two elements. First, there must be "conduct that threatens, coerces, or restrains." Second, "the union's conduct [must] force or require an employer or person not to handle the products of, or to do business with, another person."[201] Here, the court held that the procession was equivalent to picketing and was coercive, thus any First Amendment protection was removed.[202] In addition to the patrolling element of the conduct, the court also stated that because the union played loud and somber music from speakers onsite, the activity was a "'mixture of conduct and communication' intended to 'provide the most persuasive deterrent to third persons about to enter.'"[203]

As Professor Bock points out, the court also positively references the ALJ's decision in its dicta, opining that the "use of an inflatable rat at a hospital, in tandem with the misleading nature of

196. Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1264-66 (11th Cir. 2005).

197. *Id.* at 1265-66.

198. *Id.* at 1261.

199. *Id.*

200. *Id.*

201. *Id.* at 1262.

202. *Id.* at 1266.

203. *Id.* at 1265 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 582 (1988)).

handbills distributed at that site, constituted picketing."[204] The court in *Kentov* (similar to the Board) was able to sidestep the issue of the inflatable rat. However, if it were pressed, the court appears likely to enjoin the activity.[205]

b. The D.C. Circuit

After the Eleventh Circuit reviewed and affirmed the preliminary injunction, the Board ruled that the activity was coercive and appealed to the D.C. Circuit for enforcement of its order.[206] The D.C. Circuit denied the enforcement of the order and roundly disagreed with the Board and the Eleventh Circuit's interpretation that the funeral procession was "coercive" and, therefore, illegal under the Act.[207]

Recognizing the inherent constitutional implications of such a decision, the court analogized the mock funeral procession to abortion clinic protests.[208] Therefore, any interpretation of the "coercive" clause in § 158(b)(4)(ii)(B) must be examined through the lens of First Amendment jurisprudence, not an antiquated interpretation used exclusively for labor speech.[209] The dispositive question for the D.C. Circuit was how the Supreme Court could find constitutional abortion protests, set up 100 feet from clinics with bullhorns and potentially offensive posters, while proscribing the mock funeral procession.[210] Moreover, just because the funeral procession appeared distasteful or offensive to patrons did not remove its protection under the First Amendment.[211] Therefore, the court held that the union's "protest was consistent with the limitations upheld as constitutional—the buffer zones and the ban on confrontational conduct—in *Madsen* and *Hill*."[212]

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204. *See* Bock, *supra* note 14, at 924 n.103.

205. *Kentov*, 418 F.3d at 1266 n.9; Bock, *supra* note 14, at 924 n.103.

206. *See* Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB, (*Sheet Metal II*), 491 F.3d. 429, 433-34 (D.C. Cir. 2007).

207. *Id.* at 439.

208. *Id.* at 438-39; *see also* Cannon v. City & County of Denver, 998 F.2d 867, 873-74 (10th Cir. 1993) (upholding First Amendment speech rights of abortion clinic protesters who carried signs which read "The Killing Place").

209. *See Sheet Metal II*, 491 F.3d at 438-39.

210. *See id.* at 439 (citing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 758 (1994)).

211. *Id.* (citing Hill v. Colorado, 530 U.S. 703, 716 (2000)).

212. *Id.* While the D.C. Circuit did not rule on the rat display, it did remand the case back to "the Board to consider the issues it did not reach"—namely the rat display. *Id.* at 440.

II. THE FIRST AMENDMENT AND SYMBOLIC EXPRESSION

A. *Why Certain Symbols Are Speech*

Imbedded within the genesis of American labor law is a clear canon of law that allows labor to exercise its First Amendment rights.[213] Without freedom to exercise speech rights, the success and viability of the nation's labor policy would be in peril.[214] However, the evolution of American labor law has seen this seemingly concrete doctrine reduced to a state of amorphousness. It is unclear how to determine what types of labor speech are now protected under the scrutinizing eye of the NLRA and the U.S. Constitution.[215]

However, outside of the labor arena, the Supreme Court has recognized and defined an array of symbols protected as extensions of speech that are expressly covered by the First Amendment.[216] In *Spence v. Washington*, the Court created a two-element test to determine what types of symbolic behavior come within the purview of First Amendment protection.[217] In *Spence*, the Court regarded the context in which a symbol is used to be the dispositive factor in determining whether the symbol warrants a heightened level of ex-

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213. *See* Thornhill v. Alabama, 310 U.S. 88, 102 (1940) ("In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

214. *Id.*

215. *Compare id.* at 105 (holding that peaceful picketing is a constitutionally protected right), *with* Cox v. Louisiana, 379 U.S. 536, 555 (1965) (holding that picketing does not receive same First Amendment treatment and stating, "[w]e emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."), *and* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (opining that, under the Act, labor picketing is distinctively different than economic or protest picketing outside the Act).

216. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 568 (1995) (holding that the motive of a parade was expression); R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (holding that there are times when burning a cross is a constitutionally protected form of speech absent spoken or written words); Texas v. Johnson, 491 U.S. 397, 406-07 (1989) (holding that flag burning is a constitutionally protected form of speech absent spoken or written words); Spence v. Washington, 418 U.S. 405, 414-15 (1974) (holding that attaching a peace sign to a flag was a valid form of speech to protest the United States war policy in Southeast Asia); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969) (holding that the wearing of black armbands to protest Vietnam hostilities was a valid extension and expression of speech).

217. *Spence*, 418 U.S. at 410-11.

pression.[218] In its analysis of whether a student's attaching a peace symbol onto an American flag was speech, the Court looked at two elements: First, it asked whether there "was an intent to convey a particularized message."[219] Second, it considered whether, "in the surrounding circumstances[,] the likelihood was great that the message would be understood by those who viewed it."[220] The Court interpreted the peace symbol pasted on the flag not as "an act of mindless nihilism," but rather as "a pointed expression of anguish by the appellant about the then-current domestic and foreign affairs of his government."[221]

Once the symbolism is deemed to be an extension of speech, courts will assess its constitutionality via an analysis articulated by *United States v. O'Brien*.[222] Under *O'Brien*, the government must first prove that the regulation "furthers an important or substantial government interest."[223] Second, "the government interest [must be] *unrelated* to the suppression of free expression."[224] Lastly, "the incidental restriction on the alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[225]

Imbedded within the *O'Brien* test is a distinguishing mechanism that determines whether a law is content based or content neutral.[226] When this mechanism is triggered, it initiates a "switching function" from *O'Brien*'s less stringent intermediate scrutiny to a considerably more stringent strict scrutiny review.[227] To be re-

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218. *Id.* at 410.

219. *Id.* at 410-11. The particularized element of the quotient seems to have been eliminated by the Court. *See Hurley*, 515 U.S. at 569 ("[A] narrow, succinctly articulable message is not a condition of constitutional protection . . . .").

220. *Spence*, 418 U.S. at 411.

221. *Id.* at 410.

222. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). A critical factor in the application of the *O'Brien* test is the determination of whether the reason for regulation is based on the content of the message or is content neutral. *Id.* As will be seen, however, subsequent applications of *O'Brien* flesh out whether or not the motivation to regulate or ban the symbolic behavior is content based. *See* Texas v. Johnson, 491 U.S. 397, 403-06 (1989) (discussing the standard pertaining to whether the regulation is related to the expression).

223. *O'Brien*, 391 U.S. at 377.

224. *Id.* (emphasis added).

225. *Id.*; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989) (holding that while a content-neutral law must be closely tailored to meet its desired ends, the government need *not* employ the least restrictive alternative).

226. *O'Brien*, 391 U.S. at 377.

227. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 519-20 (2d ed. 2002). Under strict scrutiny review "a law will be upheld *if it is necessary to achieve a compelling government purpose*." *Id.* (emphasis added). To achieve this

garded as content neutral (thus receiving the less stringent *O'Brien* analysis) the governmental interest or purpose of the regulation must be "unrelated to the suppression of free expression."[228] In situations in which the purpose, motive, or interest of the government *is* related to the suppression of the symbolic speech, strict scrutiny analysis is applied and the speech falls into a more stringently protected category.[229]

This was specifically the issue in *Texas v. Johnson*, in which the defendant was convicted of burning an American flag as a symbol of protest against the government.[230] The Court found that the Texas statute prohibiting the desecration of the flag (while content neutral on its face) was applied solely in regard to the *expressive content* of Johnson's message of dissatisfaction with the government.[231] As a result, the Court applied strict review to the statute and found that the discriminatory application was specific to the content of Johnson's message and, thus, unconstitutional.[232] Justice Brennan stated that, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[233] This concept remains constant regardless of "the particular mode in which one chooses to express an idea."[234]

Not only is the government conduct subject to a stricter review when attempting to prohibit symbolic speech secondary to its offensive nature, but it is also subject to such review when attempting to

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end the government must prove that the application of the law is the least restrictive and the least discriminatory means available; if not, the government has not satisfied its very high burden, thus the law will be invalidated as unconstitutional. *Id.*

228. *O'Brien*, 391 U.S. at 377.

229. *See* Texas v. Johnson, 491 U.S. 397, 412 (1989); *see also* James M. McGoldrick, Jr., United States v. O'Brien *Revisited: Of Burning Things, Waving Things, and G-Strings*, 36 U. MEM. L. REV. 903, 929-30 (2006).

230. *Johnson*, 491 U.S. 397.

231. *Id.* at 411-12 (stating that the Texas statute would have allowed Johnson to have burned the flag as a means of disposal, *but not as a means of political protest*).

232. *Id.* at 420.

233. *Id.* at 414 (citing, among others, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 65 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 16-17 (1976) (per curiam); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972); *O'Brien*, 391 U.S. at 382; Brown v. Louisiana, 383 U.S. 131, 142-43 (1966); Stromberg v. California, 283 U.S. 359, 368-69 (1931)).

234. *Id.* at 416.

restrict speech because of the communicative impact on the listener.[235] In *Boos v. Barry*, Justice O'Connor stated that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. . . . [This] hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech."[236]

The Court has long held that symbolic expression is shielded under the protective blanket of the First Amendment. It is worth reiterating *some* of the symbols the Court has protected secondary to content-based restrictions: burning crosses, parades, commercial picketing protesting civil rights violations, abortion clinic picketing, black arm bands, jackets labeled "Fuck the Draft," and of course burning a flag.[237] While symbolic speech receives a less exacting analysis, the *O'Brien* test provides for a more scrutinizing review should it be found that the application and purpose of the restriction were motivated secondary to the content of the expression.[238] Moreover, should it be discovered that the speech is suppressed

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235. Restrictions based on the emotive or communicative impact on the listener are typically interpreted as content-based prohibitions and, thus, subject to strict scrutiny review. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (holding that a content ban on symbols that invoked racial animosity was unconstitutional); Forsyth County v. Nationalist Movement, 505 U.S. 123, 135-36 (1992) (disallowing permits to be regulated because of audience reaction); United States v. Eichman, 496 U.S. 310, 318 (1990); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that the "Fuck the Draft" jacket was speech designed purely for emotive impact); *see also* CHEMERINSKY, *supra* note 227, at 1029 (stating that free speech analysis "often turns on whether the government's purpose is to suppress a particular message").

236. Boos v. Barry, 485 U.S. 312, 321 (1988) (discussing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and striking down a viewpoint-restrictive law which stated, "It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government").

237. *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (upholding abortion clinic protests as constitutional); *R.A.V.*, 505 U.S. at 395-96 (holding that there are times when burning a cross is a constitutionally protected form of speech absent spoken or written words); *Johnson*, 491 U.S. at 420 (holding that flag burning is a constitutionally protected form of speech absent spoken or written words); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (holding a picket and boycott of a diner secondary to perceived civil rights violations was constitutionally protected); Spence v. Washington, 418 U.S. 405, 414-15 (1974) (holding that attaching a peace sign to a flag was a valid form of speech to protest the U.S. war policy in Southeast Asia); *Cohen*, 403 U.S. at 26; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504-06 (1969) (holding that the wearing of black arm bands to protest Vietnam hostilities was a valid extension and expression of speech).

238. *See Johnson*, 491 U.S. at 403.

specifically because of its emotive and communicative effects on the listener, the test is also strict scrutiny.[239]

B. *Rats Can Speak—At Least Under the First Amendment*

Recently, the Court of Appeals for the Sixth Circuit held that an inflatable rubber rat is a protected medium of symbolic speech under the First Amendment.[240] In *Tucker*, the union utilized the rat balloon to bring attention to the unfair labor practices of a car dealership in Ohio.[241] A content-neutral city ordinance prohibited the use of the rat and the police ordered the union to desist from further displays.[242] The Sixth Circuit stated that the government may employ "content-neutral time, place, and manner regulations only if they are narrowly tailored to serve a significant government interest."[243] In essence, such a regulatory doctrine is equivalent to the *O'Brien* test and the courts have used the two interchangeably pursuant to symbolic expression.[244]

The court stated, with regard to the status of the display as speech, "In our view, there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to the Union's message."[245] The court agreed with the lower court's ruling that the ordinance was not narrowly tailored to meet the interests of the state.[246]

In sum, it is clear that symbols, absent words or oral speech, receive First Amendment protection. The stringency of that protection depends on the motive or purpose of the regulation. To label such communication as conduct (for example, a rat balloon), would fall outside the jurisprudence of established constitutional law and abridge a right secured by the Constitution.

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239. *See R.A.V.*, 505 U.S. at 394; *Nationalist Movement*, 505 U.S. at 134-35; *Johnson*, 491 U.S. at 412; *Boos*, 485 U.S. at 321; *Cohen*, 403 U.S. at 24.

240. Tucker v. City of Fairfield, 398 F.3d 457, 460 (6th Cir. 2005).

241. *Id.* The labor dispute in *Tucker* was an "area standards" dispute on a primary employer. The union used the inflatable rat in conjunction with legal picketing to bring attention to the cause. *Id.*

242. *Id.* at 460-61.

243. *Id.* at 463 (quoting Kincaid v. Gibson, 236 F.3d 342, 348 (6th Cir. 2001)).

244. *See, e.g.*, *Johnson*, 491 U.S. at 407 (articulating the limited distinction between the *O'Brien* standard and the time, place, and manner standard).

245. *Tucker*, 398 F.3d at 462; *see also* Int'l Union of Operating Eng'rs, Local 150 v. Vill. of Orlando Park, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001) (holding an inflatable rat to be protected symbolic expression).

246. *Tucker*, 398 F.3d at 463-64.

III. THE DISPLAY OF THE RAT BALLOON PASSES CONSTITUTIONAL AND STATUTORY MUSTER

A. *The Display of the Rat Is a Form of Politically Relevant Symbolic Speech that Should Receive Strict Constitutional Review*

Because conduct and speech receive disparate constitutional protection, the protection of the display of the rat depends on its categorization. Applying the *Spence* test to the display, it is clear that the rat display falls into protected symbolic speech. First, the union must prove that it is intending to communicate a message.[247] It would be extremely difficult to argue that the inflation of a twenty-foot rat is not trying to convey a message. Further, union organizers have stated that the rat is intended to alert the public of a labor dispute.[248] Finally, as the *Tucker* court held, the rat is a "symbol of efforts to protest unfair labor practices."[249]

The second prong of *Spence* asks whether, "in the surrounding circumstances[,] the likelihood [is] great that the message would be understood by those who viewed it."[250] Given the universal message of the rat, it seems apparent that people entering a business would understand the union's intended message of discontent.[251] While the general public might not understand the intricacies of the expression, the appearance of a large inflatable rat with union members standing next to it surely articulates a dispute that, in turn, is subjected to First Amendment protection as symbolic expression.[252] This holds true so long as the union clearly articulates

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247. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 567-70 (1995); Spence v. Washington, 418 U.S. 405, 409-11 (1974).

248. *See* Feuer, *supra* note 4, at B1; *see also* Marquez, *supra* note 4 ("[T]he rat gets people to stop and ask questions about what's going on. . . . That's why we use it.").

249. *Tucker*, 398 F.3d at 460; *see also Int'l Union of Operating Eng'rs, Local 150*, 139 F. Supp. 2d at 958 (holding that an inflatable rat is protected symbolic expression).

250. *Spence*, 418 U.S. at 411.

251. This is especially true given that, in both cases involving the rat display, the union members also conjunctively handbilled. Handbilling provides a more detailed explanation to the public concerning the specifics of an obvious labor dispute. Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal I*), 346 N.L.R.B. 199, 200 (2006), *enforcement denied and remanded*, 491 F.3d 429 (D.C. Cir. 2007); Laborers' E. Region Org. Fund, 346 N.L.R.B. 1251, 1252 (2006).

252. *Tucker*, 398 F.3d at 462 ("In our view, there is no question that the use of the rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment . . . ."); *see also Int'l Union of Operating Eng'rs, Local 150*, 139 F. Supp. 2d at 958 ("We easily conclude that a large inflatable rat is protected, symbolic speech.").

that the dispute is with the primary employer, which is being *employed* by the secondary employer.

Once the *Spence* criteria are satisfied, the *O'Brien* test must be applied.[253] As mentioned previously,[254] the government must first demonstrate a substantial interest in regulating the behavior.[255] As the legislative history of the Landrum-Griffin Amendments show, the purpose of § 158(4)(b)(ii)(B) is to prevent secondary employers from being economically affected by disputes they did not *directly* initiate.[256] Again, putting aside the obvious *non sequitur* that a secondary employer is not responsible for the companies it hires, the government would be able to assert a substantial government interest. Second, "the governmental interest [must be] *unrelated* to the suppression of free expression."[257] If, however, the regulation is found to be related to suppression, then strict scrutiny review is applied.[258]

Should the government try to prohibit the rat display, it would be difficult to prove that the suppression of the speech is not content related. First, it is the rat's message that makes it offensive to the secondary employer. It is quite obvious that unions use the rat to communicate to the public at large that the secondary employer is engaged in hiring practices with which the union disagrees. Businesses often employ the use of props, banners, blimps, and balloons to attract customers to patronize a particular establishment. Unless *all* these promotional props are proscribed, there can be no reason for disparately treating the rat display other than because of the message it conveys.

Second, the government could try to assert a non-content reason for suppression. For example, the government could assert that the display presents a safety hazard to motorists because it distracts

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253. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). A critical factor in the application of the *O'Brien* test is the determination of whether the regulatory mechanism is based on the content of the message or is content neutral. *Id.* As will be seen, however, subsequent applications of *O'Brien* flesh out whether or not the motivation to regulate or ban the symbolic behavior is content based.

254. *See supra* Part II.A.

255. *Id.* at 377.

256. Modjeska, *supra* note 38, at 1007-08 ("The section embodies 'the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.'" (quoting NLRB v. Denver Bldg. & Constr. Trades Council (*Gould & Preisner*), 341 U.S. 675, 692 (1951))).

257. *O'Brien*, 391 U.S. at 377 (emphasis added).

258. *See id.* at 376-77.

their attention from traffic. Once again, however, to assume that only an inflatable rat poses such a risk flies in the face of conventional wisdom and would most certainly be struck down as censorship.[259] Third, while § 158(b)(4)(ii)(B) appears content neutral in its restriction of behavior that "threaten[s], coerce[s], or restrain[s]," its discriminatory application would trigger the court to employ strict scrutiny.[260]

Pursuant to the foregoing analysis, one is strained to find a reason—other than the emotive content of the message—for prohibiting the use of the rat display.[261] This being the case, it is appropriate to reiterate the Supreme Court's decision in *R.A.V. v. City of St. Paul*, in which the Court held that a content ban on symbols that invoked racial animosity was unconstitutional.[262] Surely, if the Court is going to protect the First Amendment rights of a burning cross, a rat balloon should enjoy the same protection.

This type of analytical syllogism regarding the rat display is also analogous to *Texas v. Johnson* and the act of flag burning as speech.[263] Similarly to *Johnson*, suppression of the symbolic speech in the present situation would be done under the guise of the content-neutral statute (i.e., the NLRA). In *Johnson*, the Court found that the government's interest in prohibiting flag burning was not sufficiently compelling to outweigh the First Amendment rights of the speaker.[264] The Court held "that the government may not prohibit expression simply because it disagrees with its message"[265]

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259. The Supreme Court rejected a similar argument in *Erznoznik v. City of Jacksonville*. In *Erznoznik*, the suppressed speech was the content of sexually explicit movies airing at a drive-in theater. Erznoznik v. City of Jacksonville, 422 U.S. 205, 206 (1975). The Court discounted the government's public safety argument that a giant movie screen portraying naked bodies would cause car accidents. *Id.* at 215. Finding the regulation to be censorship, the Court held that "when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the ground that that they are more offensive than others, the First Amendment strictly limits its power." *Id.* at 209.

260. *See* Texas v. Johnson, 491 U.S. 397, 406, 412 (1989); *see also* United States v. Eichman, 496 U.S. 310, 317-18 (1990).

261. Even if opponents of the display asserted that the rat balloon produced unwarranted economic hardship upon the secondary employer, the impetus for such hardship (assuming such a hardship actually exists) was created strictly because of the content of the message. As a result, courts must still apply strict scrutiny review.

262. R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

263. *See generally Johnson*, 491 U.S. at 416 (holding that the burning of the flag was an emotive form of political speech). The same could certainly be said of a giant rat.

264. *Id.* at 418.

265. *Id.* at 417.

and, furthermore, that such ability or inability to prohibit "is not dependent on the particular mode in which one chooses to express an idea."[266] Holding that burning a flag is a form of political protest, the Court stated further that "[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries."[267]

The rat display is analogous to burning a flag. First, it is the disagreeable and offensive message that the previous General Counsel of the NLRB found to violate the Act.[268] Second, absent complete economic ruin on the part of the secondary employer, the Government will be hard pressed to articulate some other compelling interest. If the Supreme Court cannot find a compelling government interest in protecting our national symbol or in the prohibition of a burning cross, one would suspect, based on precedent, that it would not find one to suppress a rat balloon.[269]

In sum, it is the unequivocal contention of this Note that the display of the rat is a protected form of symbolic political speech, subject to regulation only if the government can show a compelling state interest and no other less restrictive means of regulation.[270] Much like the burning of a flag is political speech, so too is the articulation of a labor dispute.[271]

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266. *Id.*

267. *Id.*

268. *Compare* Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice, Nat'l Labor Relations Bd., to Dorothy L. Moore-Duncan, Reg'l Dir. Region 4, Nat'l Labor Relations Bd. (May 3, 2006), http://www.nlrb.gov/shared_files/Advice%20Memos/2006/4-CC-2447%2805-03-06%29.pdf (advising the allowance of the presence of the rat because "[p]ersons entering the jobsite did not pass the display"), *with* Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice, Nat'l Labor Relations Bd., to Robert H. Miller, Reg'l Dir. Region 20, Nat'l Labor Relations Bd. (Dec. 30, 2004), http://www.nlrb.gov/shared_files/Advice%20Memos/2004/20-CC-3423%2812-30-04%29.pdf (advising filing a § 158(b)(4)(ii) complaint because the rat was seen by entering visitors, thus constituting "confrontational conduct"). While the distinction might appear slight, it articulates an implicit legal philosophy (on behalf of the General Counsel and the Board) concerning the display; it is not the rat that violates the Act, but the communicative and emotive impact of it.

269. *See Johnson*, 491 U.S. at 418-19.

270. This section is not intended to be a comprehensive analysis of *O'Brien* nor a comprehensive application of strict scrutiny to the display for that matter. Rather, it is intended to place the display of the rat in its rightful protective constitutional category—speech—rather than conduct.

271. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*Debartolo II*), 485 U.S. 568, 576 (1988) ("The handbills involved here, however, do *not appear to be typical commercial speech* . . . for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and

Therefore, before passing judgment on the display, the Board and the courts should understand the constitutional issues that arise secondary to suppressing the speech. As Professor Kohler insightfully points out, state economic regulation is not applicable when the goal of a boycott is "'to bring about political, social and economic change' for themselves."[272] Consequently, given the political nature of the speech, the display of the rat balloon should receive the highest form of constitutional protection. Thus, prohibition of its use should be subjected to strict-scrutiny analysis.[273]

B. *Pursuant to § 158(b)(4)(i), the Display of the Rat Does Not Induce Employees of the Secondary Employer to Stop Working by Sending a Covert Signal of a Picket Line*

The display of the rat to articulate a labor dispute is not a signal to other union members to either cease working, or not to cross an imaginary picket line.[274] Rather, the display is used solely as a means of bringing attention to a labor dispute. One union organizer stated, "[T]he rat gets people to stop and ask questions about what's going on . . . that's why we use it."[275] Additionally, the display alerts the secondary employer to the labor dispute and allows it to choose whether or not to continue its business with the primary employer, which may or may not produce adverse economic conse-

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the standard of living of the populace." (emphasis added)); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("While States have broad power to regulate economic activity we do not find a comparable right to prohibit peaceful political activity . . . . This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))). This point is only exacerbated by the fact that working Americans continue to lose economic ground while corporate CEOs enjoy record salary increases. In 2007, the average CEO made 364 times more than the average worker. *See* SARAH ANDERSON ET AL., EXECUTIVE EXCESS 2007: THE STAGGERING SOCIAL COST OF U.S. BUSINESS LEADERSHIP 5 (2007), *available at* http://www.faireconomy.org/files/ExecutiveExcess2007.pdf; *see also* Greenhouse & Leonhardt, *supra* note 16.

272. Kohler, *supra* note 58, at 169 (quoting *Claiborne Hardware Co.*, 458 U.S. at 911).

273. This Note recognizes that there are other potential constitutional arguments that can be made that are pertinent to the display; namely that, on most occasions, the rat is placed on a public sidewalk which could couple the present argument with the sidewalk having a special position in terms of First Amendment protection. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

274. The inflatable rat is analogous to the hand-held banners in *Overstreet*, which were held not to be signals to other union member that a picket line was present. Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1215-16 (9th Cir. 2005).

275. Marquez, *supra* note 4.

quences. As a result, any economic impact that results from the presence of the rat is due to choices made by the secondary employer.

While it is conceivable that the iconography of the rat could arguably be a "signal" to employees of the neutral employer; this cannot be the dispositive factor of the analysis given the duality of the rat's symbolism.[276] This is especially true given that the Sixth Circuit recently held that the display of a rat is a *universally accepted* symbol of a labor dispute.[277] Moreover, the *Overstreet* court articulated that "[t]o broaden the definition of 'signal picketing' to include 'signals' to *any* passerby would turn [this] specialized concept . . . into a category synonymous with *any* . . . labor dispute. . . . [If the definition was broadened] the handbilling in *DeBartolo II* would have been deemed signal picketing."[278] In other words, the doctrine of "signal" picketing rests on a very narrow constitutional hinge. It is applicable only in situations in which it is absolutely clear that the union is purposefully sending a covert message to other union members to cease doing business with the secondary employer.[279] The fact that a union member could see, and maybe react to the display is not dispositive in warranting suppression.[280]

Such is clearly the case in this instance. The rat display is not sending a covert message to union members. First, the rat is not being used in conjunction with a strike; it is being used to disseminate information of a labor dispute to the general public, not other union members working with the secondary employer.[281] Much like the banners in *Overstreet*, the rat is traditionally placed on public property to heighten exposure to the general public and make its message all that more effective.[282]

Second, proscribed "signal picketing" is traditionally found in situations in which the unions had a specific reason to communicate

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276. While a rat is a symbol of a nonunion worker which takes the place of a union worker during a strike, it is also a "contemptible person." *See* MERRIAM-WEBSTER, *supra* note 121, at 1031; *see also supra* note 177 and accompanying text (explaining that constitutional principles forbid censoring speech based on who might hear it).

277. Tucker v. City of Fairfield, 398 F.3d 457, 462 (6th Cir. 2005) ("The rat has long been used as a symbol of efforts to protest unfair labor practices.").

278. *Overstreet*, 409 F.3d at 1215.

279. *Id.*

280. *Id.* at 1215-16.

281. The entire concept of signal picketing thus depends on union employees talking to each other, which is backed up by potential sanctions. *See* NLRB v. Denver Bldg. & Constr. Trades Council (*Gould & Preisner*), 341 U.S. 675 (1951).

282. *Overstreet*, 409 F.3d at 1216.

to other union members that a strike line was present.[283] In this situation there is no strike. The display is aimed at educating the populace that there is a labor dispute present. Moreover, the display brings attention to the secondary employer's complicit relationship with that dispute.

To ban a speaker's right to inform the public of a labor dispute, which is inherently political in nature, because other union members *might* interpret the speech as a "signal," would most certainly violate the holding in *DeBartolo II*.[284] This is because the dispositive factor in the analysis is not that the display is some covert, iconic message or secret wink-like nod that only other union members would understand. Rather, the rat is a universally accepted message of a labor dispute and is symbolic of an individual with an unscrupulous character. Either way, it is an appeal to the general public not to patronize the neutral employer because of its complicit relationship with the primary business. As *DeBartolo* recognized, this type of speech suppression has potential to raise serious constitutional issues.[285] Moreover, in both recent rat balloon cases there was no evidence produced by the General Counsel that indicated that, had union members continued to do business with the secondary employer (in spite of the "secret" message), there would have been sanctions pursued by union authorities.[286]

C. *The Display Is Not "Traditional" Picketing, Thus Not "Coercion" Under § 158(b)(4)(ii)(B)*

Establishing that the display is not signal picketing is but one corollary in the complicated matrix of analyzing § 158(b)(4)(ii)(B), and does not end the picketing inquiry. *DeBartolo II* established that "handbilling is only persuasive, whereas picketing is coer-

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283. *Id.* at 1215 n.9 (referring to the Ninth Circuit's previous ruling in *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 433 v. NLRB*, 598 F.2d 1154, 1160 (9th Cir. 1979)); *see also Gould & Preisner*, 341 U.S. 675 (articulating the concept of signal picketing in the context of a strike).

284. *Overstreet*, 409 F.3d at 1215 (holding that banners were not signals to union members, but a signal to the public, similar to the signal the union sent to the public in *DeBartolo II*).

285. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 577-78 (1988).

286. *See generally* Laborers' E. Region Org. Fund, 346 N.L.R.B. 1251, 1264-65 (2006); Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal I*), 346 N.L.R.B. 199, 205-07 (2006), *enforcement denied and remanded*, 491 F.3d 429 (D.C. Cir. 2007). In both cases the General Counsel and the ALJ decisions proffered the legal theory and circumstantial evidence of signal picketing, but never any direct evidence.

cive."[287] Therefore, if the display is interpreted to represent a picket line then the behavior would be deemed per se "coercive" pursuant to § 158(b)(4)(ii), in that customers would be coerced not to patronize the secondary.[288]

As previously mentioned, the Board and the Eleventh Circuit have broadly defined picketing,[289] while Member Liebman and the Ninth Circuit have followed the paradigm articulated in *DeBartolo II*.[290] The distinguishing feature in the first interpretation is that it only requires the mere presence of union members at an entrance of a secondary business to label the activity picketing and, thus, trigger the coercion trap door of § 158(b)(4)(ii)(B).[291]

Such an arbitrary and amorphous definition is contrary to the holding in *DeBartolo II* and subjects § 158(b)(4)(ii)(B) to constitutional questions arising under the First Amendment.[292] In other words, to proscribe the rat secondary to its mere presence and the emotive impact of its message would fly in the face of First Amendment jurisprudence.[293] As the Court stated in *Cohen v. California*, "'words are often chosen as much for their emotive as their cognitive force'" and that emotive appeal in no way reduces the speaker's First Amendment rights.[294] Having established the display as protected speech only further solidifies this point.

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287. *See* Fisk, *supra* note 84, at 87.

288. Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB (*Sheet Metal II*), 491 F.3d 429, 438 (D.C. Cir. 2007).

289. *Id.* at 437-38.

290. *See supra* Part I.D.

291. Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1265 (11th Cir. 2005) ("[The] important feature of picketing appears to be posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business." (quoting Lumber & Sawmill Workers Local Union No. 2797 (*Stoltze Land & Lumber Co.*), 156 N.L.R.B. 388, 394 (1965))).

292. *See* Fisk, *supra* note 84, at 87-89; Kohler, *supra* note 58, at 177-78. It is worth noting that both Professors Fisk and Kohler opine that *DeBartolo II* didn't go far enough in the protection of First Amendment rights within the labor context, and both also attempt to illustrate the lessened First Amendment protection of labor speech by the Court. *See* Fisk, *supra* note 84, at 87-89; Kohler, *supra* note 58, at 177-78.

293. Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1212 (9th Cir. 2005); *see Sheet Metal II*, 491 F.3d at 438-39.

294. *Overstreet*, 409 F.3d at 1212 (quoting Cohen v. California, 403 U.S. 15, 26 (1971)); *see also Sheet Metal II*, 491 F.3d at 438-39.

1. A Rat Is Not a Picket Line

The display of the inflatable rat is most analogous to recent bannering cases. The purpose of the banners, much like the rat display, was to raise public attention of a labor dispute.[295] In *Overstreet*, the Ninth Circuit reiterated the holding of *DeBartolo II* by emphasizing that the "only activity that appears clearly proscribed by the statute is '*ambulatory* picketing' of secondary businesses."[296] Moreover, *Overstreet*, like *DeBartolo II*, relied heavily on Senator Kennedy's post-conference committee explanation of the statutory language, which allows unions to carry out "*all publicity short of having ambulatory picketing in front of a secondary site*."[297] In light of the legislative history of § 158(b)(4)(ii)(B), the court held that the activity "'falls short of revealing a clear intent' that bannering . . . is always prohibited."[298]

Much like a hand-held banner, the display of the rat balloon is stationary. With the exception of union members handing out informational handbills in front of the display, there is neither patrol nor any confrontation with customers entering the business, other than that initiated by customers accepting the handbills. Opponents to the display will inevitably assert that the posting of the display and union members is unto itself picketing and, thus, coercive under the Act.[299] Assuming *arguendo* that the mere presence of union members and a rat balloon could rise to the level of a picket line, this assertion intentionally and fatally analyzes the issue in "a vacuum," and it ignores the serious First Amendment implica-

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295. *Overstreet*, 409 F.3d at 1201-02; Kohn v. Sw. Reg'l Council of Carpenters, 289 F. Supp. 2d 1155, 1158 (C.D. Cal. 2003); *see* Benson v. United Bhd. of Carpenters & Joiners of Am. Locals 184 & 1498, 337 F. Supp. 2d 1275 (D. Utah 2004); Mackson-Landsberg, *supra* note 14, at 1154.

296. *Overstreet*, 409 F.3d at 1212 (quoting *DeBartolo II*, 485 U.S. at 587).

297. *Id.* (quoting 105 CONG. REC. 17,898-99 (1959)); *see also supra* note 69 and accompanying text.

298. *Overstreet*, 409 F.3d at 1213 (stating that, in the event an activity raises constitutional issues, there should be a "clear intent" by Congress to ban such activity (quoting *DeBartolo II*, 485 U.S. at 588)).

299. *See* United Mine Workers of Am. Dist. 2 (*Jeddo Coal Co.*), 334 N.L.R.B. 677 (2001) (holding that stationary union members holding picket signs constituted a picket line in the absence of patrolling or blocking entrance); Laborers Int'l Union of N. Am. (*Calcon Constr. Co.*), 287 N.L.R.B. 570, 573 (1987) (holding that picket signs and placards are not needed for picketing to be present). The cases in which the Board has creatively found picketing secondary to "presence" have involved situations where "traditional" picketing was used in conjunction with the presence. There was no attempt to disseminate information to the public and no First Amendment analysis. *Overstreet*, 409 F.3d at 1214 n.18. *But see Sheet Metal II*, 491 F.3d at 436-37 (holding that a mock funeral procession was not a picket line).

tions.[300] This type of analysis would be a complete abandonment of the legislative history of the Act and would put it at odds with the Supreme Court's tight-wire constitutional analysis in *DeBartolo II*.[301]

2. Come On, Who's Afraid of a Balloon Anyway?

Dispelling the attenuated picketing argument does not end the inquiry into the legality of a rat balloon.[302] Should the display be interpreted to be a "coercive" boycott call to customers—though not a picket line—it would still be illegal under § 158(b)(4)(ii)(B).[303] Opponents will claim that the mere presence of a twenty-foot inflatable rat in front of a business is a coercive activity that would create a significant economic hardship on the secondary employer, which would force it to cease doing business with the primary employer.[304]

This argument is most aptly and ironically stated in *NAACP v. Claiborne* when the Court incongruously opined that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking a delicate balance between union freedom of expression and the ability of neutral employers, employees and customers to remain free from *coerced participation in industrial strife*.'"[305] Opponents will certainly make the case, that while the display of the rat is speech, its protection is limited, secondary to the words of Congress and the Court's delineation between protest and labor speech.[306]

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300. *See Sheet Metal II*, 491 F.3d at 436-37; *Overstreet*, 409 F.3d at 1214.

301. When an activity raises serious constitutional issues, the Court will assume that the activity is legal unless there is a clear intent from Congress to proscribe such activity. *DeBartolo II*, 485 U.S. at 575.

302. *Sheet Metal II*, 491 F.3d at 438-39. Once the D.C. Circuit dispelled the assertion that the mock funeral was picketing, it still needed to analyze whether the speech was so coercive as to trigger a § 158(b)(4)(ii)(B) violation. *Id.*

303. 29 U.S.C. § 158(b)(4)(ii)(B) (2000).

304. The Regional Director of the NLRB applied this type of coerciveness argument to the hand-held banners in *Overstreet*. The argument was disposed with because of the obvious First Amendment implications. *Overstreet*, 409 F.3d at 1214.

305. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (emphasis added) (quoting NLRB v. Retail Store Employees, Local 1001, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring in part)). The irony is that *Claiborne* held that picketing to protest Civil Rights violations was clearly a right guaranteed by the First Amendment even if it produced a tortious interference with business. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances" and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1290 (2005).

306. A similar argument was raised by the NLRB in the *Sheet Metal II*. The Board creatively asserted that *Claiborne*, while upholding secondary picketing, and

This argument misses the mark on two main points: First, when defining "coercion" in contexts such as these, it "must be understood in a manner consistent with the First Amendment."[307] As stated previously,[308] the D.C. Circuit recently held that a mock funeral in front of a *hospital* (the secondary employer) to articulate a labor dispute did not rise to the level of being so coercive as to proscribe the speech.[309] The court analogized the union's labor protest to the abortion protest cases in which the Supreme Court held that proscribing the protests (despite the use of offensive language and bullhorns) would jeopardize the protester's First Amendment rights.[310] Given recent rebukes by two different circuits to the Board's legal reasoning concerning bannering and street theater, one would be hard pressed to assert that the presence of a rat balloon would rise to the level of coerciveness—at least under the analyses of the Ninth and D.C. Circuits.[311] In short, the D.C. Circuit correctly holds that, in order to suppress labor speech as being coercive, coerciveness *must be defined* within the parameters of First Amendment jurisprudence.[312]

The second problem with analogizing to *Claiborne*—as the Board did in *Sheet Metal I*—is that the Court never answers the question of how to define coercion and goes on to state:

> While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. *This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values."*[313]

In the scenario being examined in this Note, a union is waging an informational campaign that appeals to customers to boycott the secondary employer based on the persuasiveness of its message

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boycotts in the civil rights arena, prohibited the practice in the labor context. *See Sheet Metal II*, 491 F.3d at 436-37.

307. *Id.* at 439.

308. *See supra* Part I.D.2.

309. *Sheet Metal II*, 491 F.3d at 439 (citing Hill v. Colorado, 530 U.S. 703, 716 (2000)); *see* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 758 (1994).

310. *See Sheet Metal II*, 491 F.3d at 439 (citing *Hill*, 530 U.S. at 716); *see Madsen*, 512 U.S. at 758.

311. *See Sheet Metal II*, 491 F.3d at 439; Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1219 (9th Cir. 2005).

312. *Sheet Metal II*, 491 F.3d at 439.

313. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (emphasis added) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

(that a labor dispute is present).[314] The message being disseminated is quite political in nature. It raises serious social issues and allows for a purely democratic response. There are no physical barriers, no blocked doorways—just the force of an idea. While the economic effects of the speech may be substantial, it is the result of the persuasiveness of an idea, not some coercive barrier erected by the union.[315] The symbol of the rat supplements and accentuates the idea, giving it life, and producing the visceral response all great writers and orators hope to evoke from audiences to their work. The reaction to the speech is, therefore, a conscious choice for the hearer. If the customers do not want to accept the message as they patronize the secondary business, they can just look away.[316]

Within this apparent tension lies the rub. As Professor Kohler pointed out, this is why the constitutional avoidance doctrine articulated in *Catholic Bishop* was used in *DeBartolo II*.[317] Rather than affirmatively settle the issue and admit the incongruence between the less protected labor speech versus other political speech (thus effectively challenging the legitimacy of the Act), the *DeBartolo II* Court chose the doctrinal path of least resistance.[318]

In sum, whether it is time for the Court to finally address this issue head on or once again choose to interpret the statute as not prohibiting the display is obviously for the Court to decide. However, the display of the rat balloon is legal from a statutory as well as a constitutional perspective. Much like handbilling and bannering, it relies on the persuasiveness of its idea, not the coerciveness of the conduct.[319] The displays alone—like banners—are stationary and are representative of the ideas of the union. The emotive impact of those ideas has already been proven not to be a dispositive

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314. *See supra* Introduction.

315. *See generally Sheet Metal II*, 491 F.3d at 439-40 (holding that the ambulatory patrol of labor protesters did not create a symbolic barrier); Rakoczy, *supra* note 173, at 1649-50 (positing that picketing should be judged using a coercive standard, rather than the current archaic standard).

316. Erzoznick v. City of Jacksonville, 422 U.S. 205, 211 (1975); Cohen v. California, 403 U.S. 15, 21 (1971); *Overstreet*, 409 F.3d at 1214-20.

317. Kohler, *supra* note 58, at 170 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council (*DeBartolo II*), 485 U.S. 568, 575-76 (1988)). It is important to note that recent decisions by the Ninth and D.C. Circuits have also followed the logic of *Catholic Bishop* to avoid serious constitutional questions in the realm of labor speech. *See Sheet Metal II*, 491 F.3d at 437, 439; *Overstreet*, 409 F. 3d at 1209-20.

318. Kohler, *supra* note 58, at 170 (citing *DeBartolo II*, 485 U.S. at 575-76).

319. *See supra* Part I.E.1 (discussing *DeBartolo II*); *see also Sheet Metal II*, 491 F.3d at 437-39; *Overstreet*, 409 F.3d 1214.

factor in the suppression of First Amendment rights.[320] Suppression of those rights would raise serious constitutional issues.[321]

D. *Proscribing the Display of the Rat Would Be Contrary to the Purposes and Policy Behind the Inception of the NLRA*

The impetus of the NLRA was to provide industrial peace and bring a semblance of equality to the American workforce.[322] This was achieved by legalizing organized representation and collective bargaining for the outgunned workers.[323] "[T]he growth of industrial empires" has rendered "the bargaining power of the individual worker . . . illusory." Thus, Congress found it is necessary to level the playing field.[324] As Professor Modjeska pointed out, "The use of economic weapons, force and pressure are essential ingredients of the free collective bargaining process recognized by our society and its labor policy. Much blood was shed by labor and management over the establishment of the forgoing principles."[325] To strip an already outnumbered and outgunned minority of a vital economic tool because of a dormant constitutional interpretation is reprehensible, and it only furthers a disparate divide of economic power.[326]

As previously mentioned, organized labor currently appears at its nadir since the codification of the NLRA.[327] Union membership

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320. *See supra* Part II.A.

321. Finally, opponents of the display could argue that the speech is fraudulent because it gives the false impression of a rodent problem or inaccurately describes the labor dispute, and is thus not deserving of First Amendment protection. As mentioned previously however, the symbol of the rat is universally recognized as one of a labor dispute. Moreover, so long as the union accurately describes the party involved in the labor dispute, the message would not be perceived as fraudulent. *See supra* note 186 and accompanying text.

322. *See* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316-17 (1965).

323. *See supra* Part I.A.; *see also* Modjeska, *supra* note 38, at 1041.

324. Modjeska, *supra* note 38, at 1041. One is hard pressed not to wonder how Professor Modjeska would respond in the present era, given the rise of globalization, record corporate salaries and the technological impact on labor in 2006 as opposed to the 1930s.

325. *Id.* at 1042. It also seems worth noting that Professor Modjeska was one of the NLRB attorneys who argued *Tree Fruits* in front of the Supreme Court. *Id.* at 1005, Biography.

326. *See* Michael C. Harper, *The Consumers Emerging Right to Boycott:* NAACP v. Clairborne Hardware *and Its Implications for American Labor Law*, 93 YALE L.J. 409, 421 (1984) (proposing that the right of "[a]n individual's decision to join a consumer boycott must be protected precisely because it enables the individual to affect the economy, not in spite of such effects"). Harper further posits this right to be as equally a moral right as a legal one. *Id.*

327. *See supra* text accompanying notes 2, 16.

is at its lowest point in the history of organized labor, real wages for the American worker are on the decline, and the current poverty rate for the richest nation in the world is an appalling thirty-seven million people.[328] All the while, corporate profits, salaries, and productivity rise at the expense and sweat of the American worker.[329] Is this what Congress envisioned when it enacted federal labor policy in the form of the NLRA?

In 1984, Professor Modjeska posited that the fictional quality of the primary-secondary distinction "where the ostensibly neutral employer sells and profits from the sales of the struck product there is again a strong feeling, if not a principle that supports the proposition that the neutral is not in fact wholly uninvolved but has become a party *pro tanto*."[330] To limit a union's speech based on a fictional distinction would seriously undermine one of our nation's long-standing labor policies of aiding the American worker in the "socioeconomic struggle."[331] This proposition is especially true given the multi-facility of enterprises, and globalization of our current economic markets. Did Congress intend to allow "secondary" employers to exploit the American worker by hiring businesses that do not provide a living wage, health benefits, or do shoddy workmanship while giving the complicit, once-removed employer a shield from economic pressure under § 158(b)(4)(ii)(B)?[332]

Such a policy is contrary to the spirit of the Act and should not be allowed to continue. At a time of disparate economic power between workers and corporations, unions should have the right to freely voice concerns and disseminate information concerning a labor dispute. As Justice Murphy stated in *Thornhill v. Alabama*, "[I]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Consti-

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328. *See* U.S. CENSUS BUREAU, POVERTY: 2006 HIGHLIGHTS, http://www.census.gov/hhes/www/poverty/poverty06/pov06hi.html (last visited Mar. 19, 2008).

329. ANDERSON ET AL., *supra* note 271, at 5 (detailing the disparity between corporate salaries and American workers).

330. Modjeska, *supra* note 38, at 1047. Professor Modjeska's comments appear significantly prophetic given the advance of globalization, free trade, and the ability for employers to ship business to poorer counties where the labor costs are substantially less than in the United States.

331. *Id.*; *see* Harper, *supra* note 326, at 420-21.

332. With the advance of globalization, the primary-secondary distinction seems to have become a legal fiction. However, that is different argument, slated for a different day.

tution. . . . The health of the present generation and of those yet unborn may depend on these matters . . . ."[333]

To allow current labor law to remain ossified in the wake of drastic and global economic inequity, only reinforces the absence of justice and human rights within the American workforce.[334] Surrounded by a global economy it's easy to imagine and compare American workers to the overmatched island state of Melos, while the current corporate power structure assumes its position like that of the Athenian Army,[335] which consumes and exploits the disparity of power between itself and workers for furtherance of its own ends. This inequality in economic power should not mandate unions and workers to grant even more of an advantage to the fictional "neutral" business by disallowing the dissemination of information of a labor dispute. Such a policy serves only to further an outdated, inflexible labor Act and perpetuates the ever-expanding imbalance between corporations and the people who work for them.

CONCLUSION

Based on the foregoing principles, the prohibition of the display of the rat at a secondary employer to disseminate the information of a labor dispute contravenes the purpose and history of what the NLRA—at its roots—stands for.[336] Allowing (and aiding) the disparity between business and labor to grow, only increases the likelihood that the state of labor relations could eventually regress to a point of economic instability, or at the very least significant disruption of the commercial flow of the United States. Moreover, there is a moral question that should guide the current labor jurisprudence and policy. As Plutarch espoused, "an imbalance between rich and poor is the oldest and most fatal ailment of all republics."[337] Therefore, to take away the few economic tools the worker has left, defeats the vision of the Act and sends society

333. Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940).

334. Interrelating the concept that labor rights are inexorably connected with human rights. Further, "[v]iolation of those rights deny a person's humanity." James A. Gross, A Logical Extreme: Proposing Human Rights as the Foundation for Workers' Rights in the United States, *in* JUSTICE ON THE JOB, *supra* note 20, at 21, 23; Fraser, *supra* note 2, at 6-8; Harper, *supra* note 326, at 420-21.

335. THUCYDIDES, *supra* note 1, at 294-306.

336. Block et al., *supra* note 20, at 1-3.

337. Robert H. Frank, *The Spread Between the Rich and the Rest Has Been Growing for Decades. Current Policies Will Only Make It Worse*, PHILA. INQUIRER, Nov. 27, 2005, at C01 (quoting Plutarch).

closer to an apparition of justice where the strong do what they can and the weak grant what they must—despite the social, political, and moral consequences.[338]

Richard J. Padykula *

338. THUCYDIDES, *supra* note 1, at 294-306; *see also* PLATO, THE REPUBLIC (R.E. Allen trans., 2006). In *The Republic*, Plato marked the justice debate between Socrates and Thrasymachus. Thrasymachus contended that justice is an amorphous social illusion. Since the Gods did not enforce any sense of justice in their world—justice must then be defined as the advantage of the stronger. *Id.* at 21. This is why laws primarily advance the position of those in power. Therefore, injustice is "stronger and more free and more masterful than justice." *Id.* at 22. Socrates countered with a position stating that justice (i.e., fairness and morality) is an important moral and noble social good that is essential for the betterment of society and the laws it produces. *Id.* at 23. This Note asserts that unless society recoils from the current brand of Thrasymachus-like injustice, our moral and socioeconomic stability will be in jeopardy—similar to those dark days prior to the Wagner Act.

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