No. 20-1111

In the Supreme Court of the United States

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 229, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that Section 8(b)(4)(i)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(i)(B), does not violate the First Amendment as applied to petitioner's inducement or encouragement of employees of a subcontractor on a construction project to stop working, where an object of such inducement or encouragement was to force the subcontractor and the general contractor to cease doing business with another subcontractor, with which petitioner had a labor dispute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29a-39a) is reported at 941 F.3d 902. The decision and order of the National Labor Relations Board (Pet. App. 41a-43a) and the decision of the administrative law judge (Pet. App. 44a-59a) are reported at 365 N.L.R.B. No. 126.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2019. A petition for rehearing was denied on September 11, 2020 (Pet. App. 1a-28a). The petition for a writ of certiorari was filed on February 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1935, Congress enacted the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449, "to eliminate the causes of certain substantial obstructions to the free flow of commerce," § 1, 49 Stat. 449. The original statute sought to accomplish that goal by prohibiting certain "unfair labor practice[s]" by employers. § 8, 49 Stat. 452. But in the ensuing decade, Congress found that "certain practices by some labor organizations, their officers, and members" likewise had "the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest." Labor Management Relations Act (Taft-Hartley Act), 1947, ch. 120, sec. 101, § 1, 61 Stat. 137.

In 1947, Congress amended Section 8 of the NLRA to prohibit certain practices by labor organizations. Taft-Hartley Act, sec. 101, § 8(b), 61 Stat. 141. In its current form, Section 8(b)(4)(i)(B) provides that "[i]t shall be an unfair labor practice for a labor organization or its agents":

> 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 * * * , where * * * an object thereof is—
>
> * * *
>
> (B) forcing or requiring any person * * * to cease doing business with any other person * * * .

29 U.S.C. 158(b)(4)(i)(B).

Section 8(b)(4)(i)(B) does not prohibit so-called "primary" activity, 29 U.S.C. 158(b)(4)(i)(B)—such as "when a union pickets an employer with whom it has a dispute," *Local 761, Int'l Union of Elec., Radio & Mach. Workers* v. *NLRB*, 366 U.S. 667, 673 (1961) (citation omitted). Rather, what Section 8(b)(4)(i)(B) prohibits is certain "'secondary'" activity—activity "whose '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.'" *Id.* at 672 (citations omitted); see *NLRB* v. *Local 825, Int'l Union of Operating Eng'rs*, 400 U.S. 297, 302 (1971) ("Congressional concern over the involvement of third parties in labor disputes not their own prompted § 8(b)(4)(B)."). Under Section 8(b)(4)(i)(B), a union that has a dispute with employer *A* may not "engage in * * * a strike" against a neutral employer, employer *B*, with the "object" of "forcing or requiring" employer *B* "to cease doing business with" employer *A*. 29 U.S.C. 158(b)(4)(i)(B). Nor, with the same "object" of forcing employer *B* to cease doing business with employer *A*, may such a union "induce or encourage any individual employed by" employer *B* to refuse to work. *Ibid.*

Congress recognized that unions' "use of [such] economic pressure" could impose a heavy burden on neutral parties and impair the flow of commerce. *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 687 (1951); see *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 223 (1982) (explaining that "the secondary boycott provisions were designed to prevent" the imposition of "a heavy burden on neutral employers" and the "widening of industrial strife"); *Local 1976, United Bhd. of Carpenters & Joiners of Am.*

v. *NLRB*, 357 U.S. 93, 100 (1958) (explaining that Congress "aimed to restrict the area of industrial conflict * * * by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen [industrial] conflict: the coercion of neutral employers"). By deeming such activity an unfair labor practice, Congress sought to protect "neutral employers and employees from the labor disputes of others," *International Longshoremen's Ass'n*, 456 U.S. at 223 n.20, and, in so doing, limit "the scope of industrial conflict and the economic effects of the primary dispute," *Local 1976*, 357 U.S. at 106.

2. McCarthy Building Companies, Inc., was the general contractor for the construction of a parking structure at the Pechanga Resort & Casino in Temecula, California, in 2016. Pet. App. 44a. McCarthy subcontracted with Commercial Metals Company (CMC) to do rebar work, and with Western Concrete Pumping, Inc. (WCP) to do concrete work, for the construction project. *Ibid.*

Petitioner is a labor organization. Pet. App. 44a. During construction of the parking structure, petitioner and another labor organization, Operating Engineers Local 12 (Local 12), had a labor dispute with WCP. *Ibid.* Petitioner and Local 12 claimed that WCP was not paying its workers prevailing area standards on the site. *Id.* at 45a. Beginning in August 2016, Local 12 picketed the site with signs stating, "Not Paying Area Standard Wages—Western Pumping." *Ibid.* It is uncontested that Local 12's picketing, which was directed solely at WCP, was lawful. *Id.* at 45a-46a.

Around that same time, petitioner's business agent "sought to have employees of CMC leave the job to apply pressure to WCP to pay prevailing area standards." Pet. 3. Petitioner's agent sent CMC's employees a text

message that contained the words "FRIENDS DON'T LET FRIENDS CROSS PICKET LINES," Pet. App. 46a, and a link to a webpage about "Picket Line Etiquette," *id.* at 32a. In addition, petitioner's agent visited the construction site, where he "talked with" CMC's employees and "encouraged them to support [petitioner's] dispute with WCP by not working for CMC." *Id.* at 47a. He also placed flyers in the lunch boxes of CMC's employees stating, "Labor's first commandment: 'THOU SHALL NOT CROSS THE LINE.'" *Ibid.*; see *id.* at 47a-48a. And he called CMC's employees on the phone, urging them not to perform work for CMC. *Id.* at 46a-47a.

3. In September 2016, CMC filed a charge with the National Labor Relations Board (Board), alleging that petitioner had engaged in an unfair labor practice in violation of Section 8(b)(4)(i)(B). C.A. E.R. 20. In particular, CMC alleged that petitioner had induced or encouraged CMC's employees to refuse to work, "with the object of forcing [CMC] and others to cease doing business with third parties at the Pechanga jobsite." *Ibid.*

The Board served on petitioner a complaint and a notice of hearing. C.A. E.R. 22-31; see 29 U.S.C. 160(b). The parties then stipulated that petitioner, by its agent, had "induce[d] or encourage[d]" CMC's employees "to strike or refuse to perform work for [CMC] at the Pechanga jobsite, in support of Local 12's [and petitioner's] labor dispute with [WCP]." C.A. E.R. 16; see *id.* at 15-16.

Based on that stipulation, an administrative law judge (ALJ) found that petitioner had violated Section 8(b)(4)(i)(B) of the NLRA. Pet. App. 51a-52a, 58a. The ALJ rejected petitioner's contention that the NLRA is unconstitutional as applied to petitioner's conduct. *Id.* at 52a-54a. The ALJ explained that this Court's decision

in *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951) (*IBEW*), foreclosed petitioner's argument that application of the NLRA to its secondary activities violates the Free Speech Clause of the First Amendment. Pet. App. 53a-54a. And the ALJ found "no evidence of involuntary servitude" to support petitioner's argument that "application of the [NLRA] to prohibit efforts to induce or encourage workers to leave their work violates the Thirteenth Amendment." *Id.* at 54a.

The Board affirmed the ALJ's "rulings, findings, and conclusions," Pet. App. 41a (footnote omitted), and ordered petitioner to "[c]ease and desist" from engaging in unlawful secondary activity, *id.* at 42a. In particular, the Board ordered petitioner to "[c]ease and desist" from "inducing or encouraging" any of CMC's employees "to engage in a strike or a refusal to perform work in the course of employment, where an object is to force or require CMC, McCarthy Building Companies, Inc., or any other person to cease doing business with [WCP]." *Id.* at 42a.

4. The court of appeals granted the Board's application for enforcement of its order. Pet. App. 29a-40a; see 29 U.S.C. 160(e). Like the Board, the court rejected petitioner's contention that "application of the [NLRA] to its conduct punished expressive activity protected by the First Amendment." Pet. App. 34a. The court explained that this Court in *IBEW* had held that Section 8(b)(4)'s prohibition on "secondary boycotts" "'carries no unconstitutional abridgement of free speech.'" *Id.* at 35a (quoting *IBEW*, 341 U.S. at 705). And the court of appeals observed that, since *IBEW*, the D.C. and Second Circuits had rejected First Amendment challenges similar to petitioner's. *Id.* at 35a-36a (citing *Warshawsky*

& Co. v. *NLRB*, 182 F.3d 948, 952 (D.C. Cir. 1999), cert. denied, 529 U.S. 1003 (2000), and *NLRB* v. *Local Union No. 3, Int'l Bhd. of Elec. Workers*, 477 F.2d 260, 266 (2d Cir.), cert. denied, 414 U.S. 1065 (1973)). The court of appeals found "no changes to First Amendment jurisprudence in the interim that warrant divergence from [this] Court's analysis in *IBEW* or the interpretation of *IBEW* in the decisions from the District of Columbia and Second Circuits." *Id.* at 36a.

5. The court of appeals denied rehearing en banc. Pet. App. 1a-28a. Judge Berzon, joined by five other judges, dissented. *Id.* at 4a-24a. In Judge Berzon's view, this Court's holding in *IBEW* "was limited to picketing," *id.* at 11a, and should not be "extend[ed] * * * to uphold against First Amendment challenge applications of Section 8(b)(4)(i)(B) to pure speech," *id.* at 12a, particularly in light of what Judge Berzon regarded as "seismic changes in First Amendment jurisprudence since *IBEW* was decided," *id.* at 13a. Judge Bumatay also dissented, arguing that "*IBEW*'s reach is * * * limited to picketing." *Id.* at 26a.

ARGUMENT

Petitioner contends (Pet. 4-22) that the court of appeals erred in determining that Section 8(b)(4)(i)(B) of the NLRA does not violate the First Amendment as applied to petitioner's secondary activity in this case. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. This Court has previously denied a petition for a writ of certiorari raising a similar issue, see *Ironworkers Local 386* v. *Warshawsky & Co*, 529 U.S. 1003 (2000) (No. 99-922), and the same result is warranted here.

1. The court of appeals correctly determined that Section 8(b)(4)(i)(B) of the NLRA does not violate the

First Amendment as applied to petitioner's inducement or encouragement of CMC's employees to stop working, where an object of such inducement or encouragement was to force CMC or McCarthy to cease doing business with WCP. Pet. App. 34a-37a.

a. In *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951) (*IBEW*), this Court rejected a First Amendment challenge to Section 8(b)(4)'s restriction on secondary activity. *Id.* at 705. *IBEW* involved a labor union that had a labor dispute with a subcontractor doing electrical work on a construction project. *Id.* at 696. An agent of the union visited the construction site on two occasions. *Id.* at 696-697. During the first visit, the agent spoke with one or more employees of another subcontractor (hired to do carpentry work) and stated that "the electrical work on the job was being done by nonunion men." *Id.* at 697. During the second visit, the agent "repeated the statement and proceeded to picket the premises himself, carrying a placard which read 'This job is unfair to organized labor.'" *Ibid.* The carpentry subcontractor and his employees "thereupon stopped work and left the project." *Ibid.* The union's agent also "telephoned" the general contractor, "saying that [the electrical subcontractor] was 'unfair' and that [the general contractor] would have to replace [the electrical subcontractor] with a union contractor in order to complete the job." *Ibid.*

The Court in *IBEW* first held that the union and its agent had committed an unfair labor practice, in violation of an earlier, though substantively similar, version of Section 8(b)(4) of the NLRA. 341 U.S. at 695-696.[1]

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[1] At the time of this Court's decision in *IBEW*, Section 8(b)(4) provided that "[i]t shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage

The Court explained that "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Id.* at 701-702. And the Court found "no indication that Congress thought that the kind of picketing and related conduct which was used in [*IBEW*] to induce or encourage a strike for an unlawful object was any less objectionable than engaging directly in that strike." *Id.* at 704. The Court therefore rejected the contention that the secondary activity of the union and its agent were immunized by Section 8(c) of the NLRA, which provides that certain "expressi[ons] of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice," 29 U.S.C. 158(c). See *IBEW*, 341 U.S. at 704-705. Emphasizing that the purpose of Section 8(c) "is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object," the Court declined to "extend[] [Section 8(c)'s] protection to speech or picketing in furtherance of unfair labor practices as are defined in § 8(b)(4)." *Id.* at 704.

The Court then held that Section 8(b)(4)'s "prohibition of inducement or encouragement of secondary pressure * * * carries no unconstitutional abridgement of free speech." *IBEW*, 341 U.S. at 705. The Court acknowledged that "[t]he inducement or encouragement in [*IBEW*] took the form of picketing followed by a telephone call emphasizing its purpose." *Ibid.* But

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the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment * * * to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person." 29 U.S.C. 158(b)(4) (Supp. III 1949); see *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 677 n.1 (1951); *IBEW*, 341 U.S. at 696 n.1.

the Court noted that the constitutionality of Section 8(b)(4) "ha[d] been sustained by several Courts of Appeals." *Ibid.* And the Court emphasized that "[t]he substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott." *Ibid.* Citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949), and other decisions, the Court explained that it "recently ha[d] recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives." *IBEW*, 341 U.S. at 705; see *id.* at 705 n.10.

In *Giboney*, for example, the Court had upheld "the constitutional power of a state to apply its anti-trade-restraint law to labor union activities," 336 U.S. at 491 (footnote omitted), and had rejected the contention that an injunction against those activities was "an unconstitutional abridgement of free speech," *id.* at 497. The Court explained that "all of [the union's] activities" in *Giboney*—which included not just the "formation of a picket line," but also the "publicizing" of "truthful facts about a labor dispute"—"constituted a single and integrated course of conduct, which was in violation of [the State's] valid law." *Id.* at 498; see *id.* at 502 (declining to "separat[e]" the "publication" of truthful facts about the labor dispute from the rest of the union's conduct). And though the union's "course of conduct" was "brought about through speaking and writing," the Court explained that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502. "Such an expansive interpretation of the constitutional guaranties of speech and press," the Court rea-

soned, "would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." *Ibid.*; see *id.* at 503 (explaining that the union was "doing more than exercising a right of free speech or press" because it was "exercising [its] economic power together with that of [its] allies to compel [a business] to abide by union rather than by state regulation of trade").

Having rejected similar First Amendment challenges in *Giboney* and other cases, the Court found "no reason" to reach a different outcome in *IBEW*. 341 U.S. at 705. And as the court of appeals in this case recognized, *IBEW* forecloses petitioner's First Amendment challenge here. Pet. App. 35a-37a. Like the union in *IBEW*, see 341 U.S. at 696-697, petitioner engaged in a single and integrated course of conduct, with the object of using economic pressure to widen a labor dispute that petitioner had with an employer. See Pet. App. 45a-48a; Pet. 3 (acknowledging that "a business agent of [petitioner] sought to have employees of CMC leave the job to apply pressure to WCP to pay prevailing area standards"); Pet. 11 (acknowledging that this case concerns "economic action in support of" a "labor dispute over the failure of a different employer to pay area standards"). That course of conduct included visiting the jobsite, speaking with neutral employees, publicizing a message that repeatedly referred to picketing, and making phone calls. See Pet. App. 45a-48a. The Court held in *IBEW*, 341 U.S. at 705 & n.10, that Congress may constitutionally prohibit such conduct, even though "the conduct was in part initiated, evidenced, or carried out by means of language," *Giboney*, 336 U.S. at 502.

b. Petitioner asserts (Pet. 14) that this Court's decision in *IBEW* is not controlling here because, in petitioner's view, the Court in *IBEW* "did not address speech but addressed picketing only." That assertion is mistaken.

In deciding the issues before it, the Court in *IBEW* considered the entirety of the union's secondary activities in that case—its "picketing *and* related conduct," 341 U.S. at 704 (emphasis added), which, as the Court's description of the facts made clear, included speaking with neutral employees, publicizing a message, and talking on the phone, *id.* at 697. Thus, in deciding whether Section 8(b)(4)'s "prohibition of inducement or encouragement of secondary pressure" abridges the right of "free speech," the Court noted that "[t]he inducement or encouragement in the instant case took the form of picketing *followed by a telephone call* emphasizing its purpose." *Id.* at 705 (emphasis added); see *id.* at 701-702 ("The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion."). And in deciding whether Section 8(c) immunized the union's activities, the Court concluded that Section 8(c) "serves [its] purpose adequately without extending its protection to *speech or* picketing in furtherance of unfair labor practices such as are defined in § 8(b)(4)." *Id.* at 704 (emphasis added). Petitioner's contention (Pet. 14) that *IBEW* "addressed picketing only" therefore cannot be squared with the language of the decision itself.

Nor can it be squared with the decisions on which the Court in *IBEW* relied. As explained above, see pp. 10-11, *supra*, one of those decisions was *Giboney*, see *IBEW*, 341 U.S. at 705 n.10—which upheld the constitutionality of an injunction as applied not just to the "formation of

a picket line," *Giboney*, 336 U.S. at 498, but also to the "publication" of truthful facts about the labor dispute, *id.* at 502; see *id.* at 498. And in noting that the constitutionality of Section 8(b)(4) "ha[d] been sustained by several Courts of Appeals," *IBEW*, 341 U.S. at 705 & n.9, the Court in *IBEW* cited one decision that involved "no picketing" at all, *NLRB* v. *Wine, Liquor & Distillery Workers Union, Local 1*, 178 F.2d 584, 587 (2d Cir. 1949), and two decisions that involved secondary activities besides picketing—namely, speaking with neutral employees and circulating "we do not patronize" lists, see *NLRB* v. *United Bhd. of Carpenters & Joiners of Am.*, 184 F.2d 60, 62 (10th Cir. 1950), cert. denied, 341 U.S. 947 (1951); *United Bhd. of Carpenters & Joiners of Am.* v. *Sperry*, 170 F.2d 863, 866 (10th Cir. 1948). Thus, neither *IBEW* itself, nor the decisions on which it relied, addressed only picketing.

c. Petitioner also contends that this Court's decision in *IBEW* "is contrary to current First Amendment doctrine" and should be overruled. Pet. 17; see Pet. 5-8, 11-12, 21-22. That contention is incorrect. This Court's decisions since *IBEW* have repeatedly reaffirmed the principles on which *IBEW*'s First Amendment analysis rested. See, *e.g.*, *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 226-227 & n.25 (1982) (reaffirming *IBEW*); *NLRB* v. *Retail Store Emps.*, 447 U.S. 607, 616 (1980) (plurality opinion) (same).

For instance, in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court reaffirmed that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." *Id.* at 912 (citing *United States* v. *O'Brien*, 391 U.S. 367 (1968)). Citing *Giboney*, the Court explained that its precedents "recognized the

strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." *Ibid.* And the Court cited the regulation of "[u]nfair trade practices" as an example, specifically reaffirming that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" *Ibid.* (citation omitted).

Likewise, in *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552 (2011), the Court distinguished "restrictions on protected expression" from "restrictions on economic activity," and reaffirmed that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 567. The Court explained:

> That is why a ban on race-based hiring may require employers to remove "'White Applicants Only'" signs, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006); why "an ordinance against outdoor fires" might forbid "burning a flag," *R. A. V.* [v. *St. Paul*, 505 U.S. 377, 385 (1992)]; and why antitrust laws can prohibit "agreements in restraint of trade," *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Ibid. It is also why the NLRA may prohibit petitioner's "inducement or encouragement of secondary pressure" here. *IBEW*, 341 U.S. at 705.

And just last Term in *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (*AAPC*), a plurality again affirmed that "the First Amendment does not prevent restrictions directed at commerce or

conduct from imposing incidental burdens on speech." *Id.* at 2347 (quoting *Sorrell*, 564 U.S. at 567). The plurality observed that "courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech." *Ibid.* And in characterizing the statute at issue in *AAPC* as a content-based speech restriction, the plurality emphasized that its decision was "not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity." *Ibid.*

Petitioner thus errs in asserting (Pet. 17-18, 21-22) that *IBEW* conflicts with this Court's more recent First Amendment precedents. Those precedents reaffirm that "restrictions on protected expression are distinct from restrictions on economic activity." *Sorrell*, 564 U.S. at 567. And as this Court's decisions make clear, Section 8(b)(4)(i)(B) of the NLRA falls within the latter category. See, *e.g.*, *Claiborne Hardware*, 458 U.S. at 912. It is a "restriction[] directed at commerce or conduct," *Sorrell*, 564 U.S. at 567—namely, a union's "use of economic pressure" to widen the scope of a labor dispute. *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 687 (1951); see *IBEW*, 341 U.S. at 705 ("The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott."). And although such "economic action," Pet. 11, may "in part [be] initiated, evidenced, or carried out by means of language, either spoken, written, or printed," *Giboney*, 336 U.S. at 502, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567; see, *e.g.*, *AAPC*, 140 S. Ct. at 2347 (plurality opinion); *National*

Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2373 (2018); *Claiborne Hardware*, 458 U.S. at 912.

Petitioner's reliance (Pet. 5-7) on this Court's decisions in cases such as *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), *Citizens United* v. *FEC*, 558 U.S. 310 (2010), *R. A. V.* v. *City of St. Paul*, 505 U.S. 377 (1992), and *Boos* v. *Barry*, 485 U.S. 312 (1988), is therefore misplaced. Each of those decisions applied strict scrutiny to a law that "target[s] speech" on the basis of viewpoint, content, or speaker. *Reed*, 576 U.S. at 163; see *id.* at 171 (invalidating "content-based restrictions on speech"); *Citizens United*, 558 U.S. at 365 (invalidating a restriction on "political speech on the basis of the speaker's corporate identity"); *R. A. V.*, 505 U.S. at 381 (invalidating a prohibition on "otherwise permitted speech solely on the basis of the subjects the speech addresses"); *Boos*, 485 U.S. at 321 (invalidating "a content-based restriction on political speech in a public forum") (emphases omitted). None cast doubt on the distinction between such restrictions on speech and the type of restriction at issue here—a "restriction[] directed at commerce or conduct" that burdens speech only "incidental[ly]." *Sorrell*, 564 U.S. at 567.[2]

Petitioner's contention (Pet. 17) that this Court's decision in *IBEW* treats "labor speech * * * differently than any other kind of speech" is likewise incorrect. As noted, Section 8(b)(4)(i)(B) is a "restriction[] directed at commerce or conduct," not speech. *Sorrell*, 564 U.S. at

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[2] Contrary to petitioner's contention (Pet. 5), the court of appeals in this case did not "assume" that Section 8(b)(4)(i)(B) is a "content-based regulation of speech." Rather, in rejecting petitioner's argument that the "application of the statute to its conduct" violates the First Amendment, Pet. App. 34a, the court simply followed this Court's decision in *IBEW*, see *id.* at 35a-37a.

567. And contrary to petitioner's suggestion, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney*, 336 U.S. at 502.

2. The court of appeals' decision in this case does not conflict with any decision of another court of appeals. Indeed, petitioner acknowledges (Pet. 20) that "there is no explicit circuit split on the application of strict scrutiny to 29 U.S.C. 158(b)(4)(i)(B)." And every court of appeals that has confronted a First Amendment challenge similar to the one here has upheld the constitutionality of Section 8(b)(4). See Pet. App. 34a-37a; *Warshawsky & Co.* v. *NLRB*, 182 F.3d 948, 952 (D.C. Cir. 1999), cert. denied, 529 U.S. 1003 (2000); *NLRB* v. *Local Union No. 3, Int'l Bhd. of Elec. Workers*, 477 F.2d 260, 266 (2d Cir.), cert. denied, 414 U.S. 1065 (1973); *United Bhd. of Carpenters & Joiners of Am.*, 184 F.2d at 62 (10th Cir.); *NLRB* v. *Local 74, United Bhd. of Carpenters & Joiners of Am.*, 181 F.2d 126, 132 (6th Cir. 1950), aff'd, 341 U.S. 707 (1951); see *IBEW*, 341 U.S. at 705 n.9 (citing circuit decisions upholding the constitutionality of Section 8(b)(4)).[3]

Petitioner nevertheless contends (Pet. 13-14) that the decision below conflicts with other circuit decisions that

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[3] To the extent that petitioner suggests (Pet. 18) that the Board's orders in *Warshawsky* and other cases constitute "invalid prior restraints on speech," that suggestion is mistaken. When the Board orders a union to cease and desist from engaging in an unfair labor practice under Section 8(b)(4)(i)(B), such an order is based on the union's "prior unlawful conduct" and therefore is not an unlawful prior restraint on speech. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n.2 (1994).

have applied "strict scrutiny" to "content-based regulation." As explained above, however, Section 8(b)(4)(i)(B) is not a "content-based speech restriction[]." *AAPC*, 140 S. Ct. at 2347 (plurality opinion). Rather, it is a form of "traditional or ordinary economic regulation." *Ibid.* Moreover, to the extent that petitioner asserts (Pet. 13-14) that the decision below conflicts with other decisions of the Ninth Circuit, such an intracircuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner also contends (Pet. 21) that the decision below conflicts with other circuit decisions that petitioner describes as having applied "heightened or strict scrutiny" in cases involving "labor speech." That contention is incorrect. Two of the decisions petitioner cites held only that certain conduct was not—or was likely not—an unfair labor practice under a provision of the NLRA that is not at issue here, 29 U.S.C. 158(b)(4)(ii)(B). See *Sheet Metal Workers' Int'l Ass'n, Local 15* v. *NLRB*, 491 F.3d 429, 434-439 (D.C. Cir. 2007); *Overstreet* v. *United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1208-1216 (9th Cir. 2005). Two other decisions arose in the distinct context of limitations on expressive activity in a traditional public forum, see *Tucker* v. *City of Fairfield*, 398 F.3d 457, 463-464 (6th Cir.), cert. denied, 546 U.S. 929 (2005), or in a non-public forum, see *Eagle Point Educ. Ass'n/SOBC/OEA* v. *Jackson County Sch. Dist. No. 9*, 880 F.3d 1097, 1105-1107 (9th Cir. 2018). One of the opinions that petitioner cites is not a majority opinion. See *Construction & Gen. Laborers' Local Union No. 330* v. *Town of Grand Chute*, 834 F.3d 745, 750-760 (7th Cir. 2016)

(Posner, J., concurring and dissenting). And two are decisions of the Ninth Circuit, see *Eagle Point*, 880 F.3d at 1105-1107; *Overstreet*, 409 F.3d at 1208-1216, which, as explained above, cannot be the basis of any conflict that would warrant this Court's review, see *Wisniewski*, 353 U.S. at 902.[4]

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[4] Petitioner notes (Pet. 19-20) the existence of pending proceedings before the Board in *International Union of Operating Engineers, Local Union No. 150*, No. 25-CC-228342 (filed Oct. 1, 2018). Among the issues in those proceedings are (1) whether a union's "stationary display of a 12-foot inflatable rat and two large banners on public property located near the entrance of an RV trade show, a neutral site," violated Section 8(b)(4)(i)(B); and (2) whether a determination that the conduct violated the NLRA would "result in a violation of the [union's] rights under the First Amendment." *International Union of Operating Eng'rs, Local Union No. 150*, 370 N.L.R.B. No. 40, 2020 WL 6361931, at *1-*2 (Oct. 27, 2020). Petitioner anticipates that the Board's decision in those proceedings will "ignore the First Amendment." Pet. 19 (emphasis omitted; capitalization altered). But the Board has not issued any decision. And following the change in Administration, the Board's Acting General Counsel moved to withdraw the underlying complaint in those proceedings on the view that the union's conduct did not violate the NLRA. See NLRB Acting General Counsel's Mot. to Remand the Compl. to the Regional Director for Dismissal or, Alternatively, to Dismiss the Compl., *International Union of Operating Eng'rs, Local Union No. 150*, No. 25-CC-228342 (Feb. 2, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458336f12f.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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