No. 16-932

In the Supreme Court of the United States

TEAMSTERS UNION LOCAL NO. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, 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 RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), implicitly overruled this Court's precedent upholding the constitutionality of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(ii)(B), as applied to prohibit certain labor picketing activity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 668 Fed. Appx. 283. Earlier decisions of the court of appeals in these consolidated cases (Pet. App. 7a-9a, 11a-14a, 15a-19a, 21a) are not published. The order of the National Labor Relations Board in one of the underlying cases (Pet. App. 23a-52a) is reported at 261 N.L.R.B. 496.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. A petition for rehearing was denied on October 26, 2016 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on January 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1947, the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, has restricted labor unions in their use of a tactic "known as the secondary boycott," in which the union engages in activity "whose sanctions bear, not upon the employer" with whom the union has a labor dispute, "but upon some third party who has no concern in it." *Local 761, Int'l Union of Elec., Radio & Mach. Workers* v. *NLRB*, 366 U.S. 667, 672 (1961) (citation and internal quotation marks omitted). The scope of the Act's restrictions on a union's ability to disrupt the commerce of neutral parties in furtherance of its own labor-relations goals reflects "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." *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951). The resulting restrictions encompass certain types of labor picketing—*e.g.*, "consumer picketing urging a general boycott of a secondary employer aimed at causing him to sever relations with the union's real antagonist," which Congress viewed to be impermissibly "coercive." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 579 (1988). This Court has "consistently rejected the claim that secondary picketing by labor unions in violation of the [NLRA] is protected activity under the First Amendment." *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982).

a. The Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 140-141, provided that "[i]t

shall be an unfair labor practice" under the NLRA "for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is * * * forcing or requiring any employer or self-employed person to join any labor or employer organization * * * to cease doing business with any other person." In *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951), this Court upheld the constitutionality of that prohibition as applied to "peaceful picketing" that "induced employees of a subcontractor on a construction project to engage in a strike in the course of their employment, where an object of such inducement was to force the general contractor to terminate its contract with another subcontractor." *Id.* at 696; see *id.* at 705. The Court explained that the "substantive evil condemned by Congress in [the prohibition] is the secondary boycott"; observed that prior decisions "ha[d] recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives"; and determined that the NLRA's proscription similarly "carrie[d] no unconstitutional abridgement of free speech." *Id.* at 705.

b. The current version of the NLRA, as amended in relevant part in 1959, provides in 29 U.S.C. 158(b)(4)(ii)(B) that "[i]t shall be an unfair labor practice for a labor organization or its agents * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufactur-

er, or to cease doing business with any other person." See Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 704, 73 Stat 542-543. The Act specifies that "nothing contained in [Section 158(b)(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, 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).

In *NLRB* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (*Safeco*), this Court upheld the constitutionality of Section 158(b)(4)(ii)(B) as applied to "picketing [that] predictably encourage[d] consumers to boycott a neutral party's business." *Id.* at 609 (plurality opinion); see *id.* at 616 (plurality opinion), *id.* at 616-617 (Blackmun, J., concurring in part and concurring in the result); *id.* at 618 (Stevens, J., concurring in part and concurring in the result). The four-Justice plurality observed that "[s]uch picketing spreads labor discord by coercing a neutral party to join the fray," and it "perceive[d] no reason to depart from" the "well-established understanding" that "a prohibition on 'picketing in furtherance of [such] unlawful objectives' d[oes] not offend the First Amendment." *Id.* at 616 (quoting *Electrical Workers*, 341 U.S. at 705) (first set of brackets in original).

Justice Blackmun concurred in the result on the ground that Congress had struck an acceptable "balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Id.* at 617-618 (Blackmun, J., concurring in part and concurring in the result). And Justice Stevens, emphasizing that "picketing is a mixture of conduct and communication," concurred in the result on the ground that Section 158(b)(4)(ii)(B)'s restrictions "are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute." *Id.* at 619 (Stevens, J., concurring in part and concurring in the result).

2. Petitioner is a labor organization that repeatedly engaged in picketing activity prohibited by Section 158(b)(4)(ii)(B) and has, as a result, been subject to specific orders by the National Labor Relations Board requiring it to cease and desist from engaging in such activity. See Pet. App. 15a-19a, 46a-47a. The first such order was issued in 1970 and is not published. See *id.* at 7a. The second order was issued in 1982. See *id.* at 23a-52a. In that second order, the Board found that petitioner had engaged in picketing that was "tactically calculated to put pressure on neutral employers"—namely, two federal agencies (the Navy and the Defense Logistics Agency)—"to force them to cease doing business" with, or to otherwise become involved in the labor affairs of, a primary employer with whom petitioner had a dispute. *Id.* at 45a (internal quotation marks omitted). The Board required petitioner to "[c]ease and desist from * * * [i]n any manner threatening, coercing, or restraining" any "person engaged in Commerce or in an industry af-

fecting commerce" for secondary-boycotting purposes. *Id.* at 50a-51a.

The 1970 and 1982 orders have been the subject of three judgments by the court of appeals. In 1971, the court entered a judgment enforcing the Board's 1970 order. Pet. App. 7a-9a. The judgment prohibited petitioner from "[t]hreatening, coercing, or restraining by picketing, threats of picketing, or by any other manner or means," any person to "force or require" that person to "cease doing business" with "any other employer or person." *Id.* at 8a. In 1983, the court issued a similar judgment enforcing the Board's 1982 order. *Id.* at 11a-14a. And in 1986, the Ninth Circuit found petitioner to be in contempt of the 1983 judgment and once again entered a judgment requiring petitioner to cease and desist secondary-boycotting activity. *Id.* at 15a-19a.

3. In 2015, nearly 30 years after the final court of appeals judgment, petitioner filed motions seeking modification of all three judgments under Federal Rule of Civil Procedure 60(b). 82-7451 Pet. C.A. Br. 1-2; 71-1092 Pet. C.A. Br. 1-2. Invoking the standard for modifying consent judgments under *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), petitioner asked that the portions of the judgments that prohibited "threatening, coercing, or restraining" persons in violation of Section 158(b)(4)(ii)(B) be excised. 82-7451 Pet. C.A. Br. 1; 71-1092 Pet. C.A. Br. 1. Petitioner contended that this Court's decision in *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), which invalidated a town sign ordinance and did not address picketing, "is a significant change in circumstances that warrants" such revision. Pet. App. 2a.

The court of appeals denied relief in an unpublished opinion, finding that petitioner "ha[d] established no relevant change in law" that would call for revision of the court's previous judgments. Pet. App. 3a; see *id.* at 1a-3a. The court "assume[d], without deciding, that *Reed* changed the Supreme Court's First Amendment jurisprudence in some respects," but determined that "it did not do so in a way that matters here." *Id.* at 2a. The court emphasized that this Court has specifically upheld the NLRA's "prohibition against peaceful secondary picketing" against "a constitutional challenge." *Ibid.* The court of appeals also observed that this Court "has recognized that picketing might have a coercive effect, not entitling it to full First Amendment protection." *Id.* at 2a-3a. The court of appeals determined that because "*Reed*, in result and rationale, does not necessarily undermine these cases," the court was "not free to disregard the Supreme Court's picketing-specific jurisprudence." *Id.* at 3a.

ARGUMENT

Petitioner renews (Pet. 9-28) its contention that *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), implicitly overruled this Court's prior jurisprudence upholding the NLRA's restrictions on secondary boycotting. The court of appeals correctly rejected that contention, and its unpublished decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Longstanding precedents of this Court establish that 29 U.S.C. 158(b)(4)(ii)(B), as applied to picketing with the unlawful object of pressuring a business to take sides in a third-party employer's labor dispute, is consistent with the First Amendment.

a. Section 158(b)(4)(ii)(B) prohibits labor organizations and their agents from, *inter alia*, "threaten[ing], coerc[ing], or restrain[ing] any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is * * * 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." 29 U.S.C. 158(b)(4)(ii)(B). Although petitioner characterizes Section 158(b)(4)(ii)(B) as a "picketing provision" (Pet. i, 3-4), the prohibition is neither limited to nor specifically directed at picketing. It instead broadly proscribes "economic retaliation" with a secondary-boycotting purpose. See, *e.g.*, *Local Union No. 48 of Sheet Metal Workers Int'l Ass'n* v. *Hardy Corp.*, 332 F.2d 682, 685-686 (5th Cir. 1964).

Section 158(b)(4)(ii)(B)'s application does not require that the retaliation take the form of picketing, or even that the retaliation involve an attempt to publicize the union's labor grievances. The provision has been applied, for example, to circumstances in which union members "descended, in droves and in concert, upon a designated retail establishment" in an effort to crowd out legitimate customers, notwithstanding the absence of "any discernible attempt to communicate a defined message to the public" by doing so. *Pye* v. *Teamsters Local Union No. 122*, 61 F.3d 1013, 1017 (1st Cir. 1995) (explaining that union members impeded the store's business by, for example, making small purchases with large bills); see *id.* at 1021-1024. Such activity, when undertaken with the requisite "unlawful object," will "tend[] by its very nature to disrupt normal commercial activity and, thus, to place economic

pressure on a retail establishment to appease the Union by, say, cutting back on dealings with the primary employer," *id.* at 1021-1022, regardless of whether the public even perceives it as union activity.

The statute's application to picketing activity, as a subset of economically disruptive conduct, is similarly independent of any public message that the activity might convey. This Court has long recognized that "while picketing is a mode of communication it is inseparably something more and different." *Hughes* v. *Superior Court*, 339 U.S. 460, 464 (1950). Picketing "involves patrol of a particular locality," and "the very presence of the picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Id.* at 465 (citation and quotation marks omitted). As petitioner acknowledges (Pet. 27), Section 158(b)(4)(ii)(B) accordingly covers activity described as "picketing" even when the picketers do not carry placards. *International Union, United Mine Workers of Am. & Dist. 29*, 304 N.L.R.B. 71, 72 (1991) ("Picket signs or placards, while serving as indicia of picketing, are in no sense essential elements for a finding that picketing occurred."). Crowding the entrance to an establishment with picketers, like crowding the establishment itself with union members, is inherently a deterrent to customers and thus a form of economic pressure, regardless of the existence or content of any public message.

Section 158(b)(4) explicitly disavows regulation of expression as such by providing that "nothing contained in [Section 158(b)(4)] shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including con-

sumers 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," so long as the union is not soliciting an unlawful sympathy strike by the neutral business's employees. 29 U.S.C. 158(b)(4). The Act thus permits, for example, a union to "distribut[e] handbills asking mall customers not to shop at any of the stores in the mall 'until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.'" *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 570 (1988); see *id.* at 588. In the absence of further activity like "picketing, or patrolling," such "mere persuasion" does not "'threaten, coerce, or restrain'" in violation of Section 158(b)(4)(ii)(B). *Id.* at 578 (quoting 29 U.S.C. 158(b)(4)(ii)(B)).

b. This Court has long recognized that picketing "is not beyond the control of [government] if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance." *Hughes*, 339 U.S. at 465-466. The Court has "emphatically reject[ed] the notion * * * 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." *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965). Rather, the "compulsive features inherent in picketing," *Hughes*, 339 U.S. at 468, justify re-

strictions on picketing in particular contexts, notwithstanding its potential expressive component.

In *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949), for example, the Court rejected a First Amendment challenge to an injunction against "peaceful picketing carried on" by a union, where the picketing was "an essential and inseparable part of a course of conduct" that "exercis[ed] * * * economic power" on a business in a manner that violated state antitrust law. *Id.* at 491, 503; see *id.* at 497-504. The Court explained that "[p]icketing by an organized group is more than free speech" and that the noncommunicative "aspects of picketing make it the subject of restrictive regulation." *Id.* at 503 n.6 (citation and quotation marks omitted). The Court emphasized that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control." *Id.* at 502. "[I]t has never been deemed an abridgement of freedom of speech or press," the Court observed, "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." *Ibid.*

c. In accord with its general jurisprudence on picketing, the Court has "consistently rejected the claim that secondary picketing by labor unions in violation of [Section 158(b)(4)] is protected activity under the First Amendment." *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 227 (1982).

In *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951), the Court rejected a First Amendment challenge to Section 158(b)(4)(ii)(B)'s

predecessor. See *id.* at 705. The Court reasoned that the provision's "prohibition of inducement or encouragement of secondary pressure * * * carrie[d] no unconstitutional abridgement of free speech," even as applied to "picketing followed by a telephone call emphasizing its purpose." *Id.* at 705. Citing *Giboney* and other precedents, the Court recognized Congress's authority "to proscribe picketing in furtherance of * * * unlawful objectives" such as the "substantive evil" of "the secondary boycott." *Id.* at 705; see *id.* at 705 n.10 (citing, *inter alia*, *Hughes* and *Giboney*); see also *American Radio Ass'n* v. *Mobile S.S. Ass'n Inc.*, 419 U.S. 215, 228-233 (1974) (rejecting First Amendment challenge to antipicketing injunction entered under state-law analogue of Section 158(b)(4)).

In *NLRB* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980), the Court rejected a First Amendment challenge to the version of Section 158(b)(4)(ii)(B) that remains in effect today, as applied to a secondary labor picket that "encourage[d] consumers to boycott a neutral party's business." *Id.* at 609. The four-Justice plurality opinion relied on the "well-established standard," recognized in *Electrical Workers* and other cases, that a "prohibition on 'picketing in furtherance of * * * unlawful objectives,'" like "spread[ing] labor discord by coercing a neutral party to join the fray," does "not offend the First Amendment." *Id.* at 616 (quoting *Electrical Workers*, 341 U.S. at 705; citing *American Radio Ass'n*, 419 U.S. at 229-231, and *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284 (1957)). Justice Blackmun concurred in the result based on his "reluctan[ce] to hold unconstitutional Congress' striking of the deli-

cate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Id.* at 617-618. And Justice Stevens concurred in the result on the reasoning that the statutory prohibition was geographically limited; "affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea"; and was "sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute." *Id.* at 619. Justice Stevens emphasized that "picketing is a mixture of conduct and communication" and that "[i]n 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." *Ibid.*

In *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, *supra*, the Court viewed Section 158(b)(4)(ii)(B) as raising "serious constitutional questions" only if interpreted to cover expressive activity *other* than picketing. 485 U.S. at 588. In construing the provision not to apply to certain handbilling activity, the Court endorsed Justice Stevens' focus on "the conduct element," rather than the expressive element, of picketing as the reason for regulation in that context. *Id.* at 580 (citing *Safeco*, 447 U.S. at 619 (Stevens, J., concurring in part and concurring in the result)). The Court accordingly distinguished the "loss of customers * * * intimidated by a line of picketers" from the "loss of customers" as "the result of mere persuasion." *Ibid.* The Court explained that handbills "are 'much

less effective than labor picketing' because they 'depend *entirely* on the persuasive force of the idea.'" *Ibid.* (emphasis added) (quoting *Safeco*, 447 U.S. at 619 (Stevens, J., concurring in part and concurring in the result)). "[T]he very purpose of a picket line," in contrast, "is to exert influences, and it produces consequences, different from other modes of communication." *Ibid.* (quoting *Hughes*, 339 U.S. at 465).

2. Petitioner errs in contending (Pet. 10-29) that *Reed* warrants revisiting and overruling this Court's precedents upholding Section 158(b)(4)(ii)(B) and similar picketing restrictions.

a. In *Reed*, this Court held that a town sign ordinance that "identifie[d] various categories of signs based on the type of information they convey," and "subject[ed] each category to different restrictions," imposed "content-based regulations of speech that cannot survive strict scrutiny." 135 S. Ct. at 2224. Petitioner argues (Pet. 12-19) that Section 158(b)(4)(ii)(B), like the sign ordinance in *Reed*, is a content-based restriction on speech that is subject to strict scrutiny and invalid under that standard of review. That argument, however, misunderstands Section 158(b)(4)(ii)(B) and the rationale under which it and similar statutes have been upheld.

Section 158(b)(4)(ii)(B) is a regulation of conduct, not a "content-based regulation[] of speech," *Reed*, 135 S. Ct. at 2224. Like its predecessor, Section 158(b)(4)(ii)(B) "describes and condemns specific union conduct directed to specific objectives." *Local 1976, United Bhd. of Carpenters & Joiners of Am.* v. *NLRB*, 357 U.S. 93, 98 (1958). It prohibits a range of activities through which a union might put economic pressure on a business to take sides in someone else's

labor dispute. See pp. 8-10, *supra*. That prohibition is not aimed at expression; such activities are proscribed whether they have an expressive component (as picketing typically would) or lack an expressive component (as clogging the store with fake customers would). And in the context of picketing, it is the conduct-based intimidation element, not any expressive element, that provides the basis for Section 158(b)(4)(ii)(B)'s application. See *Edward J. DeBartolo Corp.*, 485 U.S. at 580.

The fact that picketing generally involves the use of placards that convey a message does not transform Section 158(b)(4)(ii)(B)'s regulation of picketing conduct into a content-based regulation of speech. See *Giboney*, 336 U.S. at 501. This Court's decisions upholding restrictions on secondary labor picketing reflect the more general principle that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 567 (2011). Even outside the context of picketing, the Court has made clear that a statute—such as an antidiscrimination statute or a hate-crime statute—may prohibit particular conduct undertaken with a particular motive, notwithstanding that the prohibition also affects expression. See, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487-488 (1993). For example, "a ban on race-based hiring," such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, "may require employers to remove 'White Applicants Only' signs." *IMS Health, Inc.*, 564 U.S. at 567 (internal quotation marks and citation omitted). But even though it has that effect, the Court has identified Title VII "as an example of a permissible *content-neutral*

regulation of conduct." *Mitchell*, 508 U.S. at 487 (emphasis added); see *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389-390 (1992).

Section 158(b)(4)(ii)(B), like Title VII, is properly viewed as content-neutral, notwithstanding that its application may be informed by the content of a regulated entity's expression. Just as Title VII may permissibly differentiate between an (unlawful) sign that says "White Applicants Only" and a (lawful) sign that says "Experienced Applicants Only," see *IMS Health*, 564 U.S. at 567, Section 158(b)(4)(ii)(B) may permissibly differentiate between an (unlawful) picket to deter customers from "shopping at the establishment entirely" and a (lawful) picket "to discourage consumers from purchasing one single struck product out of many," Pet. 17, based on the "impact of th[e] picketing," *Edward J. DeBartolo Corp.*, 485 U.S. at 579. As this Court has explained, only the former exerts the sort of economic pressure that the statute condemns. See *Safeco*, 447 U.S. at 614-615; *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 71-73 (1964). As the Court stated in *Giboney* and reiterated earlier this Term, "it has never been deemed an abridgment 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." *Expressions Hair Design* v. *Schneiderman*, No. 15-1391 (Mar. 29, 2017), slip op. 9 (citation omitted); see, *e.g.*, *Mitchell*, 508 U.S. at 489 ("The First Amendment * * * does not prohibit evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

Although potentially relevant to Section 158(b)(4)(ii)(B)'s application, the content of the message conveyed to the public by a union's picketing activity is neither a necessary nor a sufficient condition to establish a violation of that provision. As a threshold matter, the statute prohibits conduct that puts economic pressure on a business to get involved in a labor dispute even if that conduct expresses no message to the public at all. See *Pye*, 61 F.3d at 1021-1024. More fundamentally, the statute's application to picketing is not limited to picketing with a labor-related message. A union picket undertaken for the impermissible purpose of driving away customers until a store supports the union in a dispute with a third party would be unlawful under Section 158(b)(4)(ii)(B) regardless of whether the picketers interfered with the store's business by holding up animal-rights placards ("This Store Hurts Animals") or labor-related placards ("This Store Has A Non-Union Supplier"). Cf. Pet. 5-6. The focus of the inquiry is on the activity (obstructing commerce) and its purpose (embroiling a neutral party in a labor dispute), not the message that the picket projects. Cf., *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 460 (2011) (concluding, on "particular facts before" the Court, that picketing that "did not itself disrupt [a] funeral" was protected from a tort suit by the First Amendment).

Because Section 158(b)(4)(ii)(B) is a conduct regulation aimed at "[t]he substantive evil * * * [of] the secondary boycott," *Electrical Workers*, 341 U.S. at 705, rather than at expression, its limitation to the labor-union context is constitutionally unproblematic. See, *e.g.*, *Mitchell*, 508 U.S. at 487-488 (reasoning that hate-crime statute's focus on "conduct * * * thought

to inflict greater individual and societal harm * * * provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases"); *Hughes*, 339 U.S. at 468 ("A State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.") (citation and internal quotation marks omitted). Contrary to petitioner's suggestion (Pet. 23), the limitation does not evidence an intent to suppress labor-union speech on labor-related topics. A labor union remains free under Section 158(b)(4)(ii)(B) to picket directly against the employer with which it has the primary labor dispute, as well as to publicize that dispute in a manner that does not involve the application of economic pressure (*e.g.*, the lawful distribution of handbills). See *Edward J. DeBartolo Corp.*, 485 U.S. at 587-588; see also *United Bhd. of Carpenters*, 357 U.S. at 98-99.

b. Nothing in *Reed* (or any of the post-*Reed* circuit decisions cited by petitioner, see Pet. 24-25) calls into question this Court's decisions upholding Section 158(b)(4)(ii)(B) and similar picketing restrictions. The ordinance invalidated in *Reed*—which allowed more, larger, or better-located signs on some subjects than on others—drew facially content-based distinctions within a single medium of expression. See 135 S. Ct. at 2224-2225. The Court's decision in *Reed* thus did not address a situation like the one presented in this case, where a law is directed at conduct, encompasses certain picketing activity because of its noncommuni-

cative aspects, and has only an incidental effect on expression.

Petitioner's suggestion that the content-discrimination principles in *Reed* warrant overturning this Court's secondary-picketing precedent is particularly misplaced because those principles predate that precedent. In particular, this Court rejected a First Amendment challenge to Section 158(b)(4)(ii)(B)'s regulation of such picketing notwithstanding its awareness of *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), and *Carey* v. *Brown*, 447 U.S. 455 (1980). See *Safeco*, 447 U.S. at 617 (Blackmun, J., concurring in part and concurring in the result) (citing both cases). In *Mosley*, the Court had invalidated a city ordinance that prohibited all picketing within 150 feet of a school except for peaceful picketing of a school involved in a labor dispute. See 408 U.S. at 92-93. The Court explained that the "central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter," *id.* at 95, and concluded that the ordinance's "discrimination among pickets * * * based on the content of their expression," *id.* at 102, was constitutionally impermissible. Similarly, in *Carey*, the Court had invalidated a "state statute that generally bar[red] picketing of residences or dwellings, but exempt[ed] from its prohibition 'the peaceful picketing of a place of employment involved in a labor dispute.'" 447 U.S. at 457; see *id.* at 471. The Court viewed the statute as creating "content-based distinctions," and found no "compelling" interests that might justify such distinctions. *Id.* at 464-465.

The content-discrimination principles set forth in *Reed* are the same as the ones set forth in *Mosley* and

Carey. See *Reed*, 135 S. Ct. at 2227 (citing both cases). The Court has thus already considered the content-discrimination argument that petitioner presents in this case. Indeed, *Carey* itself specifically explained that "[e]ven peaceful picketing may be prohibited * * * when it is directed at an illegal purpose," and it explicitly reaffirmed the constitutionality of a "prohibition of picketing directed towards achieving [a] 'union shop' in violation of state law." 447 U.S. at 470 (citing *Vogt*, 354 U.S. 284). The Court's decision in *Reed*—which, unlike *Mosley* and *Carey*, does not even concern labor picketing—accordingly cannot be considered a "significant change in law" (Pet. 8) that warrants overruling this Court's precedents and granting relief under Federal Rule of Civil Procedure 60(b).

3. This case, moreover, does not provide a suitable vehicle for revisiting the application of the First Amendment to Section 158(b)(4)(ii)(B). The activities giving rise to the judgments petitioner challenges are more than three decades old. Although petitioner has stated that the judgments continue to chill it from picketing as a general matter, see, *e.g.*, 82-7451 Pet. C.A. Br., Ex. 3, at ¶ 6, it has not identified any specific picketing activity in which it desires to engage. As a result, any further review of this case would be limited to an abstract, purely legal, challenge to Section 158(b)(4)(ii)(B)'s coverage of picketing. See Pet. 11 (stating that the case involves only "legal questions").

Even assuming the question presented warranted review, the Court would be better served by awaiting a fresher case that presents the issue in a concrete factual context. As the Court has recognized, consideration of even purely legal questions (such as facial

challenges) frequently benefits from such presentation. See, *e.g.*, *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 812 (2003); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163 (1967). That is the case here, where the statute at issue regulates picketing only in certain factual contexts —namely, when particular picketing activity involves the application of economic pressure for impermissible secondary-boycotting purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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