UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150

Case No. 25-CC-228342

Respondent,

And

LIPPERT COMPONENTS, INC.

Charging Party

BRIEF OF *AMICI CURIAE*

ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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INTERESTS OF THE *AMICI CURIAE*

The Associated General Contractors of America ("AGC") is a national construction association that works to ensure the continued success of the commercial construction industry by advocating for federal, state, and local measures that support the industry; providing opportunities for member firms to learn about ways to become more accomplished; and connecting them with the resources and individuals they need to be successful businesses and corporate citizens. The AGC is comprised of 89 chartered chapter affiliates. AGC provides its chapters and their members with professional development opportunities, up-to-the-minute information and trends in the industry, and discounts on products, programs, and services. Over 27,000 union and nonunion firms, including more than 7,000 of America's leading general contractors, nearly 9,000 specialty contracting firms, and almost 11,000 services providers and suppliers, belong to the AGC through its nationwide network of chapters.

Most of the employers that are members of the AGC are subject to the National Labor Relations Act (the "Act"). Many of AGC's members interact with organized labor, both directly through organized labor's representation of the member's trade employees and indirectly through organized labor's advertisement of primary disputes with nonunion subcontractors and material suppliers at the members' common situs construction sites.

The questions presented by the Board in the Notice and Invitation to File Briefs are of great importance to the AGC as its members are routinely enmeshed in disputes between organized labor and non-union contractors or suppliers by the display of stationary banners and/or the inflatable rat at common situs construction jobsites. To this end, AGC is responding to questions no. 1, 2, and 4 set forth in the Notice and Invitation to File Briefs.

SUMMARY OF THE ARGUMENT

The Board should overrule its holding in Carpenters Local 1506 (Eliason & Knuth of Arizona), 355 NLRB 797 (2010), and Sheet Metal Workers Local 15 (Brandon Regional Medical Center), 356 NLRB 1290 (2011) that a union's display of a stationary banner or an inflatable rat announcing a labor dispute at a secondary employer's business did not constitute picketing or otherwise coercive non-picketing conduct and should adopt the following definition of picketing: "The advertising of a labor dispute by the posting of individuals at the approach or adjacent to a place of business in a manner that amounts to publicity-plus."

Since the term "picketing" was first incorporated into Sections 8(b)(4) and 8(b)(7) by the Landrum-Griffin Act, the Board's traditional test for picketing required "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." See Lumber and Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965). The Board's definition of picketing followed the term's ordinary dictionary definition. Movement or patrolling by union demonstrators was not a requisite element for picketing to exist or for the picketing to be coercive within the meaning of Section 8(b)(4). The core conduct that made picketing coercive was the posting of union agents at the approach or adjacent to an employer's facility in a manner that creates a physical or symbolic "line" that employees, customers, or suppliers must decide whether to "cross." See NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

The Board dramatically departed from its traditional definition of picketing in Eliason & Knuth when it redefined picketing as "persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite … creating a physical, or at least, symbolic

confrontation." See Eliason & Knuth, 355 NLRB at 802. The Board argued the historic definition of picketing, which did not require either the use of traditional picket signs or any form of patrolling, literally barred distribution of handbills to consumers in contradiction of the Supreme Court's landmark decision in Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("DeBartolo II"). Thus, to avoid serious constitutional questions under the First Amendment, the Board reasoned that picketing must involve some form of movement or patrolling with signs. See Eliason & Knuth, 355 NLRB at 803-04.

The Eliason & Knuth Board thus held the union's display of a large stationary banner (or an inflatable rat) did not constitute picketing because the union agents holding the banner (or standing next to the inflatable rat) did not engage in patrolling, did not block ingress or egress, did not engage in loud disruptive noises or actions, and did not threaten or engage in any acts of violence. See Eliason & Knuth, 355 NLRB at 802; Brandon Regional Medical Center, 356 NLRB at 1292. The Board also argued the banner/inflatable rat itself exhibited no confrontational element because members of the public could avoid the union's display by simply averting their eyes. See Eliason & Knuth, 355 NLRB at 803. In the Board's view, the display of the stationary banner and/or an inflatable rat constituted pure publicity of a labor dispute and contained no conduct that could be subject to restriction.

As discussed in greater detail below, the Board's rationale in Eliason & Knuth and Brandon Regional Medical Center was based on a flawed interpretation of the U.S. Supreme Court's holding in DeBartolo II and should be rejected.

In DeBartolo II, the Supreme Court held the legislative history of Section 8(b)(4) did not express a clear congressional intent to prohibit non-picketing labor publicity and, in the absence

of such a pronouncement, Section 8(b)(4)'s ban against coercion cannot forbid consumer boycotts by means other than picketing, patrolling, violence, or other intimidating conduct. See DeBartolo, 485 U.S. at 578. While the Court did not define the term picketing, it made clear that "picketing" and "patrolling" can be separate and distinct concepts. By doing so, the Court implicitly acknowledged that patrolling is not the core physical element of picketing that makes it inherently intimidating. It is the creation of a physical or symbolic line by union agents that passersby must cross in order to enter the employer's facility, whether by patrolling or some other conduct.

DeBartolo II restricted Section 8(b)(4)'s prohibition on secondary boycotts to those activities that involve more than mere publicity. Thus, any union demonstration at the approach or adjacent to an employer's facility must entail more than mere publicity to fall within the proscription of Section 8(b)(4)(ii) – it must entail conduct which threatens, coerces, or restrains and amounts to "publicity-plus." Union agents' display of a stationary banner or an inflatable rat advertising the existence of a labor dispute at the approach or adjacent to a neutral employer's facility relies on the same core physical element that makes picketing inherently intimidating – it creates a physical or symbolic line that employees, customers, and suppliers must confront and decide whether to "cross" to access the employer's facility. It relies on more than pure publicity to achieve its desired result and, thus, is lawfully subject to restriction under Section 8(b)(4)(ii).

ARGUMENT

I. The Board Should Overrule Eliason & Knuth and Brandon Regional Medical Center And Adopt A Definition Of Picketing That Requires A Showing Of Publicity-Plus

A. The Board's Historical Approach To Identifying Conduct As Picketing

When Congress passed the Landrum Griffin Amendments to the Act in 1959, it sought to close a loophole in the Act's secondary boycott prohibitions that allowed unions to pressure neutral employers with the hope that the neutral will intercede in a labor dispute between the union and

the primary employer. The result – Section 8(b)(4)(B) -- was a legislative compromise that balanced the right of neutral employers to be free from coercive practices designed to entangle them in a foreign labor dispute and the right of organized labor to peacefully advertise the existence of a labor dispute to the public.

The new Section 8(b)(4)(B) maintained the same analytical bifurcation as its predecessor Section 8(b)(4)(A), requiring a proscribed action element as well as a secondary object component. Specifically, Section 8(b)(4)(B) made it an unfair labor practice for a labor organization or its agents:

> (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 –
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, manufacturer, or to cease doing business with any other person … *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

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

At the end of Section 8(b)(4), Congress added a second clarifying proviso that provided nothing in subparagraph (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 …". Id. On its face, the second proviso protects non-picketing communications directed at customers of a distributor of goods produced by an employer with whom the union has a labor dispute. However, the U.S. Supreme Court interpreted the second proviso as merely a clarifying section that protects *publicity other than picketing* from the conduct proscribed by Section 8(b)(4). See DeBartolo, 485 U.S. at 582.

The Landrum Griffin Amendments added (for the first time) the terms "picketing" and "to picket" into the Act.[1] However, the Act does not define what constitutes picketing and neither previous case law nor expressions of congressional intent afforded substantial guidance to the NLRB in defining the term. See NLRB v. United Furniture Workers of America, 337 F.2d 936, 939 (2nd Cir. 1964). As a result, the NLRB was tasked with trying to discern what Congress intended when it used the term in the statutory text. Id.

The Board first addressed the meaning of "picketing" in the context of Section 8(b)(7)'s specific prohibition against recognitional or organizational picketing. The Board, in February 1962, held that the act of placing two signs in a snowbank abutting the employer's entrance that read "The Employees of Woodward Motors Are Not Protected by a Union Contract" and "We Are Not Picketing for Organization or Recognition," while union representatives stationed themselves

[1] In addition to the revisions to Section 8(b)(4), the Landrum Griffin Amendments added a new Section 8(b)(7), which was an attempt to deal legislatively with recognitional or organizational picketing, labeled by President Eisenhower as blackmail picketing. Section 8(b)(7) specifically makes it an unfair labor practice for labor organization to picket, threaten to picket, or cause to be picketed, any employer where an object thereof is to force or require the employer to recognize or bargain with a labor organization in three contexts set forth in subsections (A), (B), and (C) of that section.

in automobiles parked nearby, constituted picketing within the meaning of Section 8(b)(7). See Local 182, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Woodward Motors, Inc.), 135 NLRB 851 (1962). The sign-watchers left their cars to answer questions about the signs and to speak with drivers of delivery trucks attempting to enter the employer's facility. In upholding the Board's decision, the U.S. Court of Appeals for the Second Circuit explained:

> The Union's first objection, that the post-election activity was not 'picketing', is without merit. Webster's New International Dictionary (2d ed.) says that the verb 'picket' in the labor sense means 'to walk or stand in front of a place of employment as a picket' and that the noun means 'a person posted by a labor organization at an approach to the place of work.' Movement is thus not requisite …. The activity was none the less picketing because the Union chose to bisect it, placing the material elements in snowbanks but protecting the human elements from the rigors of an upstate New York winter by giving them the comfort of heated cars until a delivery truck approached; this was still 'more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey'. Building Service Employers' Int'l Union Local 262 v. Gazzam, 339 U.S. 532, 537, 70 S.Ct. 784, 787, 94 L.Ed. 1045 (1950). At the very least, the Board did not act unreasonably in construing 'picket', a statutory term relating to a subject within its area of special competence, to include what the Union did here.

See NLRB v. Local 182, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Woodward Motors, Inc.), 314 F.2d 53, 57-58 (2d. Cir. 1963).

In March 1964, the Board purportedly relied on its Woodward Motors decision in finding a union engaged in picketing where union agents placed signs on trees and poles in front of an employer's facility that stated, "Wages at Jamestown Sterling Are Not Up to Area Standards." The signs were affixed with padlocks by union representatives around 6:00 am, five (5) days a week. The union representatives then went to the parking lot across the street from the plant and sat in their automobiles until 3:00 pm, at which time they removed the signs. No union representatives were stationed at the entrance to the Employer's facility, and no union

representative left his/her car to speak with persons entering the facility. See United Furniture Workers (Jamestown Sterling Corp.), 146 NLRB 474, 475 (1964).

The United States Court of Appeals for the Second Circuit remanded the case to the Board after concluding that the Board's findings of fact appeared incomplete. Based on the evidentiary record, the Court could not be sure that the Board used the proper criteria in determining whether the union's conduct qualified as picketing. NLRB v. United Furniture Workers, 337 F.2d 936 (2d Cir. 1964). The court noted that a necessary condition of picketing is some form of confrontation between union members and those seeking to enter the premises at issue. "This confrontation invokes convictions or emotions sympathetic with the union activity, fear of retaliation if the picket is defied, the loyalty of nonpickets who are union members, simple embarrassment, or other similar reactions. Underlying all of these responses is an element of intimidation resulting from the physical presence of the pickets or the heritage of the union picket line tainted with bloodshed and violence." Id. at 940 (citing Note, Picketing by an Uncertified Union: The New Section 8(b)(7)(B), 69 Yale L.J. 1393, 1397 (1960)). In the court's view, no confrontation could occur if no one approaching the plant ever saw the union representatives. Id. at. 940.

In December 1965, the Board further refined its definition of picketing based on the Second Circuit's guidance in NLRB v. United Furniture Workers and held that neither the presence of picket signs nor the element of patrolling was necessary to establish a finding that picketing has occurred:

> In N.L.R.B. v. Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Woodward Motors), 314 F. 2d 53 (C.A. 2), the court quoted Webster's New International Dictionary (2d ed.) as defining the verb "picket" as meaning "to walk or stand in front of a place of employment as a picket" and the noun as "a person posted by a labor organization at an approach to the place of work …." By none of these definitions is the patrolling or the carrying of placards a concomitant element.

> **The important feature of picketing appears to be the posting by a labor organization or by strikers 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. [Emphasis added]**

See Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388 (1965).

The Board's initial picketing cases arose in the context of recognitional or organizational picketing under Section 8(b)(7); however, the legislative history of the Landrum Griffin Amendments does not clearly express any indication that Congress intended the term "picketing" to have distinct and separate meanings based on whether the object of the picketing was proscribed under Section 8(b)(7) or 8(b)(4) of the Act. See Environmental Defense v. Duke Energy Corp., 549 U.S. 561, 574, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007) ("One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning.").

Moreover, the Board has not interpreted the Act in such a manner. Since the Board issued its decision in Stoltze Land & Lumber, it consistently applied the same definition of picketing to cases arising under Section 8(b)(4). See Mine Workers District 12 (Truax-Traer Co.), 177 NLRB 213, 218 (1969) ("*The purpose of picketing in labor disputes is to convey a message which is usually intended to influence the conduct of certain persons to stay away from work or to boycott a product or business, and is frequently accomplished, as was done herein, by posting individuals at the approaches to a place of work.*"); Teamsters Local 282 (General Contractors Assn. of New York), 262 NLRB 528, 529 (1982) (found unlawful picketing, despite lack of signs or patrolling, where union posted agents at the delivery entrance to construction sites to tell drivers not to enter site); Laborers Local 389 (Calcon Construction Co.), 287 NLRB 570, 573 (1987) (citing with approval definition of picketing used in Stoltze Land & Lumber and Truax-Traer Coal); Ironworkers Local 29 (Hoffman Construction Co.), 292 NLRB 562, 583 (1989) (found picketing

occurred where group of men gathered around a sign without any patrolling); Service Employees Local 87 (Trinity Building Co.), 312 NLRB 715, 743 (1993) *("[I]ndividuals patrolling and carrying placards attached to sticks constitutes the classic form of picketing involved in alleged secondary boycott cases. [citations omitted]. It is also true, however, that neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather, the "important" or essential feature of picketing is the posting of individuals at entrances to a place of work.*"); Dist. Council 9, Int'l Bhd. of Painters and Allied Trades (We're Associates, Inc.), 329 NLRB 140, 142 (1999) ("*It is well settled that patrolling either with or without signs is not essential to a finding of picketing*."); United Mine Workers of America, District 2 (Jeddo Coal Co.), 34 NLRB 677 (2001).

The Board's historical characterization of the conduct that constitutes picketing was reasonable and grounded in industrial reality. It was not based on the antiquated belief that picketers must carry signs and patrol in an elliptical pattern in order for their demonstration to be confrontational and coercive.

B. The Eliason & Knuth and Brandon Regional Medical Center Board's Rationale For Redefining Picketing Was Fatally Flawed

In August 2010, the Board in Eliason & Knuth abandoned forty years of precedent when it held for the first time in history that picketing required "persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite." See Eliason & Knuth, 355 NLRB at 802. The Board justified its departure from established precedent based on a flawed interpretation of NLRB v. Furniture Workers, 337 F.2d 936 (2d Cir. 1964) and Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). As discussed below, the Board's rationale overstated the

importance of patrolling as the primary coercive element in picketing and is not supported by federal court precedent.

The Eliason & Knuth Board argued that "[t]he core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is not simply the holding of signs (in contrast to the distribution of handbills), but the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite." See Carpenters Local 1506 (Eliason & Knuth of Arizona), 355 NLRB at 802. The Board thereafter cited NLRB v. Furniture Workers, 337 F.2d 936 (2d Cir. 1964) in support of its argument that "this element of confrontation has long been central to our conception of picketing …". Id.

However, as set forth above, the Second Circuit in NLRB v. Furniture Workers did not hold that union members patrolling an entrance with picket signs was the core conduct that made picketing confrontational and coercive, or even suggest that patrolling an entrance with signs was a necessary element of picketing. See NLRB v. Furniture Workers, 337 F.2d at 939 (reiterating dictionary definition of picketing as indicating "a picket may simply stand rather than walk."). The court reviewed the applicability of Section 8(b)(4)(ii)(B) to a labor dispute that solely involved padlocking signs to objects near a neutral employer's entrance. No union agent was physically present or visible to passersby. In remanding the case to the Board, the court explained that the element of confrontation, which is a necessary element for conduct to be labeled picketing, cannot exist if the union representatives: (i) were not reasonably identifiable to the public as union agents, and (ii) were not seen (or could not be seen) by employees, customers, or suppliers entering the employer's facility. Id. at 940.

The Second Circuit's discussion of "confrontation" focused on whether employees, customers, or suppliers entering the employer's facility could visibly see union representatives engaged in the labor demonstration as they attempted to enter the employer's facility. The union agents did not have to block ingress or egress, patrol with picket signs, or interact with the passersby for the demonstration to be confrontational and coercive.

Federal courts have long held that the creation of a physical or symbolic barrier (i.e., the picket line) by union agents at the approach or adjacent to a facility's entrance[2] by its very nature is confrontational because it is tacitly calculated to trigger an automatic response in the passersby not to cross the line based on labor's long-history of picket line misconduct. See NLRB v. Retail Clerks Local 1001, 447 U.S. 607, 618-19, 100 S.Ct. 2372, 65 L.Ed.2d 377 (1980) (Justice Stevens' concurring opinion) ("The [Section 8(b)(4)] statutory ban … 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 the restriction on picketing is limited in geographical scope to sites of neutrals in the labor dispute."); NLRB v. Furniture Workers, 337 F.2d at 940 ("This confrontation invokes convictions or emotions sympathetic with the union activity, fear of retaliation if the picket is defied, the loyalty of nonpickets who are union members, simple embarrassment, or other similar reactions. Underlying all of these responses is an element of intimidation resulting from the physical presence of the pickets or the heritage of the union picket line tainted with bloodshed and violence.").

[2] Whether union agents are, in fact, posted at the approach or adjacent to a facility's entrance depends upon the facts of each case. Nevertheless, AGC believes any display located within 150 feet of an employer's entrance is presumptively posted at the approach or adjacent to a facility's entrance.

Furthermore, the Board's claim in Eliason & Knuth that its traditional definition of picketing defies the Supreme Court's holding in DeBartolo II appears to arise from a misunderstanding of the facts of DeBartolo II and a misapprehension of the Court's analysis. See Eliason & Knuth, 355 NLRB at 803-04. In DeBartolo II, the union distributed handbills at the entrance to a mall 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." See DeBartolo, 485 U.S. 570-71. The handbills' message was that "[t]he payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community." Id. The Court noted that the union peacefully distributed the handbills without any accompanying picketing or patrolling. Id.

In finding that distributing handbills (without any additional conduct) does not constitute coercion within the meaning of Section 8(b)(4)(ii), the Supreme Court explained that the legislative history of Section 8(b)(4) does not express a clear congressional intent to prohibit non-picketing labor publicity (i.e., pure publicity) and, in the absence of such a pronouncement, Section 8(b)(4)'s ban against coercion cannot forbid consumer boycotts by means other than picketing, patrolling, violence, or other intimidating conduct. See DeBartolo, 485 U.S. at 578. The Supreme Court did not define the term picketing; however, the Court's statement, "The Union peacefully distributed the handbills without any accompanying picketing or patrolling" and "There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall" made clear that "picketing" and "patrolling" can be separate and distinct concepts – i.e., a union can engage in picketing without any patrolling by union members. Otherwise, the Court's use of the terms would have been superfluous. In making this distinction, the Court implicitly

acknowledged that patrolling is not the core physical element of picketing that makes it inherently confrontational. It is the creation of a physical or symbolic line by union agents that passersby must decide whether to cross in order to enter the employer's facility, whether by patrolling or some other conduct.

Furthermore, the Court's recitation of facts does not suggest that the union agents in DeBartolo II broadcasted the existence of a labor dispute in an open and notorious manner, i.e., the union did not post any signs or banners at the mall's entrance notifying the public before they approached the entrance of the existence of a labor dispute. The union agents also did not station themselves at the entrances to the mall in a manner that created a physical or symbolic line that dared passersby to cross. Under these circumstances, no confrontation existed between the union agents and passersby because the public had no indication prior to receiving the handbill that the person approaching them was a union agent involved in a labor dispute. Only after the recipient received and read the handbill, which could have been hours later, did he/she discover the existence of the labor dispute. It is this dynamic that caused the Supreme Court to differentiate the union's peaceful handbilling in DeBartolo II from picketing and other intimidating conduct. Id. at 580 ("[P]icketing is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment. Handbills containing the same message … are much less effective than labor picketing because they depend entirely on the persuasive force of the idea.").

"DeBartolo dealt only with a union's peaceful handbilling in the absence of any accompanying picketing or patrolling." See Kentov v. Sheet Metal Workers' Intern. Ass'n Local 15, 418 F.3d 1259, 1264 (11th Cir. 2005). The Supreme Court did not pass judgment on whether the union's demonstration would have risen to the level of coercion within the meaning of Section

8(b)(4)(ii) if any indicia of confrontation existed. However, based on the Court's pronouncement that the handbilling occurred without any picketing or patrolling, it stands to reason that the Court would prohibit handbilling if it were inextricably tied to any confrontational conduct by the union.[3] See San Francisco Bldg. & Constr. Trades Council (Goode Elec.), 297 NLRB 1050, 1056-57 (1990) (Board found that where secondary picketing and handbilling took place concurrently, both were unlawful); Gen. Truck Drivers, Warehousemen, Helpers & Auto. Employees, Local 315 (Atchinson, Topeka & Santa Fe Ry. Co.), 306 NLRB 616, 631 (1992) (handbilling was considered part of illegal picketing where picketers also distributed handbills); Stoltze Land & Lumber Co., 156 NLRB at 394.

C. The Board Should Adopt A "Publicity-Plus" Standard For Determining Whether Any Labor Demonstration At The Approach or Adjacent To An Employer's Facility Constitutes Picketing

The Eliason & Knuth Board erred in concluding that a definition of picketing which does not require patrolling or movement is at odds with DeBartolo II because it strips picketing of the unique character that makes it intimidating. The Board's historic recognition that movement or patrolling is not an essential element of picketing comports with industrial reality and properly focuses on the physical elements of the union's demonstration that causes it to be confrontational for employees, customers, and suppliers. Union agents holding traditional picket signs and standing at the entrance to an employer's facility (without any patrolling) are reasonably

[3] The Eliason & Knuth Board claimed Stoltze Land & Lumber was flatly inconsistent with the Supreme Court's holding in DeBartolo II. However, in Stoltze, the union's distribution of handbills was immediately preceded by ambulatory picketing. The Board's recognition that the handbilling could not be separated from the ambulatory picketing caused the handbilling to obtain an inherently confrontational element that did not otherwise exist in DeBartolo II. Moreover, Stoltze involved handbilling and picketing at the primary employer's site. It did not involve a union engaging in a mix of handbilling and coercive conduct at a secondary employer's premises, which by its very nature is intended to force the neutral employer to intercede in the union's primary labor dispute.

understood by AGC's members and other laypersons to be engaged in picketing. No logical distinction exists between union agents individually holding traditional picket signs and union agents jointly holding a banner or standing next to an inflatable rat. In both instances, the union agents' posted position creates a physical or symbolic "line" in which employees, customers, and suppliers must decide whether to cross. The mere presence of this proverbial line at or adjacent to the employer's entrance creates the requisite intimidation proscribed by Section 8(b)(4)(ii).

The Eliason & Knuth Board correctly noted, however, that the broad definition of picketing set forth in Stoltze Land & Lumber is not an appropriate standard because it literally encompasses union activity that is tantamount to pure publicity (i.e., distribution of handbills in an unobtrusive manner). See Eliason & Knuth, 355 NLRB at 803. This Board has the unique opportunity to craft a definition of picketing that comports with industrial realities and is consistent with the Supreme Court's holding in DeBartolo II. To this end, AGC recommends the Board adopt the following definition of picketing: "*The advertising of a labor dispute by the posting of individuals at the approach or adjacent to a place of business in a manner that amounts to publicity-plus*."

Publicity-plus is synonymous with the "speech plus" standard utilized by federal courts in First Amendment jurisprudence. See United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (Holding when the physical action element of the expression become more than just an unobtrusive means to communicate an idea, then the conduct is called speech plus and is entitled to a lower degree of protection than pure speech); Cox v. Louisiana, 379 U.S. 536, 555-56, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Buckley v. Valeo, 424 U.S. 1, 15, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). To this end, the publicity-plus standard focuses on whether the union's activity is reliant on confrontational conduct to achieve its goal or the persuasiveness of the underlying message.

Whether conduct is unobtrusive would depend on the time, place, and manner of the union's activity. For example, a union member who verbally notifies members of the general public during normal business hours that the union has a labor dispute with a specific employer would be engaging in pure publicity because the union member's conduct is not a focal point of the union's activity. The conduct is inextricably linked with the speech and narrowly tailored to disseminate the union's message. However, as explained above, a union's display of a stationary banner or inflatable rat at the approach or adjacent to the employer's facility relies more on the time, place, and manner of its conduct to intimidate persons from entering the facility. The creation of a physical or symbolic line challenges passersby to cross in order to do business with the employer while bearing the associated risk of being subjected to picket line misconduct if one crosses the line. As the union's activity moves farther away from the entrance to the employer's premises, the union's activity becomes less reliant on the conduct element and more reliant on the persuasiveness of the union's underlying message.

Under a publicity-plus standard, labor organizations remain free to exercise their First Amendment right to peacefully and truthfully notify the public of the existence of a labor dispute through means of pure publicity, such as through distribution of leaflets as well as newspaper, radio, television, and internet appeals for a boycott of a neutral employer. Unions ***could not*** engage in activities against a neutral employer that rely on obtrusive conduct to further their objectives, such as: (i) union agents creating a physical or symbolic line at the approach or adjacent to the employer's facility by standing shoulder-to-shoulder, patrolling, holding stationary banners, or

stationing themselves next to a large inflatable rat; (ii) the repeated use of sound recordings at excessive levels[4]; (iii) physically blocking of ingress or egress; (iv) physical violence, etc.

Finally, a "publicity-plus" standard would not result in the violation of individual rights under the First Amendment because the standard strictly regulates the time, place, and manner of a labor organization's conduct as opposed to the content of the idea being expressed. See Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (Government may impose reasonable restrictions on time, place, and manner of protected speech, even of speech in public forum, as long as restrictions are justified without reference to content of regulated speech, are narrowly tailored to serve significant governmental interest, and leave open ample alternative channels for communication of information); 520 South Michigan Avenue Associates, Ltd. v. Unite Here Local 1, 760 F.3d 708, 723-24 (7th Cir. 2014) ("Important First Amendment interests are not threatened … because the Hotel's complaint is narrowly tailored to address the Union's conduct – visiting offices, making telephone calls to decision -makers (sometimes at home), carrying signs – without reference to the content of its message."); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 390, 112 S.Ct. 2538, 120 L.Ed.2d. 305 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a[n] … idea or philosophy."); United States v. Osinger, 753 F.3d 939, 944 (9th Cir. 2014) (upholding federal anti-stalking statute against constitutional challenge because it principally proscribes harassing and intimidating conduct, and only targeted speech incidentally).

[4] See International Brotherhood of Electrical Workers, Local 98 (Post General Contracting, LLC), 370 NLRB No. 51 (2020).

Application of the publicity-plus standard to a union's display of a stationary banner or inflatable rat at the approach or adjacent to a neutral employer's business passes constitutional scrutiny because it both furthers the government's significant interest in shielding neutral employers from "pressure in controversies not their own," and leaves open ample alternative channels for labor organizations to publicize the existence of a labor dispute in a manner that is not reliant on intimidation. See NLRB v. Denver Building Trades Council, 341 U.S. 675, 692, 71 S.Ct. 943, 95 L.Ed. 1284 (1951) (Section 8(b)(4) of the Act 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 pressure in controversies not their own."); International Brotherhood of Electrical Workers, Local 501 v. NLRB, 341 U.S. 694, 705 (1951) ("the prohibition [on] … secondary pressure by section 8(b)(4) carries no constitutional abridgement of free speech."); Int'l Longshoremen Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982) ("We have consistently rejected the claim that secondary picketing by labor unions in violation of Section 8(b)(4) is protected activity under the First Amendment.").

Labor organizations can continue to display a banner or inflatable rat in furtherance of their labor dispute so long as the activity is not conducted at the approach or adjacent to the entrance to the neutral employer's business. Similar time, place, and manner restrictions on conduct have been upheld by the Supreme Court as reflecting an acceptable balance between the constitutionally protected right to engage in free speech and the interests of unwilling listeners. See generally Madsen v. Women's Health Center, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (upholding injunction prohibiting protestors from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within 36 feet of an abortion

clinic); Hill v. Colorado, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (upholding a Colorado statute that made it unlawful, within 100 feet of the entrance to any health care facility, to knowingly approach another person without that person's consent for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counselling with such other persons.).

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CERTIFICATE OF SERVICE

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