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Subcommittee on Health, Employment, Labor and Pensions Hearing on

"Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation"

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My name is Catherine L. Fisk. Thank you for the opportunity to testify before the House of Representatives Subcommittee on Health, Employment, Labor and Pensions on the way in which the NLRB has regulated corporate (also known as comprehensive or corporate social responsibility) campaigns.

Since 2008, I have been the Chancellor's Professor of Law at the School of Law, University of California, Irvine. Previously, I was the Douglas Blount Maggs Professor of Law at Duke University School of Law, where I taught from 2004 to 2008, and was on the faculty of a number of other law schools since 1991. I am the co-author of a casebook, *Labor Law in the Contemporary Workplace* (West Publishing Co. 2009), as well as two other books on labor and employment law (*Labor Law Stories* (Foundation Press 2005) and *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property* (UNC Press 2009). I have published dozens of articles on labor and employment law in leading law reviews. I regularly teach Labor Law, Employment Law, Employment Discrimination Law, and a course on the legal profession, and previously have taught Civil Procedure, Legislation, and specialized courses on the law of the workplace, labor markets, and employee intellectual property. I am admitted to the bar in California and in the District of Columbia (inactive in DC), and have briefed and/or argued cases in state and federal trial and appellate courts.

I. The Benefits of Corporate Social Responsibility Campaigns in a Free Society with a Market Economy

The topic of this hearing raises significant issues at the intersection of labor law and the United States Constitution. A union corporate social responsibility campaign is designed to provide information to consumers, the public, and relevant regulatory agencies about a company's labor practices, including its wages, health and safety record, and environmental practices. Thus, at the heart of a corporate social responsibility campaign is the right to speak on matters of public concern and to petition government for the redress of grievances. *See* James J. Brudney, Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns, 83 Southern California L. Rev. 731, 733 (2010). Corporate social

responsibility campaigns are thus within the First Amendment's protections of freedom of association and the right to petition government for the redress of grievances, as well as freedom of verbal and written speech, including the dissemination of handbills and other written texts, the use of hand gestures, picketing, the display of placards and banners, symbolic conduct, and the expenditure of money to support or oppose political candidates and issues.

The Court's recent and strong protection for the First Amendment rights of companies (*Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 908 (2010), organizations (*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment protects right of Boy Scouts to discriminate against gays)), and individuals (*United States v. Stevens*, 130 S. Ct. 1577 (2010) (individual right to create, possess and sell offensive depictions of animals)) is based on a longstanding belief that in a democratic society with a market economy, the best protection for both liberty of conscience and robust economic growth lies in the electorate, consumers, and citizens having access to a full range of information on which to base their political, social and economic choices. As the Court recently emphasized: "The First Amendment confirms the freedom to think for ourselves." *Citizens United*, 130 S. Ct. at 908. Each of these decisions strikes some as wrong as a matter of policy and constitutional interpretation, but for the moment they are the law.

The purpose of corporate social responsibility campaigns is to provide workers, consumers, and citizens with the information we need, as the Court put it in *Citizens United*, "to think for ourselves" about which products to buy, which businesses to patronize, and where to work. Corporations adopt codes of corporate responsibility for a reason, and there is no basis to restrict the ability of workers and their unions to hold companies to the policies and values they announce. There is no evidence that providing workers and consumers information about companies' labor practices and safety records has any adverse effect on the economy. Indeed, to the extent that workers and consumers are empowered by information to choose jobs and to patronize businesses that pay good wages and have strong safety and environmental records, the economy is strengthened. Elementary principles of economics show that information facilitates efficient transactions, prevents negative externalities, and prevents a race to the bottom in which companies gain a competitive advantage by driving down wages and externalizing the environmental or other safety costs of their operations.

Corporate social responsibility campaigns are designed to strengthen the middle class, a goal which the House Committee on Education and Labor in the 100th Congress endorsed in a pair of hearings on "Strengthening America's Middle Class" in 2007. *See* H. Rep. No. 110-23, text accompanying notes 25-43 (2007). As the House Report produced from those hearings found, the decline of unionization and the associated decline in wages and rise in economic insecurity have had devastating effects on the size and security of the American middle class, even as corporate profits have soared. *Id.* Employees who are paid well are more likely to have money to spend, which bolsters the economy. Indeed, Congress specifically found when it

enacted the Wagner Act 1935, at the depth of the Great Depression, that promoting the rights of workers to unionize would eliminate the bargaining and wage inequality that "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 29 U.S.C. §151. Employees with decent wages and benefits are more able to pay taxes to support education and infrastructure. They are less likely to depend on public assistance. Employees with decent wages and benefits are more likely to have health care for themselves and their children and are less likely to have to work two jobs. Decent wages support strong families and strong communities. See Steven Greenhouse, The Big Squeeze: Tough Times for the American Worker (2009).

Workers and their unions perform a valuable role when they publicize the labor records of companies and urge those sympathetic to their view to support their efforts to ensure that people work for good wages in safe conditions. It is well known that unionized workplaces are generally better paid. In 2010, the median usual weekly earnings of full-time workers who are union members is $917, whereas for nonunion workers it is $717. That is not a lot of money: it works out to $47,684 for a 52 workweek year, as compared to $37,284 for a nonunion worker, but the difference could be huge for a family struggling to make ends meet. Unionized workplaces are more likely to provide employee health insurance. Unionized workplaces are more likely to provide defined benefit pension plans, which (like Social Security benefits) provide a more secure retirement by placing the risk of economic downturn on the plan rather than on the individual. Union workers are more likely than nonunion workers to enjoy freedom from wage discrimination based on gender, race, or ethnicity. See U.S. Department of Labor, Bureau of Labor Statistics, *Union Members in 2010*, Jan. 21, 2011; U.S. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2008*, August 2008.

II. The First Amendment and Worker Free Speech Rights

The First Amendment protects speech that most people value, including the right of people and political candidates to speak on political issues (*Brown v. Hartilage*, 456 U.S. 45 (1982) (political candidate has a right to promise in an election campaign to work for a lower salary)), the right to take out advertisements in newspapers criticizing government officials for failing to protect civil rights (*New York Times v. Sullivan*, 376 U.S. 254 (1964)), the right to display flags, *Stromberg v. California*, 283 U.S. 359 (1931), and the rights of both workers and employers to speak on issues relating to unionization, wages, and working conditions, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The First Amendment also protects speech that many appreciate but some find problematic in some circumstances, such as the right of companies to advertise. *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557 (1980). And, in a free society, the First Amendment necessarily also protects speech that many people find offensive, including picketing at women's health clinics and military funerals, *Snyder v. Phelps*, 131 S. Ct.

1207 (2011); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the burning of crosses and flags, *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310, 318 (1990), and burning a cross on a person's lawn, *RAV v. City of St. Paul*, 505 U.S. 377, 391 (1992).

A. The Contemporary First Amendment Protection for Picketing and Protest

In recent years, the Court has made clear that picketing – including displaying signs and people patrolling – is protected speech under the First Amendment that enjoys the highest level of constitutional protection when it addresses any matter of political, social or other concern to the community. Thus, the Court upheld picketing at a military funeral, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and picketing outside clinics that provide family planning services, *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). Even offensive and intimidating speech and symbolic conduct is protected by the First Amendment. *Snyder*, 131 S. Ct. at 1216 ("The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern'" and is thus entitled to the highest level of First Amendment protection), quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

The First Amendment protection generally means that government cannot prohibit or regulate speech or symbolic conduct expressing a political message based on content unless the regulation is narrowly tailored to a compelling governmental interest. *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180 (1997). The government can prohibit threats, *Virginia v. Black*, 538 U.S. 343 (2003), and can consider the coercive power employers have over employees in deciding which employer statements to employees are threats ("sleep with me or you're fired" or "if you join a union, I'll fire you"). *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). But saving the targets of offensive speech from psychological or economic harm is usually not a compelling governmental interest. Thus, the Court struck down prohibitions on flag burning, *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310, 318 (1990), on burning a cross on a person's lawn, *RAV v. City of St. Paul*, 505 U.S. 377, 391 (1992), on shouting at women entering a medical clinic seeking family planning services, *Schenck*, 519 U.S. 357; *Madsen*, 512 U.S. 753, and on picketing at a military funeral blaming the soldier's death on God's vengeance for American tolerance for gays and lesbians, *Snyder*, 131 S. Ct. 1207. The Court has struck down prohibitions on picketing directed at individuals in residential neighborhoods when the prohibition discriminated on the basis of subject matter. *Carey v. Brown*, 447 U.S. 455, 465 (1980). Thus even when it is alleged that the picketing infringes the rights of the targets of the protest by making it harder for them to run their business without disruption, the Court has rejected regulation.

B. The Older Rules Applicable to Labor Picketing

Given the robust contemporary First Amendment protection for picketing and protest, the treatment of labor picketing is anomalous. In *International Brotherhood of Teamsters v. Vogt*, the Court upheld a state law prohibiting peaceful picketing by union members at a work site because picketing "involved more than just communication of ideas … since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." 354 U.S. 284, 289 (1957). Since then, the Court has upheld against constitutional challenge the application of federal labor law to picketing encouraging a strike by employees other than those employed by an entity with whom the picketing employees have a labor dispute. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951). The implicit rationale of these cases is that labor picketing is a uniquely persuasive form of speech that induces union members to refuse to work regardless of their views on the merits of the labor dispute. In upholding a prohibition on picketing calling for a consumer boycott of a business if a successful boycott would threaten the business with ruin or substantial financial loss, the Court emphasized the harm that picketing can cause when consumers are persuaded of the union's message. *NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco Title Ins. Co.*), 447 U.S. 607 (1980).

Under current First Amendment doctrine, these decisions are difficult, if not impossible, to justify. In the first place, they allow Congress to treat picketing engaged in by employees affiliated with a labor union more harshly than other picketing. Today, such a distinction would fail, inasmuch as the Court has struck down bans on worksite picketing and worksite calls for consumer boycotts when engaged in by civil rights activists. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). The Court recently affirmed that the First Amendment prohibits differential regulation of speech depending on the identity of the speaker: "[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010). Second, the old labor picketing cases allow government to proscribe speech based on its content: picketing requesting workers to withhold their labor is prohibited; picketing urging workers to work or requesting consumers to withhold their patronage is not. Today, of course, this sort of content-based or viewpoint-based regulation is unconstitutional, as content-based restrictions are invalid unless strict scrutiny is met. *Mosley*, 408 U.S. 92; *Carey*, 447 U.S. 455. Finally, the notion that labor picketing can be prohibited because it is so persuasive to workers and consumers sympathetic to labor's causes is simply impossible to square with the rest of free speech jurisprudence, which does not allow government to prohibit speech simply because some find it persuasive.

The anomalous treatment of labor picketing can be understood as an historical artifact when we recall that the Supreme Court developed the law of labor picketing before it developed its modern robust protections for picketing and other forms of symbolic speech. Thus, it made sense to the Court in the 1950s to hold that picketing was not pure speech because it involves conduct (walking). Although there was some judicial protection for symbolic speech before 1950, it was not until the late 1960s that the Court clearly articulated a test for First Amendment protection for symbolic speech and increased the constitutional protection for it. Once the Court expanded First Amendment protection for symbolic conduct in the 1960s and 1970s, *United States v. O'Brien,* 391 U.S. 367 (1968) (burning draft cards); *Spence v. Washington,* 418 U.S. 405 (1974) (hanging a United States flag upside down with a peace symbol affixed to it), the differential treatment of labor picketing lost its conceptual moorings.

As First Amendment protection for picketing by civil rights and other groups has expanded in recent decades, the Court has begun to accord greater First Amendment protection to non-picketing labor protest. In essence, the Court distinguishes between labor picketing (still subject to the old cases) and other forms of peaceful labor protest, which enjoys constitutional protection more akin to that enjoyed by civil rights and other protest. Thus, the Court held that labor handbilling at a work site is not prohibited by federal labor law. *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1987). The Court reasoned that the distribution of handbills is "expressive activity" and that "legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment." 485 U.S. at 576. Similarly, in holding that the NLRA does not prohibit picketing urging a consumer boycott of a product, the Court reasoned that its construction of the statute "reflect[s] concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *NLRB v. Fruit and Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 63 (1964). Similarly, the Court has read the federal labor laws to protect the rights of employees to distribute newsletters and leaflets in the workplace urging workers to support legislation and political candidates protective of workers' rights. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

In attempting to reconcile the older cases upholding regulation of labor picketing with recent cases affording expansive protection for picketing, handbilling, and other forms of verbal and symbolic speech, the Court has emphasized that the federal labor laws strike a "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." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). The NLRB is obligated to construe the NLRA so as to maintain that delicate balance in the facts of each case. Its decisions are entitled to deference if the factual determinations are supported by substantial evidence on the record as a whole, its interpretation of the statute is rational, and "its explication is not inadequate, irrational, or arbitrary." 29 U.S.C. §159(e); *Allentown Mack Sales and Serv., Inc. v. NLRB,* 522 U.S. 359, 364 (1999).

The continuing vitality of the Supreme Court's labor picketing cases may be doubtful given the Court's expansive protection for picketing on myriad other topics, including issues pertaining to fair treatment at work. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). Nevertheless, the law of labor picketing and protest draws two crucial distinctions: (1) whether the speech is picketing or is instead handbilling, or other comparably expressive and non-coercive communication, and (2) whether the speech is at a worksite and is directed at workers or whether it is directed at consumers or the public. The law with respect to two categories of labor speech is settled under Supreme Court law: picketing directed at workers can be regulated, and handbilling directed at consumers cannot. *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1987). The Supreme Court has not addressed the outer limits of regulation of labor picketing directed only or primarily at the public, nor has it addressed the constitutional permissibility of prohibiting non-picketing speech directed only or primarily at workers, at least when the speech occurs at the worksite and when it does not call for an immediate work stoppage.

This leaves two categories of labor protest of uncertain status: peaceful picketing directed at the public (which is generally protected by the statute, but whose constitutional status has not been addressed) and dissemination of leaflets, display of banners, and other comparable forms of pure speech or non-coercive conduct directed at workers (which, similarly, is generally protected by the statute but whose constitutional status has not been addressed by the Court). It is these two categories of speech that the Board has recently held entitled to First Amendment protection.

C. The Lower Court and NLRB Approaches to Labor Protest

In the absence of Supreme Court precedent, the NLRB and the federal courts of appeals have reached an array of conclusions on the statutory and constitutional protection for picketing directed at the public and leafleting and other non-coercive protest directed at workers. Although the cases are not entirely consistent, overall they have found protection for such expression. Three types of protest activity have drawn the most litigation: display of banners; distribution of handbills; and various forms of street theater, including the appearance at a worksite of employees dressed up in rat costumes and the staging of mock funerals. As will be explained below, generally speaking the NLRB's past efforts to prohibit peaceful bannering and street theater have been rejected by the federal courts. It is entirely appropriate – indeed, it is explicitly contemplated by the statutory scheme -- that the Board has now concluded that peaceful bannering and street theater cannot be prohibited by the NLRA.

1. Banners and Leaflets

The courts of appeals have held that the display of a banner may not be prohibited by the NLRA unless the message on the banner would lead consumers and passersby to conclude that the worksite is dangerous or unhealthful. In *Overstreet v. United Brotherhood of Carpenters*,

409 F.3d 1199 (9th Cir. 2005), on public sidewalks some distance from retailers that contracted with contractors using non-union labor and paying low wages, the Carpenters Union displayed banners reading "Shame on [name of retailer]" in large letters, with the words "Labor Dispute" in smaller letters underneath. The NLRB General Counsel issued a complaint against the Carpenters Union and sought an injunction against the activity under section 10(*l*) of the NLRA. The court of appeals rejected the General Counsel's interpretation of the statute and held that the bannering was protected by the First Amendment and could not be equated with signal picketing prohibited under the Supreme Court's labor picketing jurisprudence. The court explained:

> [T]he reliance on the physical presence of speakers in the vicinity of the individuals they seek to persuade … is no basis for lowering the shield of the First Amendment or turning communication into statutory "coercion."
>
> Nor are the union members' activities "coercive" for any reason *other* than their physical presence. The union members simply stood by their banners, acting as human signposts. Just as members of the public can "avert [their] eyes" from billboards or movie screens visible from the public street, they could ignore the Carpenters and the union's banners. If anything, the Carpenters' behavior involved *less* potential for "coercing the public than the handbilling in *DeBartolo*, as there was no one-on-one physical interaction or communication.

409 F.3d at 1214.

When the message on the banner would lead consumers to conclude that the targeted business is dangerous or unhealthful (as where the union displayed a banner saying "This Medical Facility is Full of Rats"), a divided panel of the Ninth Circuit, over the dissent of Judge Kozinski, held the banner was defamatory. *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997). Distinguishing other cases in which unions had referred to employers as "rats" on the ground that the audience would know that rat is a slang term of art for an employer paying substandard wages, the court found that passersby might think that the hospital in this case had a rodent problem. *Id.* at 1235. Alternatively, if a union distributes handbills to workers (rather than to consumers and the public) and a work stoppage immediately ensues, a divided panel of the D.C. Circuit held that the handbilling was tantamount to picketing urging a strike and could be prohibited. *Warshawsky & Co. v. NLRB*, 182 F.3d 948 (D.C. Cir. 1999).

2. Street Theater and the Rat

In labor disputes across the country, workers and their unions have engaged in a variety of forms of street theater as protest. In a few cases, workers staged a mock funeral accompanied by signs proclaiming that patronizing the target business "should not be a grave decision." *Sheet Metal Workers' International Association, Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007); *Kentov v. Sheet Metal Workers, Local 15*, 418 F.3d 1259 (11th Cir. 2005). In another few cases,

employees dressed up in rat costumes and strolled around public sidewalks near job sites with leaflets complaining that targeted businesses were rats because they paid substandard wages. Construction & General Laborers Local Union 4 (Quality Restorations), Case 13-CC-2006, Advice Memorandum (January 19, 1996) (individual dressed as a rat who patrolled in front of association confronted customers or employees and thus was not engaged in protected free speech). Northern California Regional Council of Carpenters, Cases 32-CC-1469-1; 32-CC-1480-1; 32-CC-1482-1; 32-CC-1483-1; 32-CB-5451-1, Advice Memorandum (October 31, 2002) (person in rat costume who patrolled in front of employer premises was confrontational and coerced employers and thus violated section 8(b)).

At least one protest involved inflating a 16-foot-tall balloon in the shape of a cartoon rat. *Sheet Metal Workers' Int'l Assn,* 491 F.3d at 432. In other cases, janitors have conducted sing-alongs on the sidewalk outside of commercial office buildings or paraded around with mops and brooms. *Service Employees Union Local 87,* 312 NLRB 715 (1993). And in at least one instance which appears never to have resulted in a published agency or judicial decision, hotel room cleaners supported their demand for better wages by wheeling a bed onto a public sidewalk outside a hotel and demonstrated the physically arduous labor of changing the sheets on hotel beds.

There have been only a few court of appeals decisions on the permissibility of worker street theater, and they have reached conflicting conclusions. The D.C. Circuit, in an extensive and scholarly opinion by Chief Judge Douglas Ginsburg, held that the mock funeral could not constitutionally be prohibited, *Sheet Metal Workers' Int'l Assn,* 491 F.3d at 439. The Eleventh Circuit, in an opinion by Judge Kravitch, held that the mock funeral was more like picketing than it was like leafleting and thus could be prohibited. *Kentov*, 418 F.3d at 1266. Because review may be had in the D.C. Circuit in any case decided by the NLRB, 29 U.S.C. §159(f), it is not unreasonable for the Board to follow the D.C. Circuit's guidance and hold that banners and street theater cannot constitutionally be prohibited under section 8(b).

The NLRB's recent efforts to reconcile its own jurisprudence on the distinction between picketing, leafleting, bannering, and street theater are entirely reasonable. In *Eliason & Knuth*, 355 NLRB No. 159 (2010), the Board exhaustively canvassed the Supreme Court's and its own prior treatment of picketing and other labor protest in light of the Court's historical and evolving First Amendment treatment of the various forms of symbolic speech. The Board quite reasonably concluded that the display of a banner is closer to the leafleting protected by the Court in *DeBartolo* than to the picketing prohibited in *Vogt* and its progeny. *See also Carpenters Local Union No. 1506 (Marriott),* 255 NLRB No. 219 (2010) (following *Eliason & Knuth).* The Board concluded in *Southwest Regional Council of Carpenters,* 356 NLRB No. 88 (2011), that the display of banners is not prohibited by the statute even if the banners are at construction sites rather than at places frequented by the general public. The Board concluded that the bannering cannot be prohibited in the absence of evidence that the display of a banner is intended as a covert signal to engage in an illegal secondary work stoppage (as might be the case if the

employees picket) rather than as an effort to persuade workers, consumers, and other friends of labor about the harm caused by the employers paying substandard wages.

These recent efforts to reconcile the First Amendment rights of workers to publicize the nature of their labor dispute with the Supreme Court's treatment of labor picketing are entirely reasonable. As the Supreme Court has emphasized for decades, the National Labor Relations Act gives the Board the responsibility to regulate and protect both worker and employer speech "in the context of its labor relations setting." *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). *See also NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). In both *Gissel* and *Exchange Parts* the Court deferred to the Board's determination of whether particular speech was protected or prohibited by the NLRA. The Board has for 75 years attempted to decide, based on the evidence in cases and its expertise in labor relations, which speech by employees and by employers should be protected by the NLRA, prohibited by the NLRA, or left unregulated. Given that the weight of court of appeals decisions have rejected the Board's previous efforts to prohibit peaceful dissemination of leaflets or display of banners, as discussed above, and given the Supreme Court's recent unequivocal First Amendment protection for picketing and other protest, the Board reasonably has concluded that bannering and leafleting are not prohibited by section 8(b) of the NLRA. The Board would also be reasonable to conclude that other forms of symbolic speech, including street theater such as the rat and mock funerals, cannot be proscribed unless the conduct blocks ingress or egress to the property or contains false and defamatory statements. Indeed, given the Supreme Court's recent 8-1 decision in *Snyder v. Phelps* upholding offensive picketing at military funerals, the Board's prior jurisprudence allowing extensive prohibitions of worker protest based on its content and even its viewpoint is constitutionally suspect. Thus, the Board is well within its broad statutory authority to interpret the NLRA in light of workplace realities and to develop a labor policy that grants robust protection to worker speech. Indeed, its decisions in this area are all but compelled by the protection courts of appeals and the Supreme Court have granted to non-picketing labor protest.

D. Corporate Social Responsibility Campaigns Do Not Violate RICO

The title of this hearing suggests possible concern about whether union corporate social responsibility campaigns are desirable as a matter of policy or permissible as a matter of law. Inasmuch as they are designed to enforce workers' statutory rights to unionize and to inform consumers and workers about a company's labor, safety, and environmental practices, they are good policy. Whatever one's views about their desirability as a matter of policy, however, there is no basis in law for an outright prohibition. As noted above, to the extent that a corporate social responsibility campaign involves publicity about a company's labor, safety, or environmental record, it is protected by the First Amendment. To the extent that it involves invoking regulatory proceedings or litigation challenging the legality of particular practices, the usual rules governing meritorious litigation apply. But to the extent that the argument is that the mere fact of a corporate campaign, including an effort to secure recognition through card-check and a neutrality agreement, coerces a company, the law is on the unions' side. To date, several

federal courts have rejected RICO challenges to union efforts to organize through card check and neutrality agreements. *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571 (S.D.N.Y.), *aff'd,* 355 F. App'x 508 (2d Cir. 2009); *Wackenhut Corp. v. Service Employees Int'l Union,* 593 F. Supp. 2d 1289 (S.D. Fla. 2009). *See generally* Brudney, *supra*, 83 S. Cal. L. Rev. 731.

III. Congress Should Not Interfere With the NLRB's Adjudication of Pending Cases

It appears from the public commentary of some Members of Congress that some of the NLRB's recent decisions on labor protest and other topics, along with the decision of the Acting General Counsel to issue a complaint one case, have caused consternation. While it is not unheard of for Members of Congress to criticize the Board when its decisions on important matters of labor law and policy are contrary to the Members' own preferences, it is important not to allow criticism of *past* decisions or concerns about the general direction of Board law to become efforts to coerce or intimidate the Board into resolving disputed issues of fact in *pending* cases. There is no basis for suggesting that the decision of the Acting General Counsel to issue a complaint in one case and the Board's request for amicus briefs in another is evidence that the Board is somehow exceeding its statutory authority. *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9,* 15-RC-8773, and *Boeing and International Ass'n of Machinists District Lodge 751,* 19-CA-32431.

As an independent agency that exercises powers to adjudicate cases subject to deferential review from the courts of appeals under the substantial evidence standard, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1962), the NLRB is obligated by the National Labor Relations Act to decide cases based on evidence adduced in an adversary hearing. Its adjudicatory processes are relatively formal as compared to those of many agencies. It acts in the place of a United States District Court in enforcing the statutory rights of individuals and entities. Like any entity that adjudicates cases based on law and fact, including federal and state trial courts, principles of separation of powers and due process necessitate a degree of independence from legislative oversight as the agency carries out its adjudicatory role.

Although a number of federal court decisions have addressed the propriety of Congressional interference in agency processes, the most closely on point is *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966). In *Pillsbury*, a Senate subcommittee interrogated the Chair of the FTC and members of his staff regarding a pending case and expressed views on how it should be decided. After the FTC later decided the case along the lines suggested by the Senators, the court of appeals found the Senate inquiry to be improper and to have infringed the due process rights of the litigants to a "fair trial" and to be free from the "appearance of impartiality." *Id.* at 964. The court of appeals said that when a congressional investigation "focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function." *Id. Accord: Koniag v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978) (holding that a letter sent from a chair of a House committee

to the Secretary of Interior regarding the Secretary's review of decisions of the Bureau of Indian Affairs created the appearance of a compromise of the Secretary's impartiality and remanding to the new Secretary of the Interior for a fair and dispassionate treatment of the matter).

Later cases that have rejected challenges to Congressional interference in agency processes have emphasized that the interference did not express a view on the merits but was instead intended only to expedite the decision, *Gulf Oil Corp. v. Federal Power Commission*, 563 F.2d 588 (3d Cir. 1977), or that there was no evidence that the intervention had an effect on the agency's decision, *ATX, Inc. v. U.S. Dep't of Transp.,* 41 F.3d 1522, 1529-30 (D.C. Cir. 1994); *State of California v. Federal Energy Regulatory Comm'n,* 966 F.2d 1541, 1552 (9th Cir. 1992), or that the agency proceeding was informal, *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977). *See generally* Morton Rosenberg & Jack H. Maskell, Congressional Research Serv., RL 32113, Congressional Intervention in the Administrative Process: Legal and Ethical Considerations (2003).

Conclusion

The Board's recent decisions in the area of labor protest are entirely consistent with the trend in the United States Supreme Court's First Amendment jurisprudence. They are, moreover, a reasonable agency response to the fact that the agency's prior and less speech-protective approach to leafleting, street theater, and other non-picketing protest met with hostility from several federal courts. Wholly apart from the question whether the recent cases upholding worker protest rights are compelled by the First Amendment, there is no evidence that robust protection for employee speech has any adverse effect on job creation or the health of the American economy, and there is some evidence suggesting that it helps both the economy and the polity by enabling consumers and workers make informed decisions to support companies that adopt responsible labor and environmental practices that are consistent with the consumers' and workers' values.

Whatever the views of the current Congressional majority about the trend of the NLRB's case law on labor protest or other areas, there will be time enough for the losing party in those cases to seek review in the federal courts of appeals and for Members of Congress to call hearings to criticize the decisions later. To interfere with the Board's adjudication of pending cases jeopardizes the due process rights of all the parties to the case and casts doubt on the ability of the administrative state to fairly adjudicate the statutory and constitutional rights of the parties that appear before it.