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INTRODUCTION

This case warrants review because an appeals court has invalidated a state labor law that affects thousands of public employees and employers, and because the decision chips away at the carefully-balanced labor law that is credited with restoring labor peace to Ohio. Specifically, the court invalidated part of R.C. 4117.11(B)(8), which requires public-employee unions to give ten days advance notice before it may “[e]ngage in any picketing, striking, or other concerted refusal to work.” That provision (the “Picketing Notice Law”) merely requires notice to the public employer and to Appellant State Employee Relations Board (“SERB”); it does not allow SERB or the employer to stop any picketing. The appeals court, however, held that the Picketing Notice requirement violated the First Amendment guarantee of free speech—at least as applied to picketing not accompanied by a strike—because, said the court, it is a content-based restriction on speech that does not serve a compelling state interest and is not narrowly tailored. See *Mahoning Educ. Ass’n of Dev. Disabilities v. State Emp’t Relations Bd.*, 2012 Ohio App. LEXIS 2636, 2012-Ohio-3000 (7th Dist. 2012) (“App. Op.,” Ex. 2). That decision is mistaken, and for several reasons, it warrants the Court’s review.

First, the decision affects all public employees and public employers, and it undercuts Ohio’s Collective Bargaining Act, a critical piece of legislation. The breadth of the decision’s impact is undeniable, as the statute governs all of Ohio’s 2,700 public employers and their 350,000 public employees, and the notice provision itself is typically followed more than 35 times per year. Nor can the importance of Ohio’s labor law be understated. It was “meant to regulate in a comprehensive manner the labor relations between public employees and employers, *Ohio Historical Soc. v. State Emp’t Relations Bd.*, 66 Ohio St. 3d 466, 469 (1993), and it was enacted in response to the escalating amount of labor strife that occurred before the Act became effective in 1984, see *Kettering v. State Emp’t Relations Bd.*, 26 Ohio St. 3d 50, 55

(1986) (noting escalation). The Picketing Notice Law is a key part of the Act, because it allows public employees to picket their public employers during labor disputes, subject only to the minimal requirement of advance written notice. The General Assembly sought to balance public employees' rights to have their voices heard with the public interest in preserving labor peace and minimizing the possibility of public-sector labor disputes and the threat of a shutdown of government services. The decision below upsets that balance, and that warrants review.

Second, review is needed because the appeals court applied the wrong First Amendment analysis, which led not only to the wrong result as to the Picketing Notice Law, but also threatens untold other laws. The Seventh District misapprehended the distinction between content-based speech restrictions and content-neutral time, place and manner regulations. The court said the law is content-based, calling it a "disfavored speaker law" that burdened unions unfairly. The court therefore applied strict scrutiny, and although it acknowledged "legitimate concerns" by the legislature, it found that the Picketing Notice Law lacked a "compelling state interest" and was not "narrowly tailored." But that analysis missed the mark. The law should be assessed as a time, place, and manner regulation, as it is not aimed at *preventing* any speech based on content, but merely at achieving advance notice to ensure legitimate government interests in peaceful labor relations. That means that intermediate scrutiny applies, and the Picketing Notice Law satisfies that test. At a minimum, review is needed to clarify the framework that applies to this and other laws.

For these and other reasons, the Court should review and reverse the decision below.

STATEMENT OF THE CASE AND FACTS

A. The union picketed the public employer's board meeting without providing the required advance notice, and SERB found that to be an unfair labor practice.

The underlying labor issue here was between the Mahoning County Board of Developmental Disabilities (the "public employer") and the Mahoning Education Association of Developmental Disabilities (the "union" or "MEADD"), an employee organization representing certain employees of the public employer. The two sides had been parties to a collective bargaining agreement ("CBA") that was effective from September 1, 2004 through August 31, 2007. See SERB Op. 2010-008 (4-29-10) ("SERB Op.") at 2. After that CBA expired, the parties continued to negotiate over a successor agreement. *Id.*

While negotiations continued, the union picketed a meeting of the public employer's board, held on November 5, 2007. *Id.* at 3. The meeting was held at The Centre at Javitt Court, a building owned by the Mahoning County Commissioners and used primarily as a habilitation center for the public employer's medically fragile clients and for developmentally disabled senior citizens. *Id.* at 2-3. During its normal business hours, weekdays from 7:30 a.m. to 3:30 p.m., Javitt Court is not open to the general public. *Id.* The public employer uses Javitt Court for public meetings three or four times a year. *Id.*

The union did not notify the public employer or SERB of its plan to picket the meeting. Ohio's Picketing Notice Law, R.C. 4117.11(B)(8), requires such notice, and the statute provides that failure to provide such notice is an "unfair labor practice." Specifically, the law says that

It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

* * *

Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. The notice shall state the date and time

that the action will commence and, once the notice is given, the parties may extend it by the written agreement of both.

R.C 4117.11(B)(8) (emphasis added).

About three weeks after the picketing, on November 27, 2007, the public employer filed with SERB a charge that the union had committed an unfair labor practice. SERB Op. at 2. In response, the union argued (among other things) that the Picketing Notice Law was unconstitutional. SERB found probable cause, and the parties agreed to submit the matter to SERB on stipulated facts and briefs. *Id.* at 3. SERB found that MEADD committed an unfair labor practice by violating the Picketing Notice Law. *Id.* at 11. While SERB did not address the law's constitutionality, since it lacks jurisdiction to consider constitutional claims, SERB reiterated the longstanding rule that statutes are presumed constitutional. *Id.* at 9. SERB provided an in-depth historical overview of its own decisions addressing the Picketing Notice Law, *id.* at 4-8, and it concluded that the union violated the statute, *id.* at 11.

B. The Court of Common Pleas rejected the Union's constitutional challenge and affirmed SERB's decision that the Union committed a ULP.

On appeal to the Court of Common Pleas, the union argued that the Picketing Notice Law was unconstitutional on its face and as applied to the facts of this case. See Decision and Entry, Mahoning County Ct. of Com. Pl. ("Com. Pl. Op.") (Mar. 2, 2100), 4. The court rejected these arguments, upheld the law as constitutional, and affirmed SERB's decision. *Id.* at 16-17.

In rejecting the constitutional challenge, the trial court first found that the Picketing Notice Law was not content based. *Id.* at 8-11. The court found that the law does not regulate speech; it was not adopted because of a disagreement with the message it conveys; and it does not involve a complete ban of picketing. *Id.* at 8. Instead, said the court, the statute allows the speech to occur as long as the picketers comply with the time, place, and manner regulations. *Id.* at 13. The court found that the state had legitimate public policy interests, or significant

government interests, to justify the regulations, and that the law was sufficiently tailored to those interests. *Id.* at 13-14. In support, the court cited a 1994 SERB decision, *In re Ohio Civil Service Employees Assn., Local 11, AFSCME*, SERB Op. 94-009 (5-26-94). That decision lists six reasons why the legislature enacted the ten-day advance notice requirement in R.C. 4117.11(B)(8). *Id.* (Those reasons are detailed below in the Argument at 14-15). Consequently, the court held that the statute was a valid, content-neutral time place and manner regulation, and it rejected the union's facial and as-applied challenges. *Id.* at 7, 16.

C. The Seventh District Court of Appeals held that the Picketing Notice Law was unconstitutional, at least as applied to picketing not connected to a strike.

On further appeal, the Seventh District Court of Appeals reversed: It held that the Picketing Notice Law is unconstitutional, and it therefore rejected SERB's decision finding that the Union committed an unfair labor practice in picketing without notice. See App. Op. ¶ 30.

First, the court rejected SERB's and the trial court's classification of the Picketing Notice Law as a content-neutral time, place, and manner regulation, calling it a "content-based" law instead. *Id.* ¶ 21. Specifically, the court said it fell within a "subset of content-based laws" called "disfavored speaker laws." *Id.* ¶ 19. Therefore, the court applied strict scrutiny rather than the intermediate scrutiny that applies to time, place, and manner regulations. Second, applying strict scrutiny, the court found that the statute does not advance a compelling state interest. *Id.* ¶ 28. It acknowledged the State's interests as "legitimate concerns," but said they were not compelling. The court further found that, even if the interests were compelling, the law would still be invalid because the ten-day advance notice requirement is not narrowly tailored to meet those interests. *Id.* Consequently, the court held that "the portion of R.C. 4117.11(B)(8) requiring ten days' notice prior to picketing is held unconstitutional." *Id.* ¶ 30.

SERB now asks this Court to accept jurisdiction and review the case.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Court should review this case for several reasons, including its broad practical effect and its unclear doctrinal effects upon labor law and upon First Amendment law more broadly.

A. **Review is needed because the decision affects all public employers and employees.**

First, review is warranted because of the decision's broad impact. Ohio's Collective Bargaining Act, including the Picketing Notice Law at issue here, applies to every public employer in Ohio, including the State, counties, cities, school districts, and all forms of local subdivisions. It covers about 2,700 employers and 350,000 public employees. SERB Annual Report 2011, available at www.serb.state.oh.us/pdf/Annual%20Report%202011.pdf (last visited Aug. 10, 2012). Moreover, a decision affecting a part of Ohio's labor law indeed affects all employers and employees covered by the law, not just those who picket or consider picketing. That is so because the entire system of labor relations functions against the backdrop of remedies that would be available if a labor dispute arose and led to a strike or picketing.

Even if the effect were limited to those involved in labor disputes that involve the duty to notify, the impact is still broad. According to statistics compiled by SERB and reported in its 2011 Annual Report and earlier, the amount of Notices of Intent to Picket vary from a low in the last decade of just two in fiscal year 2010-11 to sixty-one in fiscal year 2004-2005. In typical years, SERB has received between fifteen to thirty Notices of Intent to Picket per year. *Id.*

Further, the decision's effect compounds an ongoing uncertainty about the valid scope of the Picketing Notice Law—an uncertainty that began when the Eighth District invalidated the law in 1998. See *United Electrical Radio and Mach v. State Employment Relations Bd.*, 126 Ohio App. 3d 345 (8th Dist. 1998). In *United Electrical*, the appeals court covering Cuyahoga County—Ohio's most populous county—also invalidated the Picketing Notice Law, but under a theory different from the decision below. The Eighth District invalidated the notification

requirement as an unconstitutional prior restraint. *See id.* at 354-57. Although that court also found the law to be content-based, as did the court below, its prior-restraint analysis left no doubt that the law could not apply at all to picketing.

Although the Eighth District's invalidation of the law in 1998 suggests strongly that unions and union members in Cuyahoga County need not comply with the law, SERB's records show that it continues to receive notices from Cuyahoga County, at rates roughly consistent with Cuyahoga County's proportion of the State's population. That suggests that public employees are uncertain about the meaning of the earlier Eighth District ruling, so employees in the Seventh District might also be unsure about the scope of the decision below. Or, the continued compliance from public employees in Cuyahoga County could show that the law's "burden" is so minimal—requiring just notice, with no possibility that SERB or the employer could actually limit the speech—that public employees find it easy to comply even if they might not have to.

On top of all that, this uncertainty puts SERB itself—as the agency designated by the General Assembly to apply Ohio's public labor laws—in a bind. The decision below, along with the earlier Eighth District decision, suggests that SERB should not apply the law in the counties in those two appellate districts—meaning that it should not find unfair labor practices for picketing-notice violations, even when employers from those areas file complaints. But that patchwork approach cuts against SERB's obligation to follow the General Assembly's instructions and its obligation to apply the law evenhandedly across the State. Only this Court can give a statewide answer to this recurring problem.

The Court should grant review because this case affects so many people and entities, and all of them need the clarification that only this Court can provide.

B. Review is needed to address the uncertainty regarding the scope of the appeals court's decision regarding the Picketing Notice Law.

As noted above, the decision below leaves all involved—public employees, public employers, and SERB—unsure about their legal obligations. The uncertainty is compounded by the unclear nature of the appeals court's reasoning and holding in at least two respects.

First, the appeals court was unclear about whether its ruling covered *all* picketing, or only picketing that is not accompanied by a strike or other work stoppage. The distinction matters. As the court noted, the picketing in *this* case was not connected to a strike or other “concerted refusal to work.” App. Op. ¶ 25. Instead, the union members here picketed the public employer's board meeting to urge the employer to move toward the union's position in negotiations. But the members stayed on the job—and that is a fairly common occurrence.

The court's reasoning strongly suggests that it meant to invalidate the Picketing Notice Law only as to non-strike picketing. The court said that the state's interest is “minimize[d]” in the scenario of non-strike picketing “as compared to the interests regarding the striking and concerted refusal to work portions of the statute.” *Id.* It added that “the government interest in avoiding a work stoppage is not as compelling in the case of picketing a board meeting as it is in the case of a strike.” *Id.* Logically, that reasoning should allow the law to apply, without constitutional problems, to the notice required *for picketing that does accompany a strike.*

But the court's language also suggests a broader reading, one that invalidates *all* picketing, and not just non-strike picketing. By contrasting the picketing scenario to what it called the “striking and concerted refusal to work portions of the statute,” the court seemed to omit the possibility that the picketing “portion of the statute” could even apply when the picketing *accompanies a strike*, but is still distinct from the strike itself. *Id.* That distinction matters, because an employer planning for a strike has valid reasons to know whether it faces a

non-picketed strike, in which case it must provide for only that, or whether it must also prepare to handle a picket line. Picketing could impede clients from receiving government services, interfere with suppliers, or cause noise or other disruptions. Thus, the Picketing Notice Law should be valid in such cases, but the court may have invalidated the law in those cases, too.

The court's holding and conclusion likewise seem to cover all picketing, not just non-strike picketing. The court said "we hold that the requirement that a public employee organization and public employees must provide ten days of advance notice of a picket does not pass the strict scrutiny test," *id.* ¶ 29 (emphasis added). It "conclude[d] that the requirement" for "ten days' advance notice of a picket" failed strict scrutiny, *id.* ¶ 30, and thus "the portion of R.C. 4117.11(B)(8) requiring ten days' notice prior to picketing is held unconstitutional," *id.* Those repeated references to "pickets" generally, or to the "picketing" "portion of" the statute seem to sweep broadly, and do not preserve the Picketing Notice Law's valid applications, which the appeals court earlier seemed to recognize.

SERB urges that the decision covers only non-strike picketing, and it asks even that ruling to be overruled. But in any case, review is needed to address the ambiguity of the decision's scope, and to ensure that an overbroad reading does not gut this law even when it would be valid by the appeals court's own reasoning.¹

¹ The distinction between strike-related picketing and non-strike-related picketing also raises the separate issue of constitutional avoidance in statutory construction. The appeals court noted that the statute raises "a potential question as to whether the only type of picketing prohibited is a type of concerted refusal to work" as a statutory matter, before reaching constitutional issues. App. Op. ¶ 25. The court rejected a narrower statutory reading, based on SERB's practice of applying the law to non-strike-related picketing. *Id.* SERB stands by that view as a matter of statutory construction, but that is because SERB also believes that the law remains constitutional if read that way. But *if* a court finds that a statute could be read in two ways, one of which renders it constitutional and one unconstitutional, the court must adopt the "saving construction" that preserves the law. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). The Seventh District did not do that. If this Court agrees with the

Second, even if the decision covers only non-strike-related picketing, the court's analysis creates a separate uncertainty over whether the decision reaches the many cases in which public employees plan their picketing more than ten days in advance, so the notice requirement is no burden at all. The appeals court singled out the timing issue, saying that *even if* a compelling interest justified some advance notice, ten days was too long, so the law was not narrowly tailored. App. Op. ¶ 28 ("Ten days is a long time to force a public employee and her union to wait And, it does not take ten days to arrange security or prepare a response to publicity.").

But the court's own acknowledgement of that issue should have led it a step further, to acknowledge that the law therefore should *not* be invalid when the facts of the case show that compliance ten days out would not be the slightest burden. As noted above, SERB receives many timely notices of intent to picket, showing that compliance is typically *not* a burden. Thus, even if the appeals court were somehow right that *some* circumstances render compliance difficult, it is undeniable that *many* circumstances allow for easy compliance. When a court takes the grave step of invalidating the General Assembly's will, it should do so no more broadly than required. And more important, at this stage, is that SERB needs to know how broadly this invalidation reaches, as it needs to apply the law properly when the parties before it ask.

C. Review is needed to address the broader uncertainty about the First Amendment framework that applies to this or other laws.

Finally, review is needed to address the equally important issue of the proper First Amendment framework to apply to this or other laws, as the appeals court sowed confusion.

The Seventh District accurately described the difference between content-based and content-neutral laws, and the different tests that apply to each. See App. Op. ¶¶ 7-12, citing *Chicago v. Mosley* 408 U.S. 92 (1972), *Carey v. Brown*, 447 U.S. 455 (1980), and *United*

appeals court's constitutional analysis, then it should still reverse the finding of unconstitutionality and instead read the statute to achieve a constitutional result.

Electrical, 126 Ohio App. 3d 345. The court opined that the Picketing Notice Law did not turn on the actual content of the speech involved in the picketing: The Law “does not delineate the subject matter of the picketing.” App. Op. ¶ 18. The court further explained, “an employee or her union may wish to picket on the topic of labor,” or, said the court, “they may wish to picket about” other issues. *Id.* The court concluded that the “statute provides that the employee or employee organization must give ten days’ worth of notice no matter what topic they choose to embrace by their picketing.” *Id.* That should have ended the matter: The law is content-neutral. But despite the court’s conclusion that the law is literally content-neutral, it went on to characterize the law as within a “corollary” of “disfavored speaker laws.” *Id.* ¶ 19. But the court did not apply the traditional test, which looks to a statute’s underlying *purpose* to classify it as content-based or content-neutral. A court should assess whether the law is meant to suppress speech based on content, but the court below did not do that.

Thus, regardless of the outcome here, the decision warrants review because the Court can and should clarify the appropriate test to be used in determining when a law is content-based or content-neutral, and that of course affects many laws beyond the one at issue.

In sum, the Court should review the case for many reasons, and ultimately, should not let such an important law be invalidated by lower courts without further review.

ARGUMENT

Appellant SERB’s Proposition of Law:

R.C. 4117.11(B)(8), in requiring public employees to give ten days’ notice before picketing, does not violate the First Amendment’s free speech guarantee, whether on its face or as applied to non-strike related picketing.

In assessing a First Amendment challenge, the threshold issue is whether the challenged law is content-neutral or content-based. That classification is made by considering the underlying *purpose* of the restriction. *Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 306,

(1996), citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994). Speech is deemed content-based only if “the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). By contrast, a “regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791. Speech regulation is content-neutral if it is “justified without reference to the content of the regulated speech.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). And if a speech regulation is content-neutral, based on its *purpose*, the State may then adopt reasonable “time, place, or manner” restrictions, provided that the restrictions are content-neutral, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *Id.*

Here, the court used the wrong framework in analyzing the law. It acknowledged the law’s literal content-neutrality, App. Op. ¶ 18, but it veered without justification into the alternate “disfavored speaker” theory, *id.* ¶ 19. But under either theory—disfavored *speech*, based on its content, or disfavored *speaker*, based on who delivers the speech—the focus should remain on whether the law’s *purpose* was to regulate the speech based on the speech or the speaker. That is, was the law enacted because of the State’s dislike of the speech/speaker, or was the State legitimately concerned solely with content-neutral time, place, and manner regulation?

The Picketing Notice Law easily passes the *right* test. The General Assembly, in enacting the Collective Bargaining Act, was surely not biased against, or “disfavoring,” public employees and their unions as speakers. To the contrary, virtually all observers agree that the Act was strongly pro-labor. In including the Picketing Notice Law within the Act, the legislature

merely sought to reduce the labor strife that preceded the Act, and it did so not by limiting the speech, but merely by asking for advance notice before the speech starts.

Indeed, the notice requirement here is even less of a time, place, and manner regulation than laws that are routinely upheld, as many laws *actually* limit the time or place of speech, while this law lets speakers speak anytime, anywhere, once notice is given.

None of the cases cited by the court support labeling the Picketing Notice Law as content-based; to the contrary, the cases support SERB, as the Supreme Court consistently looks to a law's *purpose* to see if the government had impermissibly sought to suppress speech because of its content. App. Op. ¶ 19, citing *Sorrell v. IMH Health, Inc.*, _ U.S. _, 131 S. Ct. 2653, 2664 (2011); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-50 (1994); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). In *Sorrell*, the Court found “it is apparent that [the challenged law] imposes burdens that are based on the content of speech,” 131 S. Ct. at 2664. Likewise, in *Discovery Network*, “the very basis for the regulation” was “the difference in content between ordinary newspapers and commercial speech.” 507 U.S. at 429.

Turner Broadcasting supports SERB even more strongly. There, the Court found that a law requiring cable operators to carry broadcast channels was content-neutral, because its *purpose* was not to favor certain content. 512 U.S. 622, 642-50. The law was found to “impose burdens and confer benefits without reference to the content of speech.” *Id.* at 643. Notably, the Court acknowledged that the law expressly “distinguish[ed] between speakers in the television programming market,” but that was “based only upon the manner in which speakers transmit[ted] their messages . . . not upon the messages they carry.” *Id.* “So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.” *Id.* In other words, the “disfavored speaker”

genre is not a *separate* category that condemns laws that are content-neutral in their purpose and effect; rather, the “speaker” test is merely another way to examine *whether* the speaker distinction is being used as a way to reach disfavored *content*.

Here, again, the Picketing Notice Law does not “disfavor” any speech based on content, and under *Turner*, the alleged disfavoring of the *speaker* is not a cause for strict scrutiny when the speaker-based distinction is not cover for a *content*-based distinction. That means strict scrutiny should not have been applied here, but intermediate scrutiny applies instead. That requires the law to be narrowly tailored to serve a significant (not compelling) state interest, and the law must be upheld if it leaves open ample alternative channels for communication of the information. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The State’s interests here satisfy intermediate scrutiny, and in fact, are strong enough to meet strict scrutiny even if it applies (though it does not). SERB has identified those interests:

- 1) to provide all parties an opportunity for at least ten days to resolve or mediate any labor disputes through the available procedures in Chapter 4117 prior to the heightened emotions, publicity and disruptions which often accompany picketing activities;
- 2) to provide the public employer with a ten-day period of time in which to provide any additional security precautions and/or other arrangements which it may feel are necessary to protect property and to properly carry on the public business and services;
- 3) to provide a ten-day cooling-off period for all concerned prior to employees mounting a picket line in order to minimize the chance of any violence, vandalism or intemperate behavior;
- 4) to give the employee organization a chance to work with employees to head off a confrontation and additional time to reflect on the most productive course of action;
- 5) to enable a public employer a reasonable amount of time to adequately prepare a response to the publicity and media attention which often accompanies picketing activities, including the opportunity to consult with labor experts, which will reduce the chances of intemperate or ill-advised responses by the public employer which might constitute unfair labor practices or otherwise make a bad labor situation worse, and;

- 6) to notify SERB of the labor problem so that SERB has time to respond, prepare for and possibly to attempt to defuse or resolve matters before the picketing actually begins.

In re Ohio Civil Service Employees Ass'n, SERB Op. 94-009 at 3-63. These purposes, especially taken together, justify the mild requirement of mere notice. Even in non-strike picketing cases, tempers may flare in the heat of the moment, and a “peaceful” demonstration can change into something else.

The National Labor Relations Board cited similar reasons supporting a similar federal law, 29 U.S.C. § 158(g), requiring ten-day notices for *all* picketing involving healthcare institutions. In *District 1199, National Union of Hospital and Health Care Employees*, 232 N.L.R.B. 443, 1977 NLRB LEXIS 114, *8, the NLRB explained that

[T]he very act of picketing may induce actions by others regardless of the picketers' purpose. Any form of picketing therefore creates the risk that the delivery of health services will be disrupted.

* * *

Here, the public interest in continuous health care is balanced against the right to picket as an exercise of free speech. The result of the balancing is simply the requirement that 10 days' written notice be given prior to engaging in any form of picketing so that the health care institution may have the time to prepare for possible disruptions of patient care. Such a restraint is reasonable . . .

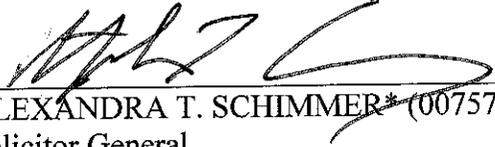
The same is true here: Ohio's law is as reasonable as the federal one, and it should be upheld.

CONCLUSION

For the above reasons, the Court should review and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

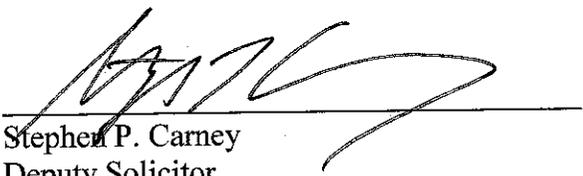
I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by U.S. mail this 13th day of August, 2012, upon the following counsel:

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APPENDIX

EXHIBIT 1

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 28 2012
FILED
ANTHONY VVO

STATE OF OHIO)
)
MAHONING COUNTY) SS: IN THE COURT OF APPEALS OF OHIO
 SEVENTH DISTRICT

MAHONING EDUCATION ASSOC.)
OF DEVELOPMENTAL DISABILITIES,)
)
APPELLANT,)
)
VS.)
)
STATE EMPLOYMENT RELATIONS)
BOARD, et al.,)
)
APPELLEES.)

CASE NO. 11 MA 52
JUDGMENT ENTRY

For the reasons stated in the opinion rendered herein, the sole assignment of error is with merit and is sustained. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio is hereby reversed and we hold that the provision at issue in R.C. 4117.11(B)(8) is unconstitutional. Costs taxed against appellees.

OHIO ATTORNEY
GENERAL'S OFFICE
JUL 05 2012
LABOR RELATIONS

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EXHIBIT 2

MAHONING COUNTY COURT OF APPEALS
JUN 28 2012
FILED
ANTHONY J. ...

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

MAHONING EDUCATION ASSOC.)
OF DEVELOPMENTAL DISABILITIES,)
APPELLANT,)
VS.)
STATE EMPLOYMENT RELATIONS)
BOARD, et al.,)
APPELLEES.)

CASE NO. 11 MA 52

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court,
Case No. 10CV1785.

JUDGMENT:

Reversed.

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

OHIO ATTORNEY
GENERAL'S OFFICE

Dated: June 28, 2012

JUL 02 2012

LABOR RELATIONS

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Developmental Disabilities)

VUKOVICH, J.

{¶1} Appellant Mahoning Education Association of Developmental Disabilities (the union) appeals the decision of the Mahoning County Common Pleas Court which upheld the constitutionality of the portion of R.C. 4117.11(B)(8) prohibiting picketing by a public employee or a public employee organization unless ten days' written notice is provided to the public employer. The union's threshold argument is that the law is an unconstitutional content-based restriction on speech that does not meet the strict scrutiny test. SERB counters that the statute is a content-neutral time, place, and manner regulation and thus subject to intermediate scrutiny.

{¶2} Because the law only applies to public employees and their employee organizations, the law delineates a "disfavored speaker" and is thus treated as a content-based restriction subject to strict scrutiny. In applying the strict scrutiny test, we conclude that the government has not met its burden of showing that the law, requiring ten days of notice before mere picketing, is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. Accordingly, we reverse the trial court's judgment and hold that the provision at issue in R.C. 4117.11(B)(8) is unconstitutional.

STATEMENT OF THE CASE

{¶3} The union was in negotiations for a new contract with the Mahoning County Board of Developmental Disabilities (the employer). On November 5, 2007, the union picketed an evening board meeting. An unlawful labor practice charge was filed with the State Employment Relations Board (SERB), and SERB concluded that the union violated R.C. 4117.11(B)(8) which states:

{¶4} "It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to: * * * Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. The notice shall state the date and time that the action will commence and, once the notice is given, the parties may extend it by the written agreement of both."

{15} Besides contesting the alleged violation, the union had also challenged the constitutionality of the statute, but SERB found that, as an administrative agency, it had no authority to find a statute unconstitutional. The union appealed to the trial court, where the parties briefed the statute's constitutionality. On March 2, 2011, the trial court found that R.C. 4117.11(B)(8) was not unconstitutional and affirmed SERB's unfair labor practice decision. The union filed a timely appeal, assigning the following as error: "THE TRIAL COURT ERRED WHEN IT FOUND R.C. 4117.11(B)(8) DOES NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 11, ARTICLE 1, OHIO CONSTITUTION."

{16} Within this assignment of error, the union raises various issues: (1) whether the statutory provision is content-based requiring strict scrutiny or content-neutral requiring only intermediate scrutiny; (2) whether the law survives strict scrutiny; (3) whether the law survives intermediate scrutiny; (4) whether the law is a prior restraint and thus subject to strict scrutiny on this alternative ground¹; and (5) whether strict scrutiny could alternatively apply because the location was a designated public forum at the time of the public meeting. Due to our resolution of the first two issues in favor of the union, the alternative arguments made by the union are moot.

CONTENT-BASED OR CONTENT-NEUTRAL

{17} When a statute that burdens speech is challenged on a First Amendment basis, an important line of inquiry is whether the regulation is content-based or content-neutral in order to determine the applicable level of scrutiny: strict or intermediate. If the statutory provision is content-based, then the strict scrutiny test is applied to determine the restriction's constitutionality. *Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A.*, 89 Ohio St.3d 564, 567, 773 N.E.2d 1152 (2000). This is because content-based regulations are presumptively invalid. *R.A.V. v. St.*

¹The Eighth District concluded that R.C. 4117.11(B)(8)'s requirement of advance notice picketing speech and assembly constitutes a prior restraint that is subject to strict scrutiny. *United Electrical, Radio and Machine Workers of America v. SERB*, 126 Ohio App.3d 345, 710 N.E.2d 358 (8th Dist.1998), citing *Thomas v. Collins* (1945), 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed.2d 430 (1945) (requirement that union speaker register and receive organizer's card before giving speech was subject to strict scrutiny even where card was issued to all who applied), *Rosen v. Port of Portland*, 641 F.2d 124 (9th Cir.1981) (one-day notice for demonstrating or leafleting in airport was invalid prior restraint).

Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). In meeting the strict scrutiny test for a content-based law, the government is required to show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

{118} A content-neutral regulation, on the other hand, is subject only to an intermediate level of scrutiny. *Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). A content-neutral regulation thus may impose reasonable restrictions on the time, place, or manner of speech as long as the restrictions are: justified without reference to the content of the regulated speech, narrowly tailored to serve a significant or substantial (as opposed to compelling) governmental interest, and leave open alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Upon outlining these levels of scrutiny, we turn to the distinction between content-based and content-neutral laws.

{119} A content-based regulation typically "stifles speech on account of its message." *Turner Broadcasting*, 512 U.S. at 641-642. A law is content-based if it applies to speech based on not just a particular viewpoint but also if it applies to burden an entire topic of expression regardless of viewpoint. *Burson v. Freeman*, 504 U.S. 191, 197, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

{110} In contrast, a regulation is said to be content-neutral if it is unrelated to the content of the speech and merely regulates the time, place, and manner of the speech. *Id.* at 642. The distinction, however, is not a clear one. "Determination of whether individual regulations are content-based or content-neutral has proved problematic in practice * * *." *Painesville*, 89 Ohio St.3d at 568.

{111} The union cites two Supreme Court cases here, which SERB urges are distinguishable. In one case, an ordinance prohibited picketing near a school unless it was peaceful labor picketing of a school involved in a labor dispute. *Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). An equal protection claim

was found to be closely intertwined with freedom of expression doctrines. *Id.* at 95. The Court held that the ordinance was content-based because it "describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter." *Id.* at 99. The Court then concluded that the discrimination against non-labor picketing was not narrowly tailored to achieve its end as peaceful non-labor picketing would not be more disruptive than peaceful labor picketing. *Id.*

{¶12} In the other case, a statute banned picketing of a residence unless used as a place of employment and specified that it does not prohibit picketing a place of employment involved in a labor dispute. *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). The Court applied the *Mosley* rationale and invalidated the statute. *Id.* at 463-469.

{¶13} The union contends that the statute at issue similarly singles out labor picketing by imposing a burden before labor speech can be used. As the union notes, the Eighth district has cited these cases in support of its decision to find that a different provision, R.C. 4117.11(B)(7), was content-based. *United Electrical, Radio and Machine Workers of America v. SERB*, 126 Ohio App.3d 345, 355-356, 710 N.E.2d 358 (8th Dist.1998). As the union points out, the *United* Court also characterized (B)(8) as a content-based law.

{¶14} Yet, the *United* court made this declaration without a full analysis. Rather, the court seemed to find (B)(8) content-based by relying on its analysis regarding why (B)(7) was content-based. However, a comparison of division (B)(7) with (B)(8) shows that the divisions have distinguishable language. Pursuant to R.C. 4117.11:

{¶15} "(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to: * * *

{¶16} "(7) Induce or encourage any individual *in connection with a labor relations dispute* to picket the residence or any place or private employment of any public official or representative of the public employer.

{¶17} “(8) Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. * * * .” (Emphasis added).

{¶18} Division (B)(7) specifically refers to picketing in connection with a labor relations dispute. However, division (B)(8) does not delineate the subject matter of the picketing. That is, an employee or her union may wish to picket on the topic of labor. Or, they may wish to picket about the political position of a candidate or office holder, or the personal immorality of a board member, or an office’s treatment of a citizen. The statute provides that the employee or employee organization must give ten days’ worth of notice no matter what topic they choose to embrace by their picketing. As such, we prefer a different line of reasoning than that mentioned by the Eighth District in *United*.

{¶19} We address a subset of content-based laws or a corollary of disfavored speech laws: disfavored speaker laws. The United States Supreme Court has treated disfavored speaker laws the same as disfavored speech laws and thus has applied strict scrutiny in cases where a type of speaker is singled out for burdened expression. *Sorrell v. IMS Health, Inc.*, ___ U.S. ___, 131 S.Ct. 2653, 2663-2664, 2667 (2011) (disfavored speaker law is essentially viewpoint discrimination); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (strict scrutiny applies to regulations reflecting an aversion to what disfavored speakers have to say); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (a law’s burden on commercial handbills that does not burden an ordinary newspaper is a type of content-based law subject to strict scrutiny as it disfavors the speaker).

{¶20} “Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. *Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.* As instruments to censor, these categories are interrelated: *Speech restrictions based on the identity of the speaker are all too often simply a means to*

control content." (Citations omitted) (Emphasis added). *Citizen's United v. FEC*, ___ U.S. ___, 130 S.Ct. 876, 898-899, 175 L.Ed.2d 753 (2010).

{¶21} R.C. 4117.11(B)(8) singles out a certain type of speaker: a public employee organization and the public employees themselves. That is, anyone can picket outside a board meeting without notice except public employees and their union, who are singled out and required to give ten days' written notice of the intent to picket. Thus, it is not merely a time, place, and manner restriction as proposed by SERB. Rather, it creates a disfavored speaker by discriminating against public employees and their unions and burdening their ability to engage in spontaneous speech in the form of a picket at a board meeting. Following this line of reasoning, we conclude that the law is content-based and thus strict scrutiny is the applicable standard.

STRICT SCRUTINY

{¶22} In applying strict scrutiny, the government is required to show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that compelling interest. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). If a less restrictive alternative would serve the state's purpose, the legislature must use that alternative. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). "When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. 656, 665, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

{¶23} As for a compelling state interest, SERB argues that the trial court properly found that the following state interests were advanced by the ten-day notice requirement: (1) ability to prepare a response to publicity; (2) ability to anticipate disruptions that often accompanying picketing and to arrange security precautions; (3) a cooling-off period minimizes the chance of violence, vandalism, heightened emotions, or intemperate behavior on the picket line; (4) a chance to avoid confrontation, such as by mediation; (5) time to reflect on the most productive course

of action and to consult with experts to reduce chances of ill-advised responses which may constitute an unfair labor practice or make the situation worse; and (6) SERB can try to defuse matters before picketing begins. The trial court also found that Chapter 4117 has a purpose to minimize the possibility of public sector labor disputes and encourage labor stability and peace by remedying the negative impact to the public caused by work stoppages. See *Kettering v. SERB*, 26 Ohio St.3d 50, 55, 496 N.E.2d 983 (1996) (also noting that prior to passage of the Act there had been over four hundred public employee work stoppages in Ohio between 1973 and 1980).

{¶24} As the trial court opined, these are legitimate concerns. However, a legitimate concern is not the equivalent of a compelling state interest. As the union emphasizes, there was no work stoppage.

{¶25} On this topic, we note that the statute prohibits without notice "any picketing, striking, or other concerted refusal to work." There is a potential question as to whether the only type of picketing prohibited is a type of concerted refusal to work. Picketing is not necessarily a refusal to work, and the picketing here occurred at an evening board meeting. Still, SERB found the union guilty of a unfair labor practice here for violating R.C. 4117.18(B)(8). Thus, SERB applies the law even if the picketing is not a concerted refusal to work. This minimizes the state's interest as compared to the interests regarding the striking and concerted refusal to work portions of the statute. In other words, the government interest in avoiding a work stoppage is not as compelling in the case of picketing a board meeting as it is in the case of a strike. Besides the lack of work stoppage and/or disruption to public services, there was no disruption in the provision of services to the government by others.

{¶26} Moreover, the desire to avoid oral dispute with one's employees in public is not a compelling state interest at the expense of free speech. In fact, "[a]n essential function of free speech is to invite dispute." *Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 309, 667 N.E.2d 942 (1996). It has been stated that avoiding a "potential threat" to public order and safety from speech is not a compelling government interest absent clear and present danger. *Id.* at 308. Speech's value is elevated because it can induce a condition of unrest and create dissatisfaction with the status quo. *Id.* As

the Eighth District opined, the state does not have a compelling state interest in avoiding bad publicity by "dispers[ing] the drama of the moment and interrupt[ing] the natural momentum of events." *United*, 126 Ohio App.3d at 365.

{¶27} Here, we have an advance notice/registration requirement for speech applicable only to disfavored speakers, the public employees and their union, which is thus content-based and subject to strict scrutiny. A concern with many advance notice requirements is that the delay squelches spontaneity and the excitement of the moment acting to dilute the effectiveness of the speech. See *Talley v. California* (1960), 362 U.S. 60, 64-65 (ordinance invalid where it prohibited distribution of leaflets unless label identified name and address of distributor); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 163, 89 S.Ct. 935, 945, 22 L.Ed.2d 162, 174 (1969) (Harlan, J. concurring) ("when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."). See also *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (state's requirement that union speaker register and receive organizer's card before giving speech was invalid even where the card was issued to all who applied).

{¶28} Even assuming arguendo the state asserted some compelling interest, the state has failed to show that written notice ten days in advance of a picket is *necessary* to serve these interests or that this requirement is *narrowly tailored* to meet these interests. See *Perry Ed. Assn.*, 460 U.S. at 45. Ten days is a long time to force a public employee and her union to wait to voice an opinion through an informational picket of a board meeting, especially since board meetings are few and far between. And, it does not take ten days to arrange security or prepare a response to publicity.

{¶29} For all of these reasons, we hold that the requirement that a public employee organization and public employees must provide ten days of advance notice of a picket does not pass the strict scrutiny test. The state has not shown that the provision is necessary to serve a compelling government interest or that it is narrowly tailored to achieve that interest.

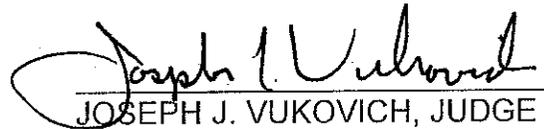
CONCLUSION

{¶30} R.C. 4117.11(B)(8) is a disfavored speaker law and thus the equivalent of a content-based burden on the free speech rights of public employee organizations and public employees. As such, it is subject to strict scrutiny. In applying the strict scrutiny test, we conclude that the requirement that public employee organizations and public employees must provide ten days' advance notice of a picket is not necessary to serve a compelling government interest and is not narrowly tailored to achieve that interest. Consequently, the trial court's decision is reversed, and the portion of R.C. 4117.11(B)(8) requiring ten days' notice prior to picketing is held unconstitutional.

Donofrio, J., concurs.

Waite, P.J., concurs.

APPROVED:



JOSEPH J. VUKOVICH, JUDGE