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Statutory:

R.C. 4117.11(B)(8)	<i>passim</i>
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Constitutional:

First Amendment to the U.S. Constitution	<i>passim</i>
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I. Statement of the Case and Facts

The Mahoning Education Association of Developmental Disabilities (MEADD) conducted informational picketing consisting of signs containing messages related to MEADD's contract negotiations with the Mahoning County Board of Developmental Disabilities (employer or Board). (Stipulation of Fact 9.) MEADD's informational picketing occurred near the entrance of Javitt Court, before the Board held a public meeting at Javitt Court. (Stipulation of Fact 7, 9.) MEADD picketed near the entrance to Javitt Court so that people attending the public meeting could see the information conveyed by the picket signs. (Stipulation of Fact 9.) Mahoning County owned Javitt Court and the Board regularly held public meetings at Javitt Court. (Stipulation of Fact 8.)

The employer filed a unfair labor practice charge with SERB. SERB found an unfair labor practice based on MEADD's failure to provide the ten day notice of picketing required by R.C. 4117.12(B)(8), which makes it 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.

The Mahoning County Court of Appeals found the R.C. 4117.11(B)(8) requirement that a union provide ten days notice before picketing unconstitutional because R.C. 4117.11(B)(8) is “the equivalent of a content-based burden on the free speech rights of public employee organizations and public employees.” *Mahoning Education Assn. Of Dev. Disabilities v. SERB*, 7th Dist. No. 11MA-52, 2012-Ohio-3000, ¶ 30.

II. Argument

Proposition of Law:

The First Amendment prohibits laws penalizing a specific party for commenting on a specific subject matter.

A. A law violates the First Amendment when it restricts informational picketing by public employees and their unions if the message relates to a labor dispute.

R.C. 4117.11(B)(8) violates the First Amendment to the U.S. Constitution because it restricts the ability of public employees and their unions to conduct informational picketing to inform the public about labor disputes.

SERB's decision whether to find an unfair labor practice when public employees, or their unions, conduct informational picketing without providing ten day notice depends on the content of the message presented. SERB only found an unfair labor practice in the present case because MEADD's informational picketing related to a labor dispute. SERB would not have found an unfair labor practice had MEADD conducted informational picketing related to political or general social issues. [SERB brief at p. 2.]

When the government decides whether to find an unfair labor practice based on the content of informational picketing it violates the First Amendment. A law like R.C. 4117.11(B)(8) which "describes permissible picketing in terms of its subject matter" violates the First Amendment because "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter,

or its content." *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

The ordinance found unconstitutional in *Mosley* only permitted picketing related to a labor dispute; R.C. 4117.11(B)(8) requires ten day advanced notice only for public employees or their unions to conduct informational picketing related to a labor dispute. In both situations, "[t]he operative distinction is the message on a picket sign." *Mosley* at 95.

The United States Supreme Court in *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263, also found unconstitutional a law which, like R.C. 4117.11(B)(8), determined how to treat picketers based on the "nature of the message being conveyed," and whether that message related to a labor dispute. *Carey* at 461.

Mosley and *Carey* demonstrate that R.C. 4117.11(B)(8), which determines whether to penalize informational picketing based on whether the picketing provides the public with information about a labor dispute, violates the First Amendment.

Contrary to the argument in the employer's brief at page 11, the First Amendment protects the rights of public employees and their unions to conduct informational picketing to get their message about labor disputes before the public because "picketing plainly involves expressive conduct within the protection of the First Amendment." *Mosley*, 408 U.S. at 99. As this Court has recognized, "[i]t is well

settled that picketing is a "pristine and classic" exercise of First Amendment freedoms." *City of Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 306, 667 N.E.2d 942 (1996). Nor does the fact that the informational picketing involved a labor dispute remove it from the protection of the First Amendment, contrary to the employer's argument, because "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.'" *Thomas v. Collins*, 323 U.S. 516, 532, 65 S.Ct. 315, 89 L.Ed 430 (1945) quoting *Thornhill v. Alabama*, 310 U.S. 88, 102-103, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

B. No justification exists for R.C. 4117.11(B)(8)'s limitation of the right of public employees and their unions to conduct informational picketing to inform the public about a labor dispute.

R.C. 4117.11(B)(8), which requires ten days notice before public employees and their unions can conduct peaceful informational picketing such as that conducted by MEADD in the present case, "regulates expressive conduct that falls within the First Amendment's preserve." *Carey v. Brown*, 447 U.S. at 460.

No justification exists for R.C. 4117.11(B)(8)'s limit on the First Amendment right of public employees and their unions to conduct informational picketing. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *US v. Playboy Entertainment Group*, 529 U.S. 803, 816,

120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

The state has not met its burden of proving a need to restrict public employees and their unions from conducting informational picketing just because the information presented relates to a labor dispute. Although SERB's brief asserts various justifications, "SERB must demonstrate, as opposed to merely assert . . . the compelling nature of these interests." *United Electrical, Radio and Machine Workers of America v. SERB*, 126 Ohio App.3d 345, 352, 710 N.E.2d 358 (8th Dist. 1998).

The state has made no showing, and has presented no evidence, to demonstrate that it has a justified interest in requiring ten day notice before public employees and their unions can conduct informational picketing related to a labor dispute. As Justice Holmes, sitting with the Eighth District in *United Electrical, Radio and Machine Workers* recognized, where a union like MEADD engages in "peaceful information dissemination", R.C. 4117.11(B)(8) "is not justified as being in this state's interest in protecting the safety of the citizenry, or protecting and preserving public services." *United Electrical, Radio and Machine Workers* at 357, (Holmes, J., concurring in part and dissenting in part).

If the government truly required ten days notice of informational picketing to prevent the "negative effects" SERB argues justify R.C. 4117.11(B)(8) in its brief at p. 16, then it would also need such notice before the other forms of picketing which the state

permits. Yet SERB permits public employees and their union to conduct informational picketing related to non-labor issues, such as political or social issues, without providing ten day notice. [See SERB brief at page 2.] Additionally, since “anyone can picket outside a board meeting without notice except public employees and their union” [*Mahoning Education Assn.*, 2012-Ohio-3000 at ¶ 21], informational picketing on labor issues can also occur without ten days notice – as long as someone other than public employees or their union conducts the informational picketing.

Nor would the claim that an increased risk of disruption exists justify R.C. 4117.11(B)(8)'s limitations on the rights of public employees and their unions to conduct informational picketing. The state cannot base predictions of disruption resulting from picketing “by means of broad classification, especially those based on subject matter.” *Mosley*, 408 U.S. at 101.

C. R.C. 4117.11(B)(8)'s content-based notice requirement burdens the free speech rights of public employees and their unions.

R.C. 4117.11(B)(8)'s content-based requirement that public employees and their unions must provide ten days notice before they can conduct informational picketing to get their message in front of the public harms the public employees and their union. The ten day waiting period “squashes spontaneity” and “dilute[s] the effectiveness” of their speech. *Mahoning Education Assn.* at ¶ 27. When parties engage in a labor dispute, ten days can be a “long time” to wait before being able to conduct informational

picketing to inform the public about their views and opinions of the labor dispute.

Mahoning Education Assn. at ¶ 28. Requiring public employees and their unions to wait ten days to conduct informational picketing also harms them because it “prevent[s] immediate response to immediate issues and thus ha[s] a chilling effect on the exercise of First Amendment rights.” *United Electrical, Radio and Machine Workers*, 126 Ohio App.3d at 356.

Although SERB attempts to justify this statute as “merely a notice requirement” [SERB brief at p. 7], the state cannot constitutionally base its decision to require notice of informational picketing on the content of the picketing:

It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.

Playboy, 529 U.S. at 812.

Thomas v. Collins, 323 U.S. 516, 532, 65 S.Ct. 315, 89 L.Ed 430 (1945) further demonstrates that R.C. 4117.11(B)(8)'s content-based notice requirement violates the First Amendment. *Thomas v. Collins* found unconstitutional a law which required prior registration of a speaker and used the failure of a speaker to register before speaking as the basis for imposing penalties. Similarly, in the present case SERB has used the failure to provide notice before conducting informational picketing as the basis for imposing

the penalty of an unfair labor practice on MEADD. Imposing such a penalty violates the First Amendment because.

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order.

Thomas v. Collins, 323 U.S. at 540.

D. R.C. 4117.11(B)(8)'s content-based standard receives strict scrutiny.

Under any standard of scrutiny, R.C. 4117.11(B)(8)'s restriction of informational picketing which only applies to a specific group (public employees and their unions) on a specific subject (labor disputes) violates the First Amendment.

Because R.C. 4117.11(B)(8) prohibits public employees and their unions from conducting informational picketing based on the content of the message, it is not content-neutral. *United Electrical, Radio and Machine Workers*, 126 Ohio App.3d at 355-356. Laws like R.C. 4117.11(B)(8) that "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

Content-based restrictions like R.C. 4117.11(B)(8) receive strict scrutiny because courts

apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens

upon speech because of its content.

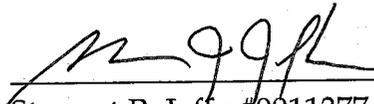
Turner Broadcasting at 642.

Just like the laws at issue in *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) and in *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263, R.C. 4117.11(B)(8) determines whether to limit the rights of public employees and their unions to conduct informational picketing based on whether the information relates to a labor dispute. SERB claims in its brief at p. 7 that this limitation does not “restrict the speech because of its content.” However, “the mere assertion of a content-neutral purpose [will not] be enough to save a law like R.C. 4117.11(B)(8) which, on its face, discriminates based on content. *Turner Broadcasting* at 642-643.

III. Conclusion

R.C. 4117.11(B)(8) determines whether informational picketing constitutes an unfair labor practice based on the identity of the messenger (is it conducted by public employees or their union) and the content of the message (does it relate to a labor dispute). This violates the First Amendment because "[p]rohibitions such as this that are based both on the speaker's identity and content are the rawest form of censorship." *United Auto Workers, Local 112 v. Philomena*, 121 Ohio App.3d 760, 783, 700 N.E.2d 936 (10th Dist. 1998). Because "[s]elective exclusions from a public forum may not be based on content alone", *Carey*, 447 U.S. at 463, this Court should affirm the Court of Appeals' decision.

Respectfully submitted,



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Certificate of Service

A true and accurate copy of the foregoing has been served upon the following by depositing a copy in the United States Mail, postage prepaid, this 25th day of March, 2013

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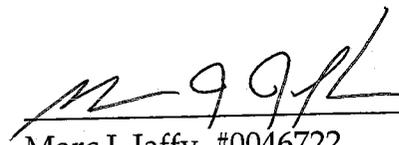
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