ORIGINAL

In the
Supreme Court of Ohio

MAHONING EDUCATION ASSOC. OF DEVELOPMENTAL DISABILITIES, Appellee, v. STATE EMPLOYMENT RELATIONS BOARD, *et al.*, Appellant.	: : : : : : : : : : : :	Case No. 2012-1378 On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District Court of Appeals Case No. 11 MA 52

REPLY BRIEF OF APPELLANT STATE EMPLOYMENT RELATIONS BOARD

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FILED
APR 15 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

Ohio law does not violate free speech rights when it requires public employees or their unions to provide ten days' written notice before they picket a public employer. *See* R.C. 4117.11(B)(8). Plaintiff-Appellee Mahoning Education Association of Developmental Disabilities (the "union" or "MEADD") attacks the law as applied to "informational picketing" unconnected to a strike, claiming the law unconstitutionally "restricts" speech. But those attacks miss the mark for several reasons, mostly centered on the indisputable fact that this mere notice requirement, when complied with, does not restrict speech at all. And the law is the mildest of time, place, or manner restrictions even when a union fails to notify.

First, MEADD never disputes, nor could it, that no speech restraint arises in the ordinary case in which notice can be, and is, easily provided. That key point distinguishes this case from all of the caselaw concerning valid or invalid time, place, or manner restrictions or content-based restrictions. Those cases all involve *restrictions* of some kind. But here, if notice is sent, *no* limits are triggered, not even as to time, place, or manner. Thus, teachers can picket along with parents on labor issues, as well as supporting the troops, if they notify. Indeed, MEADD specifies that its introductory examples apply only when "the teachers did not provide" the required notice. MEADD Br. at 1, 2. The Court therefore can and should uphold the law on its face and in most applications, and the Court should address only those applications when notice *is* omitted and the "restriction" *is* triggered.

Second, even in the few cases where the law converts to a "restriction," it is the mildest of restrictions, and it is a valid time, place, and manner restriction. Although the law involves, in a literal sense, a content-specific aspect, the doctrinal tests separating content-based laws from time, place, or manner laws do not turn solely on whether a law considers content in its operation. Instead, the tests look at whether a law aims to restrict speech *because of* its content,

or if instead, the law has a valid purpose apart from aiming to restrict content. Here, the law is not aimed at stopping any speech, or even at channeling it to a certain time or place, as again, it seeks to encourage compliance and thus allow *all* desired speech to proceed.

Even the law's "limits," as applied to non-notified picketing, are narrow and justified. Public employees can still picket everywhere but at the employer's location. They can still speak and hand out leaflets at the employer's location, as long as they do not engage in the specific physical conduct of "picketing" in conjunction with their speech. That limit is justified by the need to keep essential government services accessible to clients, and that includes the need to reassure—often in advance—clients, suppliers, and others that any "picketing" they see is not strike-related, so that they may pass without worry of crossing a strike picket line.

Third, the law is not a prior restraint, because, again, it does not restrain anything, and it does not do so prior to the speech. Any finding of a violation will occur only after the fact, resulting, as it did here, only in an administrative declaration with no fine or other penalty. The speech here, after all, *did happen*; it was not restrained.

Finally, if the Court does find a problem with the law, it should limit its ruling in either of two ways. First, it should limit any as-applied ruling to only those cases in which notice could not have reasonably been provided; it should not invalidate the law as to all informational picketing. Second, if the Court determines that the law would be unconstitutional as to all informational picketing, it should instead hold that the statute does not even reach informational picketing as a matter of statutory construction, as that reading of the statute is plausible, and thus is required by the doctrine of constitutional avoidance.

ARGUMENT

A. The picketing-notice law imposes *no* speech limit when complied with, and it is the mildest of regulations even as applied to cases in which notice is not sent.

As SERB's opening brief explained, the key point in resolving this case is that the picketing-notice law is *merely* a notice requirement, with no other restriction of any kind connected to that notice. When the law is satisfied, and notice is sent, no restrictions of *any* kind apply, not even time, place, or manner regulations. That point has several implications, including the scope of as-applied review, the distinction of much of the case law, and more. In addition, even when notice is not sent, the law's limits are especially mild.

1. Compliance involves no speech limits, and it is simple and common.

The picketing-notice law is designed to operate in a world of routine compliance, not non-compliance, and no one disputes that the compliance path leads to no limits. This is not a law that provides for notice so that the government may then respond by providing guidelines for the anticipated speech, such as a time or place permit for a parade, or a rally in a public park, etc. Instead, once the notice is sent, *any* picketing is allowed—any time, any place, any subject. And the notice requirement itself is not a speech restraint, as the act of sending a piece of paper is simply not a limit on the later speech. The only "restriction" at issue arises, conditionally, when the notice is not sent. In those "non-notified" cases—and only in those cases—the limits apply.

MEADD does not and cannot dispute that the compliance path leads to no limits, and it builds its case only around the situation in which notice is not sent. For example, MEADD's brief begins with hypothetical examples that, in its view, show the law's problems. MEADD Br. at 1-2. But in both examples, the critical fact is not that the picketers are teachers or parents, or that the picketing involves labor issues or supporting the troops. The critical fact in both examples is that limits arise *only when,* in MEADD's own words, "the teachers did not provide"

the required notice, MEADD Br. at 1 (Example 1), and when "[t]hey do not provide SERB" or the employer notice, *id.* at 2 (Example 2). When notice is sent, as in most cases, nothing happens.

Further, the compliance path, resulting in no limits, is both simple and most frequent, as the facts and common sense show. To be sure, circumstances might arise in which spontaneous speech is desired, and SERB returns to that below. But compliance is simple in most cases, as the planners know far in advance when they would like to engage in informational picketing. Public-employee picketing, whether strike-related (which is not at issue here) or informational, is typically related to contract renewal, which of course is tied to expiration after a three-year period. When (as here) picketing is aimed at a public meeting of a board, Ohio's Sunshine Law ensures advance notice of regular meetings of public bodies. *See* R.C. 121.22(F).

And the proof is in the pudding: Most unions *do* provide notice without any difficulty. As SERB's opening brief noted, it has received about fifteen to thirty notices in most years, with a recent low of two and a high of sixty-one. SERB Br. at 3. In particular, SERB continues to receive notices from Cuyahoga County, even though an appeals court in 1998 declared the law invalid as to informational picketing. *Id.*; *see United Electrical Radio & Machine v. State Employment Relations Bd.*, 126 Ohio App. 3d 345 (8th Dist. 1998). By contrast, this case is only the second court challenge to the law, to SERB's knowledge; it is the first since the 1998 case. That shows that in most cases, the law does not impose limits.

The law's no-limits nature in most cases—namely, when notice is provided—is important because it confines the scope of this challenge to a narrow as-applied situation involving a subset of non-notified picketing. Therefore, the Court should not view the case as a challenge to how

the law affects all informational picketing, but only as a challenge to SERB's ability to consider an unfair-labor-practice charge *when* picketing occurs without notice.[1]

Further, the law's no-limits nature, when complied with, distinguishes this case from most caselaw, and all U.S. Supreme Court caselaw. In most cases (as explained more fully in the doctrinal merits discussion below), a speaker faces limits even when complying with a notice law. For example, in *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 156-57 (2002), a door-to-door solicitor was not only required to register in advance, but was also required, upon registration, to avoid certain houses. Likewise, in *NAACP v. Richmond*, 743 F.2d 1346, 1354 (9th Cir. 1984), the notice law regarding parades was not a mere notice requirement, as city officials could deny a parade permit for enumerated reasons. Indeed, in *Thomas v. Chicago Park District*, 534 U.S. 316, 318 (2002), the U.S. Supreme Court *upheld* a law requiring would-be speakers to obtain advance approval before speaking in a park, and there the authorities were empowered to deny permission.

In short, the picketing-notice law, in almost all cases, is not an *allowable* regulation of speech; it is no regulation of speech at all. That is enough to save the law for its routine applications.

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[1] SERB also notes that even the broadest potential reach of MEADD's challenge—to cover all informational picketing—is limited in the context of the full reach of R.C. 4117.11(B)(8). First, MEADD of course does not challenge the notice provision as applied to strikes or other work stoppages themselves, as those involve more than speech or expressive conduct. Second, MEADD does not challenge the notice provision as applied to picketing *when connected to a strike* (or other work stoppage), which is also distinct from informational-only picketing. Thus, MEADD's challenge cannot be considered a facial challenge to the "picketing" term in the statute under any reading.

2. The law is a mild regulation of conduct even when notice is not provided, as it governs only the physical act of picketing at the public employer's location.

Not only does the picketing-notice law provide no limits at all when complied with, but it also sets the mildest of limits in the rare cases in which it is violated. Before applying all of the relevant legal doctrines, it bears noting first how little is at stake even when notice is not provided.

If notice is not sent, all that happens is that public employees may not "picket" at their employer's worksite. They may, of course, picket or demonstrate anywhere. And they may even speak or hand out leaflets at the public employer's work site as long as they do not engage in the physical conduct of "picketing." Picketing, although protected to a degree, of course, is a distinct form of expressive conduct, and it is not as protected as pure speech. "The First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing . . . as these amendments afford to those who communicate ideas by pure speech." *Cox v. Louisiana*, 379 U.S. 536, 555 (1964); *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 580 (1988) (handbilling without patrolling a picket line is different because "the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.").

And even if someone pickets without notice, the consequences are minimal: She faces no criminal enforcement, nor even civil fines, in sharp contrast to the enforcement in cases that MEADD cites. *See*, e.g., *Thomas v. Collins*, 323 U.S. 516, 518 (1945) (imprisonment and fines possible for failure to obtain an organizer's card before soliciting union membership); *Grossman v. City of Portland*, 33 F.3d 1200, 1202 (9th 1994) (permit requirement for protesting enforced by arrest and exclusion from public spaces). At most, SERB may find an unfair labor practice if

the employer files a charge. Here, SERB found an unfair labor practice, and mandated publication of that fact. That is all.[2]

B. The picketing-notice law, even as applied to non-notified picketing, is a valid regulation of the time, place, or manner of speech.

Even when notice is not sent, and the picketing-notice law therefore limits picketing until the notice is provided, the law is a valid time, place, or manner regulation.

1. The law is not treated as content-based, even if content is considered in triggering the law's application, because it does not seek to limit speech based on its content.

At first blush, MEADD's description of the law as "content-based" might seem correct. After all, the law only applies to labor-related speech by public employees. SERB does not dispute that literal description. However, it is not that simple, because the doctrines and cases that distinguish "content-based" regulations from "content-neutral" regulations of "time, place, and manner" do not turn on whether content plays any role at all in the law's operation. Instead, as SERB explained in its opening brief, several branches of speech jurisprudence categorize laws as "content-neutral," even when the laws literally consider content in some way. *See* SERB Br. at 8-9, 10-11. The picketing-notice law falls under the "content-neutral" category, despite a content-related aspect, because it does not aim to regulate the expressive conduct here in order to limit speech *because* of its content.

The U.S. Supreme Court has repeatedly categorized laws as content-neutral, despite a content-based or speaker-based element in those laws. *See*, e.g., *Turner Broadcasting System,*

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[2] SERB also notes that R.C. 4117.12(C), which authorizes SERB to seek an injunction in common pleas court to stop ongoing unfair labor practices that cause "substantial and irreparable injury," is not at issue here. MEADD challenges only the notice provision itself, not the injunction provision. Also, that provision most likely could not apply (and never has been applied) to non-notified informational picketing, because such speech would not cause the required injury.

Inc. v. FCC, 512 U.S. 622 (1994) (classifying regulation of cable channel content for certain speakers as "content-neutral"); *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002) (classifying zoning regulations as to "adult entertainment" and "adult bookstores" as content-neutral). In *Turner Broadcasting,* for example, the Court treated a speaker-based regulation as "content-neutral" because the law did not seek to restrict content. And in *Alameda Books,* and the entire body of adult entertainment cases, the Court treats laws that openly consider content—by applying to "adult" bookstores but not other bookstores, and so on—as "content-neutral," because the laws aim to deal with "secondary effects" and *conduct* that might be connected with certain types of expression.

Here, too, the law is not aimed at restricting content. First, as explained above, the compliance path involves *no* restrictions of any kind. Second, when the "limits" apply to non-notified picketing, they are not intended to limit the content of any speech, as the same content can be advanced by leaflets or oral speech or any other means. The law addresses only the specific physical conduct of picketing, which is recognized as having effects different from other means of conveying the same content. Indeed, the law is concerned with those effects, such as the prospect of government clients not receiving the service they need.

MEADD's argument about content seems to rely on the simplistic but mistaken premise that the law is content-based because it applies only to public employees and only when they address labor topics. MEADD does not address SERB's argument about the law's *purpose* and the U.S. Supreme Court's treatment of several laws as content-neutral even when they consider content in some respect. For example, MEADD cites *Turner* repeatedly for boilerplate statements, but never addresses *Turner*'s explanation of how speaker-specific laws can be valid. *See* MEADD Br. at 11, 15, 25, 29.

Moreover, the provision's focus on labor-related speech by public employees is explained by reasons other than some antipathy to such speech. First, as to the speakers covered, this particular provision must be considered in its proper context as a statute that governs the relationship between public employees and their employers. In all respects, SERB has jurisdiction over only those actors; it has no jurisdiction over parents or other citizens. In that regard, SERB's oversight is somewhat akin to regulation of a certain industry or certain profession. Doctors, lawyers, and others may be disciplined for speech in certain circumstances, and by definition, those rules do not apply to non-doctors or non-lawyers. But that does not make such rules invalid as "disfavored speaker" rules. Likewise, all employees working in the "profession" of public service are subject to SERB's oversight.

Second, and similarly, the same concept explains why non-labor-related picketing, such as "support the troops" picketing, is not covered: It is simply not SERB's mission. That does not mean the State of Ohio seeks to favor one stripe of speech or another; it means only that SERB's mission, and thus this provision, is confined only to the labor context. Indeed, other laws might apply to parents, or teachers picketing to support troops, or parents picketing to support troops, if any of those picketers were to act in such a way that implicates the content-neutral concerns that animate the notice provision here. For example, if non-labor picketers were to patrol in a way that impedes access, or disturbs the peace, other laws might apply to them, just not those laws entrusted to SERB's labor-specific jurisdiction. If such picketers went beyond a public sidewalk to a parking lot or a private-property sidewalk in front of a building, they might be trespassing or in a limited, non-public forum. *See Gilles v. Garland*, 281 Fed. Appx. 501, 510 (6th Cir. 2008) (finding college campus to be non-public forum as to non-students, such that students and those working with them could speak, but outsiders could not). Indeed, in this era

of increasing school-safety concerns, virtually every school has tightened its policies about visitors on school property, showing that different laws and policies cover different aspects of such issues.

These features distinguish the picketing-notice provision—which addresses labor-related speech in the context of broader regulations of labor relations in the public sector—from the type of content-based labor-speech favoritism exemplified by *Carey v. Brown*, 447 U.S. 455, 466 (1980). The challenged law in *Carey* sought to restrict residential picketing on all topics *except* labor relations, and the Court explained that this topic-based favoritism violated equal protection. It explained that the defense of the law there "forthrightly presuppose[d] that labor picketing is more deserving of First Amendment protection than are public protests over other issues." *Id.* MEADD suggests that this case is just *Carey* in reverse, disfavoring labor speech rather than favoring it. But that is not so, as the law in *Carey* truly restrained non-labor speech, while the law here does not restrain anything. Moreover, the notice here is in the context of other laws addressing labor, showing that it addresses these speakers for *that* reason, not because a broader law was written to favor or disfavor this group.

In sum, as a matter of legal doctrine, this is not a content-based restriction, despite the literal consideration of content in triggering SERB's jurisdiction.

2. The picketing-notice law meets the time, place, and manner standards, especially because it is narrowly tailored to serve the significant interest of ensuring access to public services to people who need them.

Not only is the picketing-notice law a time, place, or manner regulation (when it is a restriction at all), and not a content-based restriction, but it is a *valid* time, place, or manner regulation. Such regulations are valid if they are not aimed at limiting a message because of its content, are narrowly tailored to serve a significant government interest, and leave open ample

alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The picketing-notice law meets these three conditions, *see* SERB Br. at 8-16, and MEADD's arguments do not undermine SERB's initial showing.

First, as explained above, the provision does not aim to limit a message because of its content. Again, the compliance path allows for both a message *and* for picketing as a means of expressing it, and even the noncompliance path allows the message to be expressed in many ways, showing that no content-based suppression is intended.

Second, the provision is narrowly tailored to serve a specific government interest. MEADD purports to refute the government interests at stake, but it does not succeed. A primary interest here is ensuring that clients continue to access vital government services, whether schools, benefits offices, or, as here, developmental-disability services. Comparing government services to health-care facilities, which are protected from non-notified picketing under federal law, is instructive. *See* 29 U.S.C. § 158(g). It is not just that many services, such as health-benefits services, are just as important as health care. It is that public offices, by definition, are often the *only* place to go for the service at issue. If a private-sector union pickets Kroger, a customer who is unwilling or unable to cross a picket line can shop at Giant Eagle. But if a public school is picketed, a student cannot just go to another school for that day. Government clients typically can go to only one county benefits office, one school, etc.; public services are not interchangeable. Ensuring access to those locations is therefore critical.

Further, as SERB explained, informational picketing creates very real problems for access, and advance notice can greatly alleviate or eliminate those problems. *See* SERB Br. at 12-16. A particular problem is that some clients, or suppliers or others doing business with the public employer, are committed to not crossing picket lines—but many of those non-crossers are

committed only to honoring *strike-related* pickets, and are willing to cross informational pickets. With advance notice, a public employer can assure its partners that the picket is informational only, and encourage, for example, a food-supply truck to deliver to the school cafeteria. Without advance notice, the misperception that a picket is strike-related could cause an approaching trucker to turn away when he sees the pickets from blocks away, leaving the cafeteria unsupplied.

In addition, notice allows public employers, and the safety forces in the jurisdiction, to plan for sufficient coverage to prevent problems before they happen. Recent events surrounding the teachers' strike in Strongsville, Ohio, illustrate the point. True, the picketing there is strike-related, and that type of picketing is not at issue here. But the safety challenges raised by the Strongsville picketing could happen with informational picketing as well. Incidents of violence have been alleged as tempers flare, such as a driver allegedly hitting a picketer with a car. *See Strongsville teachers strike enters day 2,* Plain Dealer, Mar. 5, 2013, available at http://www.cleveland.com/strongsville/index.ssf/2013/03/strongsville_teachers_strike_e.html (last visited Apr. 12, 2013) (describing incident). The city has had to provide additional police officers to keep the peace, and in addition to planning the staffing itself, the city faces the budgetary challenge of paying for the ongoing police time. *See Both sides back at bargaining table as teachers strike continues toll on Strongsville,* Plain Dealer, Apr. 8, 2013, available at http://www.cleveland.com/strongsville/index.ssf/2013/04/post_17.html (last visited Apr. 12, 2013) (noting that city budgeted $350,000 for police overtime, and had already spent $135,000 for overtime for forty officers). Advance notice is critical to providing for safety needs.

Thus, the picketing-notice law does serve important interests, and it is narrowly tailored to meet those interests without unnecessarily restraining speech. Again, if the notice is provided, no speech is restrained at all.

Finally, the provision satisfies the third prong by leaving open ample alternative means for communicating. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The law does more than allow "alternative" means, as compliance leaves open even the avenue of picketing itself. And even when viewed as a limit, it leaves open alternative means, including onsite speech and leafleting, limiting only picketing as a means of expressive conduct.

Taking all of the prongs together, Ohio's law is a model example of the type of time, place, and manner "regulation" that the doctrine is meant to accommodate. It is a lesser "regulation" than any of the types of laws invalidated in caselaw, and it is even a milder regulation than laws that are upheld as valid. In *Carey,* for example, the U.S. Supreme Court explained that access to government services could be enough to justify an outright ban on picketing. "Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities . . .." *Carey*, 447 U.S. at 470. Here, Ohio has chosen to ensure access to vital governmental facilities not by banning picketing, as *Carey* blesses, nor by truly restricting it. Ohio asks only for a minimal notice so that public needs can be met without any cost to speech.

In sum, the law is a valid regulation of the time, place, or manner of speech—when it is a limit at all—and it should therefore be upheld.

Moreover, for these same reasons, the law would satisfy strict scrutiny as well, even though such scrutiny does not apply here. Ensuring access to public services is a compelling interest on its own, and other interests, such as public safety, add to that. And the picketing-

notice law is as narrowly tailored as possible: While most narrowly tailored laws try to minimize the amount of speech actually restricted, Ohio's law reduces it to zero when notice is provided. It does not get narrower than that.

C. The picketing-notice provision is not a prior restraint.

The picketing-notice provision also is not a prior restraint, as it does not empower SERB or a public employer to suppress picketing before it occurs. The term "prior restraint" means exactly what it says: a restraint on speech *prior* to its expression. *See Near v. Minnesota*, 283 U.S. 697, 715 (1931) (prior restraint is the "suppression and injunction" of speech before it happens); *State ex rel. Toledo Blade Co. v. Henry County Court of Common Pleas*, 125 Ohio St. 3d 149, 153 (2010) (prior restraint is "a governmental restriction on speech ... before its actual expression"). The picketing-notice provision, however, is not a "restraint" of picketing, let alone a "prior" one. It is no restraint because the rule permits picketing at any time or place, and it is certainly no *prior* restraint, because the only consequence of picketing without notice is receiving an "unfair labor practice" designation *after* the speech has taken place. By contrast, "prior restraints" actually restrict speech by controlling what speech takes place before that speech happens. Prior restraints include enjoining the publication of particular material, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), enjoining publication by particular speakers, *Near v. Minnesota*, 283 U.S. at 702, or conditioning speech on prior approval or permitting, *Watchtower Bible & Tract Soc. of New York v. Stratton*, 536 U.S. 150, 154-56 (2002). The picketing-notice provision does none of those things.

MEADD cites cases that it claims apply the doctrine of prior restraints to mere notice provisions like the one here, but these cases are distinguishable. MEADD Br. at 17. Two of the cases are about notice-and-approval regulations, where the government not only required notice

before speaking, but also claimed authority to approve or disapprove of the proposed speech. *Douglas v. Brownell*, 88 F.3d 1511, 1514 (8th Cir. 1996) (police chief could deny parade permit for enumerated reasons); *NAACP v. Richmond*, 743 F.2d 1346, 1354 (9th Cir. 1984) (city officials could deny a parade permit for enumerated reasons). The rest of the cases concern regulations enforceable by arrest, criminal penalties, or the forfeiture of future speech rights. *Thomas v. Collins*, 323 U.S. 516, 518 (1945) (failure to obtain an organizer's card before soliciting union membership punishable by fine and brief imprisonment); *Grossman v. City of Portland*, 33 F.3d 1200, 1202 (9th 1994) (city ordinance requiring a permit before protesting carried potential penalty of arrest and exclusion from public spaces); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245 n.2 (9th Cir. 1981) (violation of one-day notice requirement could be penalized by a six-month ban on non-commercial solicitation at the airport, or for more than one violation, a twenty-four-month ban); *Robinson v. Coopwood*, 292 F. Supp. 926, 929 (D.C. Miss. 1968) (failure to give one-hour's notice before a public march resulted in the arrest of twenty demonstrators). By contrast, the picketing-notice provision does not carry criminal penalties and cannot be enforced by imposing restraints on future speech.

Because the picketing-notice provision does not restrict speech before it occurs, it is not a prior restraint, and precedent governing prior restraints does not apply.

D. If this Court finds any constitutional problem, it should apply the narrowest-needed as-applied ruling or should adopt a saving statutory construction.

The Court should uphold the law as it stands, but if it does perceive a problem with the law, it should limit its holding either by narrowing the scope of any constitutional ruling or by addressing a statutory issue that avoids the constitutional issue entirely.

1. The Court should limit any possible as-applied holding to only those cases in which a party makes some showing why notice could not be sent.

As explained in Part A above, MEADD's challenge is an as-applied challenge as to only some picketing, for it does not challenge the notice requirement as to strike-related picketing (nor does it challenge notice as to an actual strike apart from any related picketing). But any potential invalidation of the law should cover not all informational picketing, but at most, only those cases in which a party makes some minimal showing as to why it was impractical to send notice before its informational picketing began. In other words, if a need for spontaneity exists in some cases, the Court should address only those cases, and if such a need exists, a party should have little trouble showing it.

First, although MEADD suggests that it challenges the law as to all informational picketing, its argument applies, at most, to non-notified picketing. That is, MEADD never addresses how speech has been purportedly restricted all these years for those who *did* provide notice. Because notice in all those cases through the years has provided the benefits of notification, *with no countervailing cost to speech at all,* no basis exists to invalidate the law as applied to those situations where notice was provided. Nothing would be gained by enjoining the law as to all informational picketing, but much would be lost.

Second, the Court should also limit any holding not just to non-notified picketing, but only to *justifiably* non-notified picketing. That is so because otherwise, a holding as to "all non-notified picketing" would collapse into an overbroad holding as to all informational picketing, as parties of the type that are easily complying now could simply skip the notice for no reason at all. Without some check, all compliance would collapse—a senseless result since, again, compliance should continue for those who find compliance easy and *thus face no speech limits, because none arise when they comply.* That is shown, again, by the imbalance between the

decades of routine compliance and the rarity of challenges, and by the common-sense recognition that most labor-related picketing is anticipated far in advance. The need for spontaneous picketing is low.

The Court could easily establish a low threshold for the required showing, and it could order SERB not to find an unfair labor practice if the party makes any good-faith showing as to why it could not provide the ten-day notice. The most obvious example would be if a public body called an emergency meeting, without ten days' notice, so the picketers correspondingly could not notify the public employer of their intent to picket. Or picketers could show that they responded to a late-breaking event of any type. But picketing a regularly-scheduled meeting, based on a long-scheduled expiration of a contract, or on other long-known events, should still require the minimal "burden" of notice.

Here, MEADD has never offered a reason for its noncompliance, only its claim on principle that it should not have to comply. Thus, a holding in MEADD's favor, as applied, is not warranted. However, because a proof-based standard would be new, the Court could choose to remand the case to allow MEADD to show why it reasonably could not comply with the notice requirement.

All of this is not to say that the Court *should* find the statute unconstitutional at all; it should not. But if the Court does limit the law in any respect, it should do so in the narrowest terms necessary to alleviate the alleged harms.

2. If this Court finds the provision unconstitutional as applied to informational picketing, it should adopt a constitutionally-saving construction of the statute and read the statute to apply only to strike-related picketing.

As an independent alternative, if the Court is inclined to invalidate the statute as to all informational picketing, it should instead adopt a saving construction of the statute, preserving

its constitutionality by reading the statute to apply only to strike-related picketing. As SERB explained, the appeals court here identified that issue as a live one, but it mistakenly said that it would follow SERB's broader reading of the statute simply because SERB had always applied it that way. *Mahoning Educ. Assoc. of Developmental Disabilities v. State Employment Relations Board*, 2012-Ohio-3000, (7th Dist.) ("App. Op."), Appx. Ex. B, ¶ 25.

But SERB's own reading over the decades was premised on the belief that the broader reading would be constitutional. But if that premise is gone, and the broader reading *would be unconstitutional,* then the constitutional-avoidance doctrine *mandates* the adoption of a narrower reading as long as the statute is fairly susceptible to the narrower reading. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Pizza v. Sunset Fireworks Co., Inc.,* 25 Ohio St. 3d 1, 7 (1986) ("[C]ourts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.").

Here, the statute can plausibly be read to cover only strike-related picketing, and not to reach informational picketing. It applies to "any picketing, striking, or other concerted refusal to work." R.C. 4117.11(B)(8). That language includes the term "*any* picketing," and SERB has looked to the term "any" in adopting a broader reading. But the language refers, in a series, to "picketing, striking, or *other* concerted refusal to work." *Id.* (emphasis added). If the term "other" encompasses all three terms, so that both the term "picketing" and "strike" are connected to some type of refusal to work, then picketing *absent* such refusal to work is simply not covered. Both readings are plausible, and while SERB stands by its reading *if* that reading survives constitutional scrutiny, it cannot deny that the other reading is at least plausible, and that ends the inquiry under the constitutional avoidance rule.

MEADD's response to this issue does not truly grapple with the critical question of whether the narrower reading is plausible. It purports to address it, as MEADD's heading asserts that the statute "is not susceptible to a constitutionally savings construction," MEADD Br. at 29 (Heading F), and it begins that section with a triple assertion that "[t]he statute is not susceptible to that construction; SERB has never applied that construction; and the National Labor Relations Board has rejected the same argument with respect to 29 U.S.C. § 158(g)" (which has similar language regarding picketing at health-care facilities). MEADD Br. at 29.

But after that triple assertion, MEADD's response goes on to include a paragraph about SERB's practice and a paragraph about the NLRB's approach to the federal law, and it then closes with the bare assertion that Ohio's statute "is not susceptible" to the narrower reading. *Id.* at 29-30. MEADD never truly engages in any analysis of why the narrower reading is not plausible, and that absence confirms what SERB's analysis shows: The narrower view works, too, so it must be adopted if need be.

MEADD's reliance on SERB and the NLRB is misplaced, because both SERB and the NLRB adopted their readings on the premise that the broad reading would also be constitutional. Neither entity even asked, let alone answered, whether the narrower reading was a plausible alternative if the constitution required it.

Finally, MEADD does not explain, nor could it, how a narrower statutory reading is any less beneficial to its interests than a constitutional holding. Such a statutory restriction, by removing SERB's power to reach informational picketing at all, would put MEADD in the same place as a constitutional ruling. But the statutory approach would be superior because it would follow the time-honored practice of avoiding unnecessary constitutional pronouncements. It

would avoid creating new constitutional law, and as a practical matter, it would avoid unintended consequences as to other regulatory schemes that might involve notice.

None of that means that the Court should take that approach, as it should agree with SERB on the constitutional and statutory issues. But if the Court would otherwise rule broadly here on the constitutional issue, it must instead resort to the saving statutory construction.

CONCLUSION

For these reasons, the picketing-notice provision should be upheld.

Respectfully submitted,

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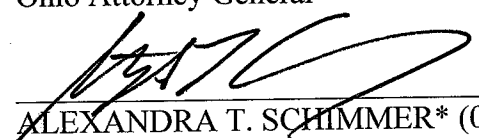

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant State Employment Relations Board was served by regular U.S. mail this 15th day of April, 2013 upon the following:

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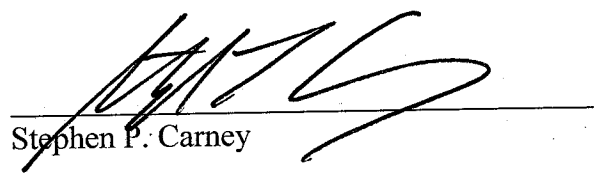

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