FIRST AMENDMENT — LABOR SPEECH — NINTH CIRCUIT HOLDS THAT FIRST AMENDMENT DOES NOT PROTECT ENCOURAGING SECONDARY BOYCOTTS. — *NLRB v. International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 941 F.3d 902 (9th Cir. 2019).

The First Amendment has long had an uneasy relationship with labor law, an area riddled with exceptions to normal protections for expressive conduct.[1] One such exception is the ban on secondary boycotts and the encouragement thereof.[2] In 1951, the Supreme Court held this ban not to violate the First Amendment.[3] Last October, in *NLRB v. International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*[4] (*Local 229*), the Ninth Circuit used this precedent to enforce a cease-and-desist order against Local 229.[5] The court erred in concluding that no developments in First Amendment law warranted revisiting the precedent. Such a holding perpetuates an inconsistency in the law, with courts invoking the First Amendment when — but only when — it is to the detriment of unions.

In 2016, McCarthy Building Companies, Inc. (McCarthy), a general contractor, hired two subcontractors, Western Concrete Pumping (WCP) and Commercial Metals Company (CMC), to construct a parking structure.[6] Local 229 engaged in a wage dispute with WCP, and another labor organization, also involved in the dispute, set up a picket line.[7] Local 229's business agent, James Alvernaz, began texting CMC employees a picture with the words "Friends Don't Let Friends Cross" and a link to a page entitled "Picket Line Etiquette."[8] The page's "first commandment" was "Thou Shall Not Cross the Line."[9] Alvernaz moreover encouraged those employees, on the phone and in person, to boycott CMC to pressure it or McCarthy to stop doing business with WCP.[10]

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[1] *See, e.g.*, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2072–73 (2018).

[2] *See* 29 U.S.C. § 158(b)(4)(i) (2018).

[3] IBEW v. NLRB, 341 U.S. 694, 705 (1951).

[4] 941 F.3d 902 (9th Cir. 2019).

[5] *Id.* at 903, 906–07.

[6] *Id.* at 904.

[7] *Id.*; Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229 (Local 229), 365 N.L.R.B. No. 126, at 2 (Aug. 30, 2017). The other organization, Operating Engineers Local 12, was not a party to the case. *Local 229*, 365 N.L.R.B. No. 126, at 2. The picket line was located such that CMC employees could not get to work without crossing it. *Id.* at 4.

[8] *Local 229*, 365 N.L.R.B. No. 126, at 3 (capitalization omitted); *Picket Line Etiquette*, LIUNA! LOCAL 582, https://www.local582.us/picket-line-etiquette [https://perma.cc/N3J8-ELET].

[9] *Picket Line Etiquette*, *supra* note 8 (capitalization omitted). That same command would appear on flyers Alvernaz distributed over the subsequent days. *Local 229*, 365 N.L.R.B. No. 126, at 3.

[10] *Local 229*, 365 N.L.R.B. No. 126, at 3.

CMC filed a charge against Local 229, alleging an unfair labor practice under the National Labor Relations Act[11] (NLRA).[12] Section 8(b)(4)(i)(B) of the NLRA declares it an unfair labor practice to "engage in, or to induce or encourage any individual . . . to engage in, a strike or a refusal in the course of his employment to . . . perform any services," where a purpose is to pressure "any person to . . . cease doing business with any other person."[13] In other words, it prohibits engaging in or encouraging secondary strikes.[14] Before Administrative Law Judge Cracraft, Local 229 stipulated that Alvernaz's purpose was to "induce or encourage CMC employees to strike or refuse to perform work for CMC in support" of the wage dispute.[15] Judge Cracraft found, accordingly, that Local 229 had engaged in an unfair labor practice.[16]

Judge Cracraft proceeded to deny Local 229's defenses. The union argued that the provision facially violated the First Amendment under the new rule articulated by *Reed v. Town of Gilbert*,[17] which expanded the "content-based" designation and thus the applicability of strict scrutiny.[18] Judge Cracraft disagreed, holding that *IBEW v. NLRB*,[19] which had found the predecessor of section 8(b)(4)(i)(B) not to violate the First Amendment, remained good law.[20] *IBEW* also belied the claim that inducement or encouragement under the NLRA required "threat of reprisal or force or promise of benefit."[21]

She recommended the National Labor Relations Board (Board) issue a cease-and-desist order and require Local 229 to post a notice in its offices to apprise its members of the prohibition on encouraging secondary strikes of CMC.[22] The Board adopted her order[23] and, in November of 2017, sought enforcement of the order in court.[24]

Writing for the Ninth Circuit panel, Judge Rawlinson[25] granted the petition.[26] Addressing the First Amendment claim, she noted that in

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[11] 29 U.S.C. §§ 151–169 (2018).

[12] *Local 229*, 941 F.3d at 904.

[13] 29 U.S.C. § 158(b)(4)(i). Liability under the NLRA is civil. *See id.* § 160(b).

[14] *See Local 229*, 941 F.3d at 905.

[15] *Local 229*, 365 N.L.R.B. No. 126, at 4.

[16] *See id.*

[17] 135 S. Ct. 2218 (2015).

[18] *See Local 229*, 365 N.L.R.B. No. 126, at 4 & n.22 (citing *Reed*, 135 S. Ct. at 2227).

[19] 341 U.S. 694 (1951).

[20] *Local 229*, 365 N.L.R.B. No. 126, at 5 & n.24 (citing *IBEW*, 341 U.S. at 705).

[21] *Id.* at 5 (citing *IBEW*, 341 U.S. at 701–02). Judge Cracraft also denied Local 229's Thirteenth Amendment and Religious Freedom Restoration Act (RFRA) claims. *Id.*

[22] *Id.* at 6–7.

[23] *Id.* at 1.

[24] Application for Enforcement of an Order of the National Labor Relations Board, *Local 229*, 941 F.3d 902 (9th Cir. 2019) (No. 17-73210).

[25] Judge Rawlinson was joined by Judges Schroeder and Lasnik. Judge Lasnik, of the Western District of Washington, was sitting by designation.

[26] *Local 229*, 941 F.3d at 907.

IBEW, "[w]ithout applying strict scrutiny, the Supreme Court concluded that . . . the prohibition [of peaceful picketing to encourage secondary boycotts] 'carries no unconstitutional abridgment of free speech.'"[27] "[T]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion," she quoted, refuting Local 229's claim that the holding covered only picketing.[28] And "[t]he two circuits to address the First Amendment implications of Section 8(b)(4)(i)(B) in the context of pure speech"[29] (as opposed to picketing) had held that the "First Amendment is not at all implicated."[30] The cases in question were *NLRB v. Local Union No. 3, IBEW*[31] and *Warshawsky & Co. v. NLRB*,[32] dated 1973 and 1999. Since these cases were decided, Judge Rawlinson concluded, "no changes to First Amendment jurisprudence" warranted a different analysis.[33] Judge Rawlinson cabined *Reed* narrowly to its facts,[34] buttressing this reading by citing *Agostini v. Felton*,[35] in which the Supreme Court cautioned against reading implicit overrulings into its decisions.[36] And *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*[37] provided no relief: that case pertained to a *consumer* boycott.[38] Accordingly, *IBEW* was still good and applicable law, and Alvernaz's pure speech could constitutionally be proscribed.[39]

Finally, the court rejected Local 229's statutory defense. Section 8(c) of the NLRA provides that expressing or disseminating "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice" absent "threat of reprisal or force or promise of benefit."[40] But, relying once again on *IBEW*, the court agreed with the Board that this did "not immunize activities that violate[d] Section 8(b)(4)."[41] As such, Judge Rawlinson granted the Board's petition for enforcement.[42]

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[27] *Id.* at 905 (quoting IBEW v. NLRB, 341 U.S. 694, 705 (1951)).

[28] *Id.* (quoting *IBEW*, 341 U.S. at 701–02).

[29] *Id.*

[30] *Id.* (quoting Warshawsky & Co. v. NLRB, 182 F.3d 948, 952 (D.C. Cir. 1999)); *see id.* at 905–06.

[31] 477 F.2d 260 (2d Cir. 1973).

[32] 182 F.3d 948.

[33] *Local 229*, 941 F.3d at 906.

[34] *See id.* ("*Reed* involved content-based restrictions in a municipal ordinance regulating signs directed toward the general public." (citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2225–26 (2015))).

[35] 521 U.S. 203 (1997).

[36] *Local 229*, 941 F.3d at 906 (citing *Agostini*, 521 U.S. at 237).

[37] 485 U.S. 568 (1988).

[38] *See Local 229*, 941 F.3d at 906 (citing *DeBartolo*, 485 U.S. at 581–82). *DeBartolo* moreover did not address the constitutional issue, but rather resolved the case on statutory interpretation grounds. *DeBartolo*, 485 U.S. at 588.

[39] *See Local 229*, 941 F.3d at 906.

[40] 29 U.S.C. § 158(c) (2018).

[41] *Local 229*, 941 F.3d at 906 (citing IBEW v. NLRB, 341 U.S. 694, 704–05 (1951)). The court also rejected Local 229's RFRA, Thirteenth Amendment, and notice claims. *Id.* at 907.

[42] *Id.* at 907.

The court erred in concluding that no developments in First Amendment law warranted revisiting *IBEW*. *IBEW* was colored by a now-eroded labor exceptionalism. Case law has since standardized the First Amendment, and the underlying justifications for treating labor as distinct have weakened. Meanwhile, *Reed*, by defining "content-based"[43] broadly, expanded strict scrutiny. *Agostini* cannot justify ignoring this development. These changes call for strict scrutiny of section 8(b)(4)(i)(B). And this call is only amplified as speaker-based distinctions have come under increased constitutional fire.

The precedents on which the Ninth Circuit relied reflect a period of labor exceptionalism. Labor activism was key to the development of the First Amendment in the early twentieth century.[44] But starting in the 1940s, the Supreme Court clamped down on labor protest, viewing it as *coercive economic conduct* as opposed to *persuasive political speech*.[45] This conception proved sticky. In *NAACP v. Claiborne Hardware Co.*,[46] for instance, even as it safeguarded secondary boycotts and pickets by civil rights protestors, the Court expressly carved out from this protection identical acts by unions.[47] "Since the early 1940s," notes Professor Catherine Fisk, "the First Amendment has not been salient to labor law."[48] The precedents underlying *Local 229* were thus informed by a context where First Amendment law was not especially applicable.

But in recent years, the Court has narrowed the gap between labor speech and other kinds of speech. This is part of a broader trend in the Roberts Court's jurisprudence, namely its attempt to standardize First Amendment law.[49] For instance, *Citizens United v. FEC*,[50] in which the Court struck down restrictions on corporate electoral spending,[51] was

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[43] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015).

[44] *See, e.g.*, Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 525–28.

[45] Catherine L. Fisk, David E. Feller Memorial Labor Law Lecture, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment Is a Friend or Foe of Labor*, 39 BERKELEY J. EMP. & LAB. L. 253, 258–62 (2018); Fisk, *supra* note 1, at 2066–71; *see also* Richard Blum, *Labor Picketing, the Right to Protest, and the Neoliberal First Amendment*, 42 N.Y.U. REV. L. & SOC. CHANGE 595, 604 (2019) (noting the Court's "speech-plus" conception of picketing).

[46] 458 U.S. 886 (1982).

[47] *Id.* at 911–12. The boycotts were secondary in that participants boycotted white merchants in order to pressure elected officials to accede to their political demands toward racial equality. *See id.* at 899–900.

[48] Fisk, *supra* note 1, at 2070.

[49] *See, e.g.*, Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 67, 71 (2016). For a critical view of this development, see Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 582–83 (2011).

[50] 558 U.S. 310 (2010).

[51] *Id.* at 318–19.

peppered with language suggesting that a primary motivation was increasing consistency throughout the First Amendment.[52] In so doing, it threatened to "collapse the distinction between commercial speech . . . and protected political or artistic expression."[53] *Janus v. AFSCME, Council 31*[54] crystallized this move toward uniformity in the labor realm. There, the Court held that the First Amendment protected the choice not to subsidize labor speech, thereby rejecting subject-matter differentiation.[55] That opinion, too, stressed consistency, noting that the decision would "bring a measure of greater coherence to our First Amendment law."[56] Since it would be peculiar to hold that subsidizing speech is more worthy of protection than is speech itself,[57] *Janus* seems to effectively reject *IBEW*'s suggestion, and *Local Union No. 3*'s and *Warshawsky*'s holdings, that pure labor speech is subject to weaker First Amendment protection than is other pure speech.

In addition to this express flattening, the underlying justifications for distinguishing labor speech have softened. First, a onetime political/economic distinction has eroded.[58] Labor protest was once deemed economic activity; indeed, this was a key ground for upholding restrictions thereon in the 1940s and '50s.[59] But *Janus* is one of several recent cases to note that many union-negotiated terms are "of great public importance."[60] This renders labor activity political, rather than merely economic.[61] Second, the coercive nature of labor activity was once, but is no longer, cause for its separate regulation.[62] For instance, coercion was cited in *Claiborne* as a reason for carving out labor activity.[63] Yet the coercive potential of picketing has been blunted. Before the demise of

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[52] *E.g.*, *id.* at 329 (rejecting "intricate case-by-case determinations"); *id.* at 353 ("This differential treatment cannot be squared with the First Amendment."); *id.* at 385 (Roberts, C.J., concurring) ("[C]ontinued adherence to [the precedent overruled] threatens to subvert the 'principled and intelligible' development of our First Amendment jurisprudence . . . ." (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))); *see also* Hasen, *supra* note 49, at 582–83.

[53] TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT 4 (2012).

[54] 138 S. Ct. 2448 (2018).

[55] *See id.* at 2459–60, 2464, 2484 ("[W]e end the oddity of privileging compelled union support over compelled party support . . . ." *Id.* at 2484.).

[56] *Id.* at 2484.

[57] *See* William Baude & Eugene Volokh, *The Supreme Court, 2017 Term — Comment: Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 190 (2018) ("[C]ompelling us to *give* money does not appreciably restrict our speech . . . [or] compel us to speak or to believe.").

[58] *See, e.g.*, Fisk, *supra* note 1, at 2061–62 (noting the Court's "determination to erase the First Amendment line between political and economic speech in the labor law realm," *id.* at 2062).

[59] *See, e.g.*, Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 292 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502–03 (1949); *see also* Blum, *supra* note 45, at 600.

[60] *Janus*, 138 S. Ct. at 2475; *accord* Harris v. Quinn, 134 S. Ct. 2618, 2642–43 (2014).

[61] *See* Fisk, *supra* note 1, at 2062–63; *see also Janus*, 138 S. Ct. at 2475–76.

[62] *E.g.*, Blum, *supra* note 45, at 600; Fisk, *supra* note 1, at 2080–81; Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 19–20 (2011) (describing the Court's justifications for treating nonviolent picketing as coercive).

[63] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982).

compulsory union membership, a worker who crossed a picket line could "los[e] union membership and, consequently, the ability to work," a threat that no longer exists.[64] These factors had motivated treating labor picketing as less protected;[65] their elimination calls for greater uniformity.

Even as the First Amendment has become more enmeshed with labor law, it has also since the 1990s become generally stronger. *Reed* expanded the "content-based" designation, mandating strict scrutiny in a broader swath of cases.[66] "[R]egulation of speech is content based if a law applies . . . because of the topic discussed or the idea or message expressed."[67] *Reed* designated as content-based not only laws with a discriminatory purpose, but also those that can be "justified by reference to a content-neutral purpose" but that are facially nonneutral.[68] Under a previous line of reasoning, facially content-based laws had been upheld if they could nevertheless be "justified without reference to the content of the speech they regulated,"[69] leaving the door ajar for regulation (including labor regulation) to draw content distinctions for content-neutral reasons.[70] *Reed* thus constituted a major shift, with already far-reaching implications.[71] It was the starting point, in *National Institute of Family & Life Advocates v. Becerra*[72] (*NIFLA*), for the Supreme Court's refusal to categorically exempt "professional speech" from strict scrutiny;[73] and in *Victory Processing, LLC v. Fox*[74] for the Ninth Circuit's application of strict scrutiny to a facially content-based robocall statute.[75] Neither opinion paused to consider whether *Reed*'s holding was relevant to evaluating the challenged regulation. Instead, each treated *Reed* as the presumptive rule for all content-based restrictions on speech.[76]

Local 229 papered over this change by citing *Agostini* to justify a narrow reading of *Reed*.[77] But this reliance is misplaced. *Agostini* is a

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[64] Fisk, *supra* note 1, at 2081; *see id.* at 2080–81.

[65] *See, e.g.*, Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 776–77 (1942) (Douglas, J., concurring); *cf.* Fisk, *supra* note 45, at 258–60.

[66] *See* Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 235.

[67] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

[68] Lakier, *supra* note 66, at 235 (citing *Reed*, 135 S. Ct. at 2227).

[69] *Id.* at 247; *see id.* at 246–47, 247 n.61 (describing the test and collecting cases).

[70] *See id.* at 265–67, 265 n.139, 266 n.142.

[71] *Id.* at 235. *But see, e.g.*, Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191, 193 (2019) ("[C]ircuit courts have largely read [*Reed*] narrowly.").

[72] 138 S. Ct. 2361 (2018).

[73] *Id.* at 2371–72.

[74] 937 F.3d 1218 (9th Cir. 2019).

[75] *Id.* at 1226 (citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227–28 (2015)); *see also* Lakier, *supra* note 66, at 235 & n.11 (citing *Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016), for an example of a law that might previously have been upheld).

[76] *See NIFLA*, 138 S. Ct. at 2371; *Victory Processing*, 937 F.3d at 1226.

[77] *See Local 229*, 941 F.3d at 906.

poor fit for *Reed*, a case that implicitly overruled "multiple decisions in which the Court did what the *Reed* majority said it had never done."[78] Specifically, the Court *had* "construed facially content-based laws as content-neutral because of the purposes that justified them."[79] In any case, *IBEW* is not quite on point: it permitted restrictions on *picketing* used to encourage secondary boycotts.[80] Only circuit courts extended *IBEW* to pure speech.[81] As such, *Agostini*'s admonition against overruling *directly applicable* Supreme Court precedent[82] is not implicated.

Together, these cases effect a "change[] to First Amendment jurisprudence" that, contrary to *Local 229*'s assertions, "warrant[s] divergence" from *IBEW*.[83] As applied, section 8(b)(4)(i)(B) regulated Alvernaz's texts, phone calls, and conversations[84]: in other words, his pure labor speech. It is facially content based: it prohibits union members from discussing a "particular subject matter"[85] — "the propriety of engaging in a strike"[86] — and distinguishes based on a particular "function or purpose,"[87] encouraging a secondary strike.[88] Section 8(b)(4)(i)(B) is therefore content-based regulation of pure speech, and, like all content-based regulation of pure speech, should be subjected to strict scrutiny.

In addition to clamping down on content-based distinctions, the Court has also shown increasing hostility to speaker-based distinctions.[89] Historically, such distinctions were not a standalone ground for strict

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[78] Lakier, *supra* note 66, at 235.

[79] *Id.* at 252.

[80] IBEW v. NLRB, 341 U.S. 694, 696, 705 (1951).

[81] Warshawsky & Co. v. NLRB, 182 F.3d 948, 952 (D.C. Cir. 1999); NLRB v. Local Union No. 3, IBEW, 477 F.2d 260, 266 (2d Cir. 1973). Moreover, these cases mistakenly use *IBEW*'s statutory interpretation language to support constitutionality. *Warshawsky*, 182 F.3d at 952 ("[T]he words induce or encourage are broad enough to include in them *every form of influence and persuasion*." (quoting *IBEW*, 341 U.S. at 701–02)); *Local Union No. 3*, 477 F.2d at 266. In *United States v. Sineneng-Smith*, No. 19-67 (U.S. May 7, 2020), similar language was at issue, *see id.* at 1. While the Supreme Court refused to decide the case on the merits, *see id.* at 3, the government acknowledged that the statute "could not be applied to the full extent of its literal language," Gabriel Chin, *Opinion Analysis: Lawyers Should Lawyer, Judges Should Judge — The Court Remands* Sineneng-Smith, SCOTUSBLOG (May 7, 2020, 4:24 PM), https://www.scotusblog.com/2020/05/opinion-analysis-lawyers-should-lawyer-judges-should-judge-the-court-remands-sineneng-smith [https://perma.cc/L42W-WRE3], rendering such an expansive reading particularly dubious.

[82] Agostini v. Felton, 521 U.S. 203, 237 (1997).

[83] *Local 229*, 941 F.3d at 906; *see id.* (insisting the opposite).

[84] *Local 229*, 365 N.L.R.B. No. 126, at 3–4 (Aug. 30, 2017).

[85] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

[86] Respondent's Opening Brief at 23, *Local 229*, 941 F.3d 902 (No. 17-73210).

[87] *Reed*, 135 S. Ct. at 2227.

[88] Respondent's Opening Brief, *supra* note 86, at 23. Tellingly, the Board did not attempt to rebut this contention, *see* Brief for the National Labor Relations Board at 21–40, *Local 229*, 941 F.3d 902 (No. 17-73210), and given its finding that *Reed* did not apply, the court did not undertake this analysis, *see Local 229*, 941 F.3d at 906.

[89] *See* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 766 (2015).

scrutiny.[90] But *Citizens United* suggested a different inclination. There, the Court held that a speaker's corporate identity could not justify weaker First Amendment protection for its political speech.[91] It is unclear whether this holding implies that speaker-based distinctions constitute a discrete form of discrimination[92] or rather inform a finding of content-based discrimination.[93] But in either case, it begs a parallel in the labor context, such that unions cannot be prevented from saying that which a civilian could freely advocate.[94] Section 8(b)(4)(i)(B), since it applies only to unions, may run afoul of this hostility also.[95]

"The Court," Fisk notes, "cannot have it both ways."[96] It has sought to standardize First Amendment law, and has overruled its own precedents to do so.[97] *Janus* concretizes that aim in the labor context. In other contexts, the First Amendment requires strict scrutiny of laws that differentiate based on content. Section 8(b)(4)(i)(B) does so differentiate. As such, it would be remarkably inconsistent to exempt it from strict scrutiny. It would amount to holding that "all speech by and about unions is political except when union supporters gather in a public forum to urge workers and consumers to boycott."[98] It cannot be the case that an "absolutist vision of the First Amendment"[99] is warranted only when, as in *Janus*, it threatens union activity. For consistency, the protection of the First Amendment must encompass not only *Janus* and compelled union support, but also *Local 229* and section 8(b)(4)(i)(B).

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[90] *See id.* at 771–72; *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 645 (1994) ("So long as they are not a subtle means of exercising a content preference, speaker distinctions . . . are not presumed invalid under the First Amendment.").

[91] *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[92] *See, e.g.*, *id.* at 340 ("Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."); United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118, 1126 (D. Ariz. 2011) (concluding that a law that imposed speech burdens only on certain unions was subject to strict scrutiny); Kagan, *supra* note 89, at 782.

[93] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230 (2015) ("[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." (quoting *Turner*, 512 U.S. at 658)); Thomas v. Bright, 937 F.3d 721, 729 (6th Cir. 2019) ("[A] law regulating speech is facially content-based if it . . . 'distinguish[es] among different speakers' . . . ." (alteration in original) (quoting *Citizens United*, 558 U.S. at 340)); Carey v. Wolnitzek, 614 F.3d 189, 200 (6th Cir. 2010) (subsuming speaker-based distinctions within content-based distinctions).

[94] *See, e.g.*, Garden, *supra* note 62, at 27.

[95] *See* Respondent's Opening Brief, *supra* note 86, at 20.

[96] Fisk, *supra* note 1, at 2063.

[97] *E.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)); *Citizens United*, 558 U.S. at 365 (overruling Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990)).

[98] Fisk, *supra* note 1, at 2063.

[99] Hasen, *supra* note 49, at 582; *see* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2169 (2015).