**IN THE SUPREME COURT OF OHIO**

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| Portage County Educators Association for Developmental Disabilities – Unit B, OEA/NEA | : | Case No. 2021-0190 |
| | : | Case No. 2021-0191 |
| Plaintiff-Appellee, | : | |
| v. | : | On Appeal from Portage County Court of Appeals, Eleventh Appellate District |
| State Employment Relations Board, *et al*. | : | Case No. 2019-P-0055 |
| Defendants-Appellants | : | |

# BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF COUNTY BOARDS SERVING PEOPLE WITH DEVELOPMENTAL DISABILTIES IN SUPPORT OF APPELLANT PORTAGE COUNTY BOARD OF DEVELOPMENTAL DISABILITIES

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## INTRODUCTION

The Ohio Association of County Boards Serving People with Developmental Disabilities ("OACB") submits this *amicus curiae* brief in support of Appellant Portage County Board of Developmental Disabilities ("Portage DD"). OACB is a trade association, whose members are the 88 county boards of developmental disabilities created by the Ohio General Assembly in Ohio Revised Code Chapter 5126. Appellant Portage DD is a member of OACB. One of OACB's many functions is to engage in advocacy efforts for its members, whether that is before the General Assembly or in state or federal courts.

Each county board of developmental disabilities has seven members, resulting in a total 616 members for all 88 boards in the State of Ohio. Members serve 4-year terms and Boards generally must hold at least 10 regular meetings per year. That is a long-term commitment to ask of a volunteer. It is often hard for county boards to find persons willing to serve on the board based upon that commitment. Allowing labor picketing at a member's private place of employment could seriously impair the ability of boards to recruit interested candidates for membership.

This case presents the question as to whether Ohio Revised Code §4117.11(B)(7) is constitutional in light of the First Amendment. R.C. §4117.11(B)(7) is part of Ohio's Public Employees Collective Bargaining Act and characterizes the following activity by a union or public employees as an unfair labor practice: "Induce or encourage any individual in connection with a labor relations dispute to picket the residence or any place of private employment of any public official or representative of the public employer." Decisions from the Eleventh and Seventh Appellate Districts reached opposite conclusions on that question. For the reasons set forth below, OACB urges the Court to reverse the decision of the Eleventh Appellate District and find that R.C.

§4117.11(B)(7) is valid under the First Amendment as a reasonable time, place, or manner restriction on speech and for the additional reason that the conduct in this case is not protected by the First Amendment.

## STATEMENT OF FACTS

With respect to the facts of this case, OACB refers the Court to the stipulations that Appellant Portage DD and Appellee Portage County Educators Association for Developmental Disabilities, Unit B, OEA/NEA, presented to Appellant State Employment Relations Board, which is contained in the trial court's decision. See SERB Amended Memorandum in Support of Jurisdiction, APP 0038-0047.

## ARGUMENT

### A. Standard of Review

When reviewing the constitutionality of legislation, Ohio courts must presume the statutes to be constitutional. *Hughes v. Ohio Bur. of Motor Vehicles* (1997), 79 Ohio St. 3d 305, 307, 681 N.E.2d 430, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59. This presumption can only be overcome when it appears "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St. 3d 46, 47, 554 N.E.2d 97, quoting *Dickman, supra* at paragraph one of the syllabus. The Court must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional. *Hughes, supra,* at 307; *State v. Dorso* (1983), 4 Ohio St. 3d 60, 446 N.E.2d 449. As stated by this Court in *Arnold, et al. v. City of Cleveland* (1993), 67 Ohio St. 3d 35, 38-39, 616 N.E.2d 163:

> In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation. Further, the legislation being challenged will not

> be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt.

Despite the decision of the Eleventh Appellate District, it cannot be shown that R.C. §4117.11(B)(7) is unconstitutional beyond a reasonable doubt.

**B. When a statute is content-neutral, reasonable restrictions on the time, place, or manner of protected speech are permitted.**

R.C. §4117.11(B)(7) is valid under the First Amendment as a reasonable time, place, or manner restriction on speech. The First Amendment does not prohibit all governmental regulation of speech; the extent to which speech may constitutionally be regulated, however, depends on the nature of the forum in which the regulation operates. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). The decisions of the United States Supreme Court make clear that, "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample 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) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))).[1]

[1] OACB does not concede that the term "any place of private employment of any public official or representative of the public employer" would always encompass a public forum, but recognizes that it can.

**1. R.C. §4117.11(B)(7) is content-neutral.**

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech *because of disagreement* with the message it conveys. *Ward, supra*, at 791, citing *Community for Creative Non-Violence*, at 295. The government's purpose is the controlling consideration. 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. *Id*, citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." *Id.* at 792, citing *Community for Creative Non-Violence*, at 293; *Heffron*, at 648; and *Boos v. Barry*, 485 U.S. 312, 320-321 (1988) (opinion of O'Connor, J.).

Here, R.C. §4117.11(B)(7) is a content-neutral statute. It is contained within the very statutory scheme that allows unions to be recognized by public employers and grants public employees the rights to engage in concerted activity, form or join a union, and engage in collective bargaining with their public employers. Thus, the message to be conveyed by public employees or their unions is certainly not at issue. Yet, the Public Employees Collective Bargaining Act was not created in a vacuum. As this Court noted in *Kettering v. State Employment Relations Bd*., 26 Ohio St. 3d 50, 55, 496 N.E.2d 983:

> … the General Assembly was exercising its police power to promote the general safety and welfare in enacting the Public Employees Collective Bargaining Act. As we just observed in *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44,* v. *State Emp. Relations Bd*. (1986), 22 Ohio St. 3d 1, 5, prior to passage of the Act there had been over four hundred public employee work stoppages in Ohio between 1973 and 1980. The Act was designed to "minimize the possibility of public-sector labor disputes," to bring "stability and clarity to an area where there had been none," and to "facilitate the determination of the rights and obligations of government employees and employers, and give them more time to provide safety, education, sanitation, and other important services." *Id*.

> …. Ohio's unfortunate experience with public employee labor strife, described in *Dayton Fraternal Order of Police, supra,* graphically illustrates the need for a statewide framework of collective bargaining for all employees of the state and local governments.

The Public Employees Collective Bargaining Act was designed to clarify the rights and obligations of public employers, public employees and unions in Ohio. In this regard, R.C. §4117.11(B)(7) simply places neutral restrictions on the *place and manner* of expression by public employees and their unions: no picketing at any private place of employment of a public official or representative. No particular message is proscribed by R.C. §4117.11(B)(7).

As noted by Justice Stevens in *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 100 S. Ct. 2372, 65 L. Ed. 2d 377 (1980),

> Like so many other kinds of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers v. Wohl, 315 U.S. 769, 776-777*, Mr. Justice Douglas stated:
>
> > "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."
>
> Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The decision in *Retail Store Employees Union* – that the National Labor Relations Board could regulate secondary picketing consistent with the National Labor Relations Act and the First Amendment - is alive and well today. *See Ameristar Casino E. Chi., LLC v. Unite Here Local 1*, 2018 U.S. Dist. LEXIS 144171, *9 (“Section 8(b)(4)(ii)(B) of the National Labor Relations Act is concerned with secondary labor activity (and tertiary, quaternary, and beyond) and reflects

'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife'" (citing *Retail Store Employees Union*, 447 U.S. at 617-618); *NLRB v. Teamsters Union Local No.70*, 668 Fed. Appx. 283, 284 (9th Cir. 2016) ("When faced with a constitutional challenge, the Supreme Court has not disturbed the National Labor Relations Act's prohibition against peaceful secondary picketing. *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 100 S. Ct. 2372, 65 L. Ed. 2d 377 (1980)."); *Kentov ex rel. NLRB v. Sheet Metal Workers' Int'l Ass'n Local 15, AFL-CIO*, 418 F.3d 1259, 1265 (11th Cir. 2005) (concluding that "*DeBartolo* reaffirmed longstanding Supreme Court precedent that the [NLRB] can regulate union secondary picketing under Section 8(b)(4)(ii)(B) without implicating the First Amendment.").

R.C. §4117.11(B)(7) is directed toward conduct, not a message to be conveyed. Nothing in R.C. §4117.11(B)(7) prohibits any particular message; it just limits the place and manner in which such message can be conveyed.

**2. R.C. §4117.11(B)(7) is narrowly tailored to serve a significant governmental interest.**

There can be no dispute that R.C. §4117.11(B)(7) is narrowly tailored. It limits picketing only at two locations – the "private place of employment" and "residence" of a public official or representative. It cannot be disputed that the State has a "significant governmental interest" in ensuring that third parties (such as private employers) not involved with the labor dispute are not drawn into the fray. As noted in *Harrison Hills Teachers Ass'n v. SERB*, 2016-Ohio-4661, 56 N.E.3d 986, at ¶28, the United States Supreme Court found that it "left no doubt that Congress may prohibit secondary picketing calculated "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." *Retail Store Employees Union*, 447 U.S. at 616, citing *NLRB v. Fruit Packers*,

377 U.S. 58, 63 (1964). The Court recognized that "[s]uch picketing spreads labor discord by coercing a neutral party to join the fray" and that "a prohibition on 'picketing in furtherance of [such] unlawful objectives' did not offend the First Amendment." *Id.*, citing *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951), *American Radio Assn. v. Mobile S.S. Assn.*, 419 U.S. 215, 229-231 (1974), and *Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957). Thus, as applied to picketing that predictably encourages consumers to boycott a secondary business, §8(b)(4)(ii)(B) [of the National Labor Relations Act] imposes no impermissible restrictions upon constitutionally protected speech." *Id*. This principle needs reinforced in this case, as it is more likely than not (given Ohio's ethics laws) that a Board member's private employer has nothing to do with the operations of the county board of DD, yet could have its workplace subject to picketing over matters it has no interest in or control over.

In enacting R.C. §4117.11(B)(7), much like Congress did in the National Labor Relations Act, the Ohio General Assembly sought to strike that "delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." With respect to county boards of DD alone, this "significant governmental interest" is plain to see.

Members of a county board of DD are volunteers and serve without compensation. R.C. §5126.028. A county board of DD is comprised of seven members, five of whom are appointed by the board of county commissioners of the county and two of whom are appointed by the senior probate judge of the county. At least three of those members must be individuals eligible for services from the county board of DD or family members of such individuals. R.C. §5126.022(B) and (C). Members serve 4-year terms. R.C. §5126.025.

If a union or public employees are allowed to picket the private place of employment of a member of a county board of DD, the member of the county board of DD could easily be put into a difficult situation. Facing a picket, which may jeopardize the business, the private employer could pressure the member of the county board of DD to make the picket go away, by acquiescing to the union demands, or face termination of employment. Thus, the member of the county board of DD would be faced with putting his/her private interests ahead of his/her duties as a public official. R.C. §4117.11(B)(7) is not directed against labor picketing because of the *content* of its message, but rather because of its effects. *See Harrison Hills*, ¶37 ("The ban on picketing a private employer targets only the issue it seeks to remedy (the effects of secondary labor picketing) …").

**3. R.C. §4117.11(B)(7) allows ample alternative channels for communication.**

The final factor is whether R.C. §4117.11(B)(7) leaves open "ample alternative channels for communication of the information". The answer is undoubtedly yes. R.C. §4117.11(B)(7) prohibits only picketing at any place of private employment of a public official or representative. R.C. §4117.11(B)(7) does not prohibit all manners of expression at any place of private employment of a public official or representative; thus, hand-billing or leaf-letting is permitted. Moreover, R.C. §4117.11(B)(7) does not prohibit picketing at other places, such as the public employee's place of employment, or traditional public fora, such as the town square. Rather, R.C. §4117.11(B)(7) "leaves open ample alternative channels for communication." *Harrison Hills*, at ¶37.

**C. Labor Picketing is not Protected Speech**

There seems to be no dispute that analysis of First Amendment cases at the federal and state level has evolved over the past 40 years. In this regard, missing from the lower courts' analysis is a discussion of whether the "speech" involved in this case is protected by the First

Amendment. In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), the United States Supreme Court addressed the application of first amendment protections to the speech of public employees. In that case, a district attorney (Ceballos) authored a memorandum addressing what the employee believed were inaccuracies in an affidavit submitted by the police to a court to obtain a search warrant. The employee recommended the resulting criminal case be dismissed, but his recommendation was rejected. Ceballos claimed he was then subjected to several retaliatory and adverse employment actions. *Id.* at 415. The United States Circuit Court for the Ninth Circuit held that Ceballos' allegations of wrongdoing were protected speech under the First Amendment, relying upon *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). *Pickering* instructs that courts analyzing free speech violations asserted by public employees must start with the question of whether the speaker was speaking "as a citizen upon matters of public concern". The Court of Appeals held that allegations of governmental misconduct are inherently matters of public concern, and that therefore, Ceballos' speech was protected.

The Supreme Court disagreed that Ceballos was acting as a private citizen addressing matters of public concern and sought to lend some clarity to the Court's jurisprudence concerning the First Amendment protections afforded to public employees. The Court held that, although public employees do not surrender their First Amendment protections by accepting public employment, speech made pursuant to and in furtherance of the duties of the employee is not protected: "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering, supra*, or discussing politics with a co-worker,

see *Rankin*, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees". *Garcetti v. Ceballos*, 547 U.S. 410, 423-424, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

As noted in *Connick v. Myers*, 461 U.S. 138, 147, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), First Amendment protection does not exist "[w]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." Moreover, an employee's speech, activity or association, merely because it is union-related, does not touch on a matter of public concern as a matter of law. *Akers v. McGinnis*, 352 F.3d 1030, 1038 (6th Cir. 2003) (citing *Boals v. Gray*, 775 F.2d 686, 693 (6th Cir. 1985)).

Following *Garcetti's* bright line test, courts have not had difficulty distinguishing the types of speech afforded First Amendment protection and those that are not. For example, in the very recent case of *Bushong v. Del. City School Dist.*, 2021 U.S. App. LEXIS 8150, 2021 Fed. App. 0143N (6th Cir. March 18, 2021), the Court was faced with a First Amendment case involving a teacher who voiced numerous concerns about classroom discipline and control among other working conditions. Following an incident with a student, the teacher was placed on administrative leave and ultimately temporarily reassigned. The teacher sued the school district alleging First Amendment retaliation based upon her prior complaints. In granting the school district's motion for judgment on the pleadings, the District Court held that the teacher's speech was not protected, and therefore no retaliation claim could lie. *Id.* at *5. Affirming the District Court, the Sixth Circuit noted that "'[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.' *Garcetti v.*

*Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). The 'critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties.' *Lane v. Franks*, 573 U.S. 228, 240, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014). In making that inquiry, this court has 'recognized several non-exhaustive factors to consider, including: the speech's impetus; its setting; its audience; and its general subject matter.' *Mayhew v. Town of Smyrna*, 856 F.3d 456, 464 (6th Cir. 2017)". *Bushong*, 2021 U.S. App. LEXIS 8150, at *4-5 (Mar. 18, 2021). These questions of "who, what, when, why and how" continue to be utilized by courts. If the answers to those questions demonstrate that the "speech" in question "owes its existence to" the employment relationship, the speech is not protected. *Weisbarth v. Geauga Park District*, 499 F.3d 538, 544 (6th Cir. 2007).

Similarly, courts have held that speech about matters of personal interest for public employees is not speech protected under the First Amendment. Therefore, speech that deals with "individual personnel disputes and grievances" and that would be of "no relevance to the public's evaluation of the performance of governmental agencies" is generally not of "public concern." *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003). Speech expressing discontent with a new police canine training program "reflects nothing more than 'the quintessential employee beef: management has acted incompetently.'" *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 365 (6th Cir. 2007). A teacher's complaints to her supervisors about the size of her teaching caseload were not protected as the speech in question was made not in her role as a "public citizen", but as an employee, that it was made to her immediate supervisors, and that it did not address a matter of "public concern" but, rather, only the conditions of her employment. *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, 605 F.3d 345, 348 (6th Cir. 2010).

In the case now before this Court, the answers to the questions of "who, what, when, why and how" all lead to the conclusion that the alleged "speech" in the context of the labor picketing in this case owed its existence to the employment relationship, and is not protected by the First Amendment.[2] The unfair labor practice described by R.C. §4117.11(B)(7) only applies to unions and employees involved in a labor dispute. Necessarily, those labor disputes involve wages, hours, terms and conditions of employment. R.C. §§4117.03(A)(4) and 4117.08(A). Indeed, the only strikes permitted by Ohio's collective bargaining law have to do with either an unfair labor practice or an impasse in bargaining. R.C. §4117.14(D)(2). In each such case, and in particular in the case at bar, the public employees and their union are addressing their particular wages, hours terms and conditions of employment. In other words, the "speech" "owes its existence to" the employment relationship, and not to any traditional matters of public concern.

Striking employees (at least those striking under the auspices of the collective bargaining law) and employee organizations may only engage in strikes over their particular working conditions. Were they not employees, they could not strike, and thus could not picket with the cloak of protection provided by the collective bargaining law.[3] Additionally, the targets of the

[2] The parties entered into fifty (50) stipulated facts in the proceeding before SERB (APP053). Among them were that the picketing occurred after bargaining impasse (Joint Stipulation 14), the union filed a notice of intent to strike with SERB (Joint Stipulation 15), and that the unlawful picketing occurred during the labor strike and the picketing was engaged in by the union and its public employee members (Joint Stipulation 18-49). The parties *expressly stipulated* that each instance of unlawful picketing was related "…to the successor contract negotiations…" (Joint Stipulations 18, 22, 27, 32, 37, 42, 47).

[3] It is worth noting that the strike in this case was a lawful one. The union filed the required notice with SERB, which only occurred after the parties reached ultimate impasse in bargaining. As such, the striking employees gained the protection of the collective bargaining law. They were entitled to return to their jobs when the strike ended and they were protected from retaliation for engaging in the strike. R.C. §§4117.11(A)(1) and 4117.14(D)(2). Only unlawful strikers may be removed due to the strike. R.C. §4117.23(B)(1). The protection of the law comes with certain conditions, such as limiting the place where lawful strikers may picket.

picketing addressed by R.C. §4117.11(B)(7) are the members of the Board governing the public employer. Thus the "who" question is answered simply: public employees are addressing employment grievances to their public employer. The "when" in this case is during a strike after an impasse in bargaining. *Portage County Educators Assn for Developmental Disabilities-Unit B, OEA/NEA v. State Employment Relations Board*, 11th District C.A. Case No. 2019-P-0055, ¶4 (Dec. 31, 2020). The question of "why" is also simple to answer: because the employees are dissatisfied with their employer's bargaining position. There is simply no part of the First Amendment analysis that leads to the conclusion that the "speech" in question does *not* owe its existence to the employment relationship. Without it, the "speech" would not occur at all. This is a textbook example of unprotected employee speech.

## CONCLUSION

For the reasons stated above, it cannot be shown beyond a reasonable doubt that R.C. §4117.11(B)(7) and the First Amendment are clearly incompatible. *Amicus Curiae* Ohio Association of County Boards Serving People with Developmental Disabilities, on behalf of Appellant Portage County Board of Developmental Disabilities, respectfully requests the Court to conclude that the decision of the Seventh Appellate District in *Harrison Hills Teachers Ass'n* represents the correct view of the law, that the decision of the Eleventh Appellate District in *Portage County Educators Assn for Developmental Disabilities-Unit B, OEA/NEA* was in error, and to declare R.C. §4117.11(B)(7) constitutionally valid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this *Amicus Curiae* Brief was filed with the Court electronically and served by regular U.S. mail on July 9, 2021 on the following attorneys for the parties in the case:

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