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In the Supreme Court of Ohio

MAHONING EDUCATION ASSOCIATION OF DEVELOPMENTAL DISABILITIES,

Appellee

-vs-

STATE EMPLOYMENT RELATIONS BOARD, ET AL.

Appellants

Supreme Court of Ohio
Case No. 12-1378

On Appeal from the Court of Appeals of Ohio, Seventh Appellate District, Case No. 11 MA 52

Memorandum Opposing Jurisdiction

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1. Explanation of why this is not a case of public or great general interest and does not present a substantial constitutional question.

A. Introduction.

R.C. 4117.11(B)(8) provides in relevant part:

> It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to: *** engage in any picketing, *** without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action.

Fourteen years ago, the Eighth District Court of Appeals held R.C. 4117.11(B)(8)'s requirement of ten day's notice before *picketing* was an unconstitutional content-based restriction on free speech rights. *United Electrical, Radio and Machine Workers of Am. v. State Employment Relations Bd.*, 126 Ohio App.3d 345, 354-357, 710 N.E.2d 358 (1998). SERB sought review of that decision, arguing it presented a case of public or great general interest and a substantial constitutional question. *United Electrical, Radio and Machine Workers of Am. v. State Employment Relations Bd.*, Case No. 98-1330, Memorandum in Support of Jurisdiction, 1998 WL 34277496. This Court declined to hear the case. *United Electrical, Radio and Machine Workers of Am. v. State Employment Relations Bd.*, 83 Ohio St.3d 1447, 700 N.E.2d 331 (1998). Nothing has transpired over the last fourteen years that would warrant this Court's review of the Seventh District's decision, which reached the same conclusion as did *United Electrical.*

B. The Seventh District's decision, like that of the Eighth District, is narrow and has no broad impact.

The decision below invalidated a specific and narrow provision of Ohio's public sector collective bargaining law. Like the Eighth District's decision in *United*

Electrical, the Seventh District invalidated only that portion of R.C. 4117.11(B)(8) that requires ten day's notice before picketing. R.C. 4117.11(B)(8)'s other notice provisions remain intact, *i.e.*, notice must still be provided before a strike or other concerted refusal to work.

The statistics SERB cites bear out the limited impact of the Seventh District's decision. SERB points out that only a few notices of intent to picket are filed each year; and even in Cuyahoga County, where R.C. 4117.11(B)(8)'s notice before picketing requirement has been unconstitutional for a decade and a half, public employees and their unions continue to file notices of intent to picket. Thus, the decision has limited practical impact.

SERB also argues the Seventh District and Eighth District decisions place SERB in "a bind" as to how to proceed when employers within those jurisdictions file unfair labor practices charges with respect to R.C. 4117.11(B)(8)'s notice before picketing requirement. There is no evidence the Eighth District's long-standing decision has created any problem for SERB. In fact, in its decision in this case, SERB noted that *United Electrical* existed as binding precedent only in the Eighth District and thus, was applied by SERB only in that jurisdiction. Contrary to its arguments here, SERB has demonstrated it has no difficulty following court precedent with respect to the applicability of R.C. 4117.11(B)(8). Nor has SERB demonstrated the decision below imposes any burden on SERB whatsoever.

C. The scope of the Seventh District's decision is clear and narrow.

The holding of the Seventh District is quite clear: "*** the portion of R.C. 4117.11(B)(8) requiring ten days' notice prior to picketing is held unconstitutional."

Mahoning Edn. Assn. of Developmental Disabilities v. State Emp. Relations Bd., 7th Dist. No. 11 MA 52, 2012-Ohio-3000, ¶30. There is no need for clarification with respect to that holding. While the Seventh District invalidated the notice requirement with respect to both strike and non-strike related picketing, it did not invalidate R.C. 4117.11(B)(8)'s requirement of notice before a public employee organization engages in strike activity or other concerted refusal to work. Thus, SERB's argument that the decision below sows confusion among public sector employers is meritless. Under this decision, like the long-standing *United Electrical* decision, the public employer will still receive notice before a strike or other concerted refusal to work, and can take the steps it deems appropriate in response.

Further, SERB's argument that the Seventh District should have engaged in some review to determine whether the statute could survive under certain facts misapprehends the nature of the right at issue and the constitutional analysis applicable to it. SERB suggests the burden was on the Association to show the facts here made compliance with the notice requirement unduly burdensome. But as the Seventh District correctly noted, SERB had the burden to show the statute was narrowly tailored to serve a compelling interest. SERB did not attempt to present evidence to meet that burden. The fact that providing notice may not be burdensome under some circumstances is entirely beside the point.

D. The Seventh District applied well-settled law in resolving this case.

SERB and the Board urge review arguing the decision below broke new ground with respect to First Amendment law and Article II, Section 34, Ohio Constitution. With respect to the latter, there is simply no mention of that provision

anywhere in the Seventh District's decision, and the Board's statement that the decision below somehow ruled on the constitutionality of that provision is simply baseless. With respect to the First Amendment, the court below applied well-settled law when it found the statute at issue was a content-based speech regulation.

The First Amendment prohibits regulations that allow speech by some groups but not by others, as well as regulations that impose additional burdens on some speakers but not others. The court below recognized R.C. 4117.11(B)(8) applied only to one group of speakers and imposed burdens on those speakers and not others. Thus, the court properly concluded R.C. 4117.11(B)(8)'s notice before picketing requirement was a content-based regulation because it disfavored (or treated differently) one group of speakers, regardless of the message they intended to convey.

There is nothing new or unusual about this application of First Amendment law. It dates to at least *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) and was recently applied by the Court in *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) and *Citizens United v. Fed. Election Commn.*, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

It also bears noting that SERB failed to present any evidence before the hearing officer or the common pleas court to show R.C. 4117.11(B)(8)'s notice before picketing requirement survives any level of scrutiny. The record is simply devoid of evidence on this critical issue. As such, this Court would be reviewing this case on

an incomplete record and with no evidence that would support reversal of the court of appeals' decision.

This case does not present a question of public or great general interest or a substantial constitutional question. The Seventh District applied well-settled law in a clearly limited decision that invalidated only the requirement that public employees and their unions provide ten day's notice before picketing. SERB has been following the same law in the Eighth District for fourteen years with no adverse impact.

2. Statement of the case and facts.

The Mahoning County Board of Mental Retardation and Developmental Disabilities ("Board") is a public employer and the Mahoning Education Association of Developmental Disabilities ("Association") is an employee organization under Ohio's public sector collective bargaining law. The Association is the bargaining unit for some Board employees.

The Board and Association were parties to a collective bargaining agreement that was set to expire August 31, 2007. The parties were negotiating a successor agreement. The Association had not engaged in a strike or given notice of an intent to strike.

Beginning at 6 p.m. on November 5, 2007, the Board held a public board meeting at The Centre at Javit Court, a facility owned by the Commissioners of Mahoning County, Ohio. Immediately before that meeting, the Association, through its agents or representatives, engaged in picketing related to the successor contract

negotiations outside the meeting.[1] The picketers were expressing their desire for a fair contract and their dissatisfaction with the progress of negotiations, The picketing was peaceful.

The Board filed an unfair labor practice charge alleging, among other things, that the Association had violated R.C. 4117.11(B)(8) by engaging in informational picketing without having given a ten day notice. In defense of the charge, the Association challenged the constitutionality of R.C. 4117.11(B)(8).

SERB determined probable cause existed for believing the Association had committed an unfair labor practice by engaging in informational picketing at the Board meeting without having given a ten day notice. SERB authorized the issuance of a complaint, referred the matter to hearing, and directed the parties to unfair labor practice mediation. The parties agreed to waive an evidentiary hearing and submit the case to SERB on briefs and stipulations.

SERB found the Association had violated R.C. 4117.11(B)(8) "by engaging in picketing related to negotiations for a successor collective bargaining agreement without providing a written ten-day notice as required by this statute." SERB did not consider, and thus rejected, the Association's defense that R.C. 4117.11(B)(8) is unconstitutional on its face and as applied. It found that, as an administrative agency, it lacked authority to declare R.C. 4117.11(B)(8) unconstitutional.

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[1] The Board states "At that meeting, union members appeared, without notice, using mentally retarded clients as human sign boards ***." (Board Memorandum in Support of Jurisdiction, p.2). There is absolutely no evidence in the record to support this statement.

The Association appealed to the Mahoning County Common Pleas Court, which affirmed SERB's decision and rejected the Association's argument that R.C. 4117.11(B)(8) was unconstitutional on its face and as applied.

The Association appealed to the Seventh District Court of Appeals, which reversed the trial court's judgment and held that the portion of R.C. 4117.11(B)(8) that requires ten day's notice before picketing is an unconstitutional content-based restriction on free speech rights.

3. Argument

A. Counter Proposition of Law One: R.C. 4117.11(B)'s notice before picketing requirement violates the First Amendment.

(1) *R.C. 4117.11(B)(8) is a content-based regulation.*

The first step in free speech analysis is to determine whether the law at issue is content-based or content-neutral. *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1053 (3rd Cir. 1994). R.C. 4117.11(B)(8)'s notice before picketing requirement applies to only one type of speech and only to one group of speakers—labor speech by public employees or public employee labor organizations. It imposes a ban on labor speech unless a ten-day notice is provided and it bans labor speech before the tenth day after the notice is given. Thus, R.C. 4117.11(B)(8) is a content-based regulation. *United Electrical,* 126 Ohio App.3d 345, 355-356, 710 N.E.2d 358, 365 (1998); *Sorrell,* 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); *Citizens United,* 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

(2) *R.C. 4117.11(B)(8)'s notice before picketing requirement is a content-based disfavored speaker regulation.*

It has long been established that a state may not, consistent with the First Amendment, favor one speaker over another, either by banning certain people from speaking or imposing burdens on some speakers that are not imposed on others. *See, Thomas, supra,* (overturning on First Amendment grounds a state statute that required prior registration by labor organizers); *Sorrell, supra,* (overturning state statute that targeted speakers and their message for disfavored treatment); *Citizens United,* 130 S.Ct. at 898-899, ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. *** Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. *** As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.")

R.C. 4117.11(B)(8) imposes burdens on only one group of speakers; thus, it is a disfavored speaker law and is subject to strict scrutiny. *Sorrell,* 131 S.Ct. 2653, 2663-2664, 2667, 180 L.Ed.2d 544 (2011); *Turner Broadcasting Sys. Inc., v. FCC,* 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

(3) *Disagreement with the message is not the only criteria for determining if a statute is content-based; a statute is content-based if it regulates speech on a particular subject.*

Appellants argue the statute was not adopted because of the government's disagreement with the message and thus, was content-neutral. This is an oversimplification of the content-based/content-neutral analysis. A statute that bans a particular type of speech because of the government's disagreement with its

message is content-based, but so too is a statute that bans a specific type of speech, regardless of the government's position on the message. The United States Supreme Court has "held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson v. Freeman*, 504 U.S. 191, 197, 112 S.Ct. 1846, 1850 (1992), citing *Consolidated Edison Co. of N.Y. v. Public Serv. Commn. of N.Y.*, 447 U.S. 530, 537, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991).

Further, "The key to determining whether [a statute] makes a content-based distinction between varieties of speech lies in understanding that content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others." *Hill v. Colorado*, 530 U.S. 703, 735, 120 S. Ct. 2480, 2499, 147 L.Ed.2d 597, (2000), Souter, J., concurring.

So, it is not simply the government's position on the message that determines if a regulation is content-based; the act of regulating a particular topic also makes the statute content-based. The United States Supreme Court has twice considered laws analogous to R.C. 4117.11(8)(B); laws that allowed certain types of picketing and prohibited others. *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Carey v. Brown*, 447 U.S. 455, 100

S.Ct. 2286, 65 L.Ed.2d 263 (1980). In each case, the Court found the restrictions were content-based regulations and unconstitutional.

In *Mosley,* the city had passed an ordinance that prohibited picketing public schools except for schools involved in a labor dispute. *Mosley,* at 92-93. The Court found the ordinance was unconstitutional because it made an impermissible distinction between labor picketing and peaceful picketing. *Id.* at 94, 92 S.Ct. at 2289. The Court stated:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Id.* at 95, 92 S.Ct. at 2290.

The Court continued:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Id.* at 96, 92 S.Ct. 2290.

In *Carey,* the Court considered a statute that banned the picketing of residences or dwellings but exempted from the prohibition the picketing of places of employment involved in a labor dispute. *Id.* at, 457, 100 S.Ct. 2286, 2288, 65

L.Ed.2d 263 (1980). The Court found that statute unconstitutional because it was indistinguishable from the ordinance struck down in *Mosley.*

Other courts have followed this reasoning. In *CF&I Steel, L.P. v. United Steel Workers of Am.*, 23 P.3d 1197 (2001), the court held a statute that made it an unfair labor practice to picket the domicile of another employee was an unconstitutional content-based regulation. *Id.* at 1202. In *French v. Amalgamated Local Union 376, U.A.W.*, 526 A.2d 861 (1987), the court found a ban on all picketing except labor picketing, was an unconstitutional content-based regulation.

In R.C. 4117.11(8)(B), the General Assembly has determined that, absent a ten day notice, and for ten days after notice is given, a public sector labor organization, and public employees, may not picket. Under *Mosley*, this is a content-based regulation.

(4) ***Even under SERB's proposed analysis, R.C. 4117.11(B)(8)'s notice before picketing requirement is a content-based regulation.***

SERB focuses on the purposes of R.C. 4117.11(B)(8)'s requirement of notice before picketing and argues the provision is content-neutral. But clearly, the purposes SERB cites in support of the regulation relate only to labor speech. Thus, even if this Court were to somehow determine the statute is content neutral on its face, the underlying purposes of the statute—which SERB emphasizes must be considered (SERB Memorandum in Support of Jurisdiction, p.11)—shows R.C. 4117.11(B)(8)'s notice before picketing requirement is a content-based regulation.

SERB cites six purposes in support of R.C. 4117.11(B)(8), and every one of those purposes is premised on the fact that the speech being regulated is labor

speech or speech related to a labor dispute. (SERB Memorandum in Support of Jurisdiction, pp.14-15). Thus, R.C. 4117.11(B)(8) is a content-based regulation even under the analysis SERB urges this Court to adopt.

(5) *R.C. 4117.11(B)(8) is a prior restraint.*

"Prior restraint" is a term of art that refers to judicial orders or administrative rules that operate to forbid expression before it takes place. *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149, 153, 926 N.E.2d 634, 640, 2010-Ohio-1533, ¶20. The phrase refers to a "'governmental restriction on speech or publication before its actual expression.'" *Id.*, quoting Black's Law Dictionary (9th Ed.2009) 1314. A law that requires a party to provide a government official with advance notice of speech activity is a prior restraint. *See, N.A.A.C.P. v. City of Richmond,* 743 F.2d 1346 (9Th Cir. 1984). Any system of prior restraint bears a heavy presumption against its constitutionality. *New York Times Co. v. United States,* 403 U.S. 713, 714, 91 S.Ct. 2140, 2141 (1971). Prior restraints are the most serious and least tolerable of First Amendment infringements. *State ex. rel Toledo Blade Co.,* 125 Ohio St.3d at 153, 926 N.E.2d 634, 640, 2010-Ohio-1533, ¶21.

Advanced notice requirements such as those contained in R.C. 4117.11(B)(8) substantially inhibit speech. *N.A.A.C.P.*, 743 F.2d at 1355 (9th Cir. 1984). "The simple knowledge that one must inform the government of his desire to speak *** discourages citizens from speaking freely." *Id.* Advanced notice requirements also outlaw spontaneous expression.

Courts have regularly and consistently invalidated advance notice requirements on First Amendment grounds, even where the requirement granted government officials no discretion to allow or forbid the noticed speech. In *N.A.A.C.P., supra,* the court found a content-neutral ordinance that required twenty day's advanced notice of a parade unconstitutional. Courts have also invalidated, as prior restraints, laws that required advanced registration before demonstrating or leafleting in an airport terminal, *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981); before soliciting membership in a labor union, *Thomas, supra*; one-hour advance notice before a march or protest, *Robinson v. Coopwood*, 292 F.Supp. 926, (N.D. Miss. 1968); that required a permit to demonstrate in a park, *Grossman v. Portand* , 33 F.3d 1200 (9th Cir,. 1994); and that required a five day notice before a parade. *Douglas v. Brownell* , 88 F.3d 1511 (8th Cir., 1996).

In *Thomas, supra,* the Court stated:

> As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, *** are not instruments of harm which require previous identification of the speakers. And the *** of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.
>
> ***
>
> If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration *** and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it

> is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment. *Id.* at 539-540, 65 S. Ct. 315, 327, 89 L.Ed. 430.

Although R.C. 4117.11(B)(8) does not give SERB discretion to permit or forbid picketing, it does impose a ten day advance registration requirement with both SERB and the public employer before the speech and assembly can occur. This is "quite incompatible with the requirements of the First Amendment."

(6) *R.C. 4117.11(B)(8)'s notice before picketing requirement is subject to strict scrutiny.*

Whether R.C. 4117.11(B)(8)'s notice before picketing requirement is considered a disfavored speaker regulation, content-based regulation, or prior restraint, it is subject to strict scrutiny. In the proceedings below, SERB did not even attempt to present any evidence to establish the law survived strict scrutiny—or any level of scrutiny—and it cannot do so now. Thus, there is no evidentiary basis to support reversal of the court of appeals' decision.

B. Counter Proposition of Law Two: R.C. 4117.11(B)'s notice before picketing requirement does not allow government employers to restrict the First Amendment rights of their employees when those employees speak in non-official capacities.[2]

A public employer cannot restrict the First Amendment rights of its employees when those employees speak in non-official capacities, even on subjects

[2] The Board's Proposition of Law Number Two raises an issue that was not raised, briefed, or decided below. Indeed, the Board did not file a brief in the Seventh District Court of Appeals.

related to their employment, except restrictions necessary to the efficient and effective operation of the public employer. *Garcetti v. Ceballos*, 547 U.S. 410, 419, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Further, public education employees have a First Amendment right to speak on issues related to educational funding because such funding is a matter of public concern. *Pickering v. Bd. of Edn. of Tp. High School Dist. 205*, 391 U.S. 563, 571-572, 88 S.Ct. 1731, 20 L.Ed.2d 811.

The picketing at issue here was done in non-official capacities and related to a matter of public concern. Application of R.C. 4117.11(B)(8)'s notice before picketing requirement implicated First Amendment rights so the lower court's analysis was necessary and appropriate.

4. Conclusion

This case does not merit the Court's review. The decision below is narrow, clear and applied well-settled law.

Respectfully submitted,

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Certificate of Service

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