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Portage Cty. Educators Ass'n for Developmental Disabilities-Unit B v. State Emp't. Rels. Bd. 2022-Ohio-3167

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I. INTRODUCTION

In 1935 Congress enacted the National Labor Relations Act (NLRA), codifying organized bargaining rights in the private sector.[1] Public employees were not included, and instead gained the right to organize through piece-meal state legislation.[2] In 1983, nearly fifty years after the NLRA, Ohio repealed the Ferguson Act which banned public employees from striking and enacted ORC § 4117, detailing the rights of public employees to organize.[3] Section 11 details unfair labor practices; subsection (A) regulates employers, and (B) regulates employee organizations.[4] Under subsection (B)(7) it describes employee organizations "[i]nduc[ing] or encourag[ing] 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" as an unfair labor practice.[5]

The Ohio Supreme Court reviewed the constitutionality of this statute in their 2022 session.[6] They found that picketing is an expressive activity protected by the First Amendment, and therefore content-based restrictions on picketing are subject to strict scrutiny.[7] The court found that the restriction was content-based because it only restricted activity if it was connected with a labor dispute and done by an employee organization.[8] They found the statute did not serve a compelling government interest, failed strict scrutiny, and was an unconstitutional violation of First Amendment rights.[9]

This decision resolved an appellate court split and brought the court in line with decades-old Supreme Court precedent.[10] However, the court did not thoroughly address the distinction between picketing and "encouraging or

1. National Labor Relations Act (NLRA), 49 U.S.C. § 449 (1935).
2. Michael Hunter, *Public Employee Collective Bargaining Becomes a Matter of Right in Ohio*, 13 CAP. U. L. REV. 219, 219-20 (1983).
3. John F. Haviland Jr. & Colleen M. Hunt, *S. 133: Ohio's Public-Sector Collective-Bargaining Framework,* 9 U. DAYTON L. REV. 583, 583 (1984); OHIO REV. CODE ANN. § 4117.11 (West 2022).
4. OHIO REV. CODE ANN. §§ 4117.11(A)-(B) (West 2022).
5. OHIO REV. CODE ANN. § 4117.11(B)(7) (West 2022).
6. Portage Cty. Educators Ass'n for Developmental Disabilities-Unit B v. State Emp't Rels. Bd., 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690, at ¶ 1.
7. *Id.* at ¶¶ 9, 12.
8. *Id.* at ¶ 17.
9. *Id.* at ¶ 32.
10. *Id.* at ¶¶ 5, 23, 26.

inducing" picketing.[11] Further, the court did not determine if other legislation could shield officials from targeted residential picketing without violating the First Amendment.[12]

II. STATEMENT OF FACTS

In mid-September of 2017, the appellee, Portage County Educators Association for Developmental Disabilities–Unit B, OEA/NEA (the association), filed a notice of intent to strike due to stalled negotiations in a labor dispute with appellant Portage County Board of Developmental Disabilities (the board).[13] The following month, members of the association picketed outside the residences of six board members, after which the board filed a violation of § 4117.11(B)(7) with the State Employment Relations Board (SERB).[14] SERB issued a statement confirming the violations based on the association's stipulation that they induced and encouraged the picketing and ordered the association to cease and desist the picketing.[15]

The association appealed the decision, claiming § 4117.11(B)(7) was unconstitutional in the Portage County Court of Common Pleas, which upheld SERB's decision.[16] The association appealed to the Eleventh District Court who reversed and determined that the statute violated First Amendment rights with content-based speech restrictions.[17] SERB and the board then appealed to the Ohio Supreme Court.[18]

III. THE COURT'S DECISION AND RATIONALE

A. Majority

The majority opinion was authored by Justice Donnelly and joined by Justices Stewart, O'Connor, and Brunner.[19]

Justice Donnelly opened with an overview of First Amendment jurisprudence, noting that picketing itself is an expressive activity and therefore protected speech.[20] Public sidewalks and streets are specially protected from speech regulation, due to their roles as traditional public forums.[21]

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11. *Portage Cty. Educators* at ¶¶ 22, 43.
12. *Id.* at ¶ 27.
13. *Id.* at ¶¶ 2-3.
14. *Id.* at ¶¶ 3,4.
15. *Id.* at ¶¶ 4, 44.
16. *Portage Cty. Educators* at ¶ 5.
17. *Id.*
18. *Id.*
19. *Id.* at ¶ 1.
20. *Id.*
21. *Portage Cty. Educators* at ¶ 10.

However, these protections have exceptions.[22] Governments may enact content-neutral regulations on the time, place, and manner of speech.[23] Content-based restrictions are subject to strict scrutiny and must be narrowly tailored to a compelling government interest.[24] The court first evaluated whether the restriction was content-based or content-neutral to determine the appropriate level of scrutiny.[25]

The court considered whether § 4117.11(B)(7) was content-based on its face and determined that it was.[26] The First Amendment bars the government from favoring or disfavoring speech based on its "disagreement with the message."[27] The U.S. Supreme Court has overruled picketing restrictions that *exempted* picketing associated with labor-disputes from regulation.[28] The laws were found facially content-based because the government was favoring some speech based on its subject-matter.[29] The Ohio court found that "singling out labor picketing for specialized treatment is a content-based regulation[,]" "whether a statute accords preferential treatment or disfavored treatment."[30] Because § 4117.11(B)(7) prohibits labor-dispute picketing but allows picketing unrelated to labor-disputes, it is a facially content-based restriction.[31]

Second, Justice Donnelly considered whether § 4117.11(B)(7) was content-based under a non-facial standard.[32] If a regulation is not facially content-based but requires enforcement authorities to examine the speech's content to determine a violation, it is an unconstitutional content-based restriction.[33] In this case SERB, "the enforc[ing] authority," had to determine whether the picketing was related to an on-going labor dispute and had to identify the picketers as the "employee" side of the dispute, not the employer's.[34] Because SERB had to determine the identity of the speakers and the content of the speech to enforce the law, it was unconstitutionally content-based.[35]

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22. *Id.* at ¶ 11.
23. *Id.*
24. *Id.* at ¶ 12.
25. *Id.* at ¶¶ 13, 14.
26. *Portage Cty. Educators* at ¶ 17.
27. *Id.* at ¶¶ 18, 41 (quoting Reed v. Gilbert, Arizona, 576 U.S. 155, 156 (2015)).
28. *Id.* at ¶ 18 (citing Carey v. Brown, 447 U.S. 455, 456 (1980) (syllabus); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 93-94 (1972)).
29. *Portage Cty. Educators* at ¶ 18.
30. *Id.*
31. *Id.* at ¶¶ 17, 18.
32. *Id.* at ¶ 19.
33. *Id.*
34. *Portage Cty. Educators* at ¶ 19.
35. *Id.* at ¶¶ 19-21.

Having determined that R.C. 4117.11(B)(7) was a content-based restriction on speech, the court applied strict scrutiny.[36] Strict scrutiny requires that the law be narrowly tailored to a compelling government interest and be the least restrictive means of accomplishing that interest.[37] SERB argued that protecting residential peace, preserving privacy of officials, and encouraging public service were compelling government interests that the statute served.[38] However, the Ohio Supreme Court previously ruled that residential peace and privacy are *significant* government interests, not compelling.[39] SERB also argued that preserving the peace in labor disputes was a compelling interest, but the court found the interest "too vague."[40]

Even if the listed interests were compelling, the restriction was not the least restrictive means available to serve those interests.[41] Unruly and disruptive behaviors that violate privacy or engage in harassment are regulated by municipal codes without reference to subject-matter.[42]

The court also dismissed SERB's claim that preventing secondary picketing was a compelling government interest served by the statute in the least restrictive means available.[43] Secondary picketing is the practice of exerting pressure on a neutral party to cease business relations with a party of the dispute and is prohibited by the National Labor Relations Board (NLRB).[44] SERB argued that a board member's private employer was a neutral third party who should not be picketed.[45] However, the U.S. Supreme Court has clarified that when a neutral third party is incidentally affected, rather than targeted and coerced out of business relations, the speech is permitted.[46] Here, there is no evidence or claim that the picketers were attempting to coerce the private employers out of business dealings with the board, and no party who dealt with the board in its capacity as a board was targeted.[47] The private employers were incidentally affected by picketing targeted at the board members, and the doctrine of secondary picketing was not implicated.[48]

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36. *Id.* at ¶ 24.
37. *Id.*
38. *Id.*
39. *Portage Cty. Educators* at ¶ 25 (citing Cty of Seven Hills v. Nations, 76 Ohio St. 3d. 304, 309, 667 N.E.2d 942, 948 (1996)).
40. *Id.* at ¶ 26.
41. *Id.* at ¶ 27.
42. *Id.*
43. *Id.* at ¶¶ 30-32.
44. *Portage Cty. Educators* at ¶ 30 (citing National Labor Relations Act (NRLA), 29 U.S.C. § 158(b)(4)(i)(B)).
45. *Id.* at ¶ 30.
46. *Id.* (citing Natl. Lab. Relations Bd. V. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 612-13 (1980)).
47. *Id.* at ¶ 31.
48. *Id.*

The majority established that picketing is speech, and the government cannot restrict it, except for time, place, and manner restrictions.[49] In this case, the restrictions are content-based because the picketer's identity and connection to a labor dispute determine the legality of the speech.[50] Because the statute was content-based, the court applied strict scrutiny and found the cited interests were not compelling.[51] They further found that the restrictions were not narrowly tailored to those interests.[52]

B. The Concurrence

Justice Kennedy wrote a concurrence joined by Justice Fischer and Justice DeWine.[53] While the majority opinion brushed over the distinction and treated the ordinance as though it prohibited picketing, the dissent emphasized the text of the statute, which prohibits "encouragement" or "inducement" of picketing, not the picketing itself.[54] Reasoning that "inducement" and "encouragement" were protected speech, she agreed that the regulation was inarguably content-based.[55] Under the statute an organization could discourage its members from picketing, and it could encourage its members to picket on any issue whose message was not related to an on-going labor dispute.[56] The content of the encouragement was the basis for its restriction or permissibility.[57]

After determining that encouragement and inducement are protected speech restricted based on content, Justice Kennedy applied strict scrutiny.[58] Her reasoning mirrored the majority's: SERB's cited interests were not compelling, and the statute was not narrowly tailored to the interests of privacy, peaceful labor disputes, or encouraging public service, as it permitted picketing on all other topics.[59]

The concurrence discussed the restricted protected speech as "encouragement" to picket, rather than the picketing itself, but used similar rationale to the majority to reach the same conclusion.[60]

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49. *Portage Cty. Educators* at ¶¶ 9, 11.
50. *Id.* at ¶¶ 18, 20.
51. *Id.* at ¶¶ 23, 25.
52. *Id.* at ¶ 27.
53. *Id.* at ¶ 35 (Kennedy, J., concurring).
54. *Portage Cty. Educators* at ¶ 43.
55. *Id.* at ¶ 48.
56. *Id*.
57. *Id*. at ¶ 48.
58. *Id.* at ¶ 49.
59. *Portage Cty. Educators* at ¶ 49.
60. *Id.* at ¶¶ 43, 49-50.

IV. ANALYSIS

A. History

The language of § 4117.11(B)(7) appears pro-employer, but the political environment of the time contradicts that assumption.[61]

The energy for public employee collective bargaining had been building for decades.[62] After several failed legislative attempts, Ohio was trailing behind the country in organizing rights.[63] By the time the 115th General Assembly was drafting § 4117.11, collective bargaining for public employees was protected in 25 states.[64] The 1980 national Democratic Party platform aimed to "ensure that the rights of workers to engage in peaceful picketing during labor disputes are fully protected," and the Ohio Legislature was controlled by Democrats.[65]

Senator Branstool introduced the bill on March 17, 1983, and it sailed through the House and Senate.[66] Despite creating a major regulatory framework and constructing a board of review, the bill was signed into law in fewer than four months.[67]

The legislative history shows that amendments on the Senate floor were passed along party lines, and pro-employer amendments were swiftly struck down.[68] The House votes concerned more technical details after the framework was constructed in committee, resulting in less partisan votes.[69] They discussed amendments regulating unfair labor practices and political activities of employee organizations but were not generally pro-employer or anti-labor.[70] Labor unions were pleased with the legislation, and it was termed "one of the most pro-labor public employee bargaining statutes in the nation."[71]

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61. OHIO REV. CODE ANN. § 4117.11(B)(7) (West 2022); Robert Sauter, *A Union Perspective*, 18 J.L. & EDUC. 289, 291-92 (1989).

62. Haviland & Hunt, *supra* note 3, at 586; Hunter, *supra* note 2, at 221, 227.

63. Haviland & Hunt, *supra* note 3, at 586.

64. Sauter, *supra* note 61, at 289 n.1.

65. *1980 Democratic Party Platform*, AM. PRESIDENCY PROJECT, (Aug. 11, 1980), https://www.presidency.ucsb.edu/documents/1980-democratic-party-platform; *115th Ohio General Assembly,* WIKIPEDIA*,* https://en.wikipedia.org/wiki/115th_Ohio_General_Assembly; 140 1983-84 OHIO SENATE AND HOUSE JOURNALS INDEX & APPENDIX 8-9, 62-65 (1984) [hereinafter JOURNALS INDEX]; Sauter, *supra* note 61, at 291 n.18.

66. JOURNALS INDEX, *supra* note 65, at 164, 579; Sauter, *supra* note 61, at 292.

67 JOURNALS INDEX, *supra* note 65, at 164, 579.

68. *Id.* at 236-43.

69. *Id.* at 734-746.

70. *Id*.

71. Sauter, *supra* note 61, at 289 (quoting John Lewis & Steven Spirn, OHIO COLLECTIVE BARGAINING LAW: THE REGULATION OF PUBLIC EMPLOYER-EMPLOYEE LABOR RELATIONS 3 (1983)); Rebecca Hanner White et al., *Ohio's Public Employee Bargaining Law: Can it Withstand Constitutional Challenge?,* 53 U. CIN. L. REV. 1, 1 n.1 (1984) (quoting Lewis & Spirn, *supra* note 71, at 3).

Against a pro-labor background, why would the legislature prohibit targeted picketing?[72] No amendments to this section were suggested during floor votes in either the House or Senate, and the section at issue has not been amended since its enactment.[73] Perhaps the intention was to limit the restriction, leaving all other picketing available. The two United States Supreme Court cases cited in the majority for overruling labor-picketing specific restrictions were decided in 1972 and 1980, long before the floor debates considered this provision.[74] Perhaps, rushing to push the legislation, no legislators thoroughly researched the jurisprudence, or they thought regulating organizations and not prohibiting picketing itself would circumvent constitutional issues. Most likely the labor-specific language seemed appropriate in the context of collective bargaining regulations and a reasonable protection from "unfair labor practice[s]."[75]

However benign or nefarious their intentions were, the statute disfavored speech because of its content and "strikes at the heart of the First Amendment."[76]

B. Encouraging Picketing vs. Picketing Itself

Is the distinction between "[i]nduc[ing] or encourag[ing]" picketing and the actual picketing meaningful?[77] The majority opinion exhaustively detailed how picketing is a revered speech activity.[78] The concurrence then distinguished that the law restricted an organization from "*inducing or encouraging*" picketing, not the picketing itself.[79] But are these concepts entirely distinct?[80]

The board's complaint was not filed at the time the organization "encourage[d]" the employees to picket, but when the theoretically legal picketing actually occurred.[81] Although SERB's decision rested on the organization's stipulation that they encouraged the pickets, it also discussed the picketing-in-fact extensively, citing that the *picketers* knew they were in front of a board member's house, not whether the *organization* had

72. OHIO REV. CODE ANN. § 4117.11(B)(7) (West 2022); Sauter, *supra* note 61, at 291-92.

73. JOURNALS INDEX, *supra* note 65, at 164, 579, 734-46; *Shepard's Comprehensive Report for Ohio Rev. Code Ann. Sec. 4117.11: Citing Decisions*, LEXISNEXIS (last visited Apr. 12, 2023).

74. Portage Cty. Educators Ass'n for Developmental Disabilities-Unit B v. State Emp't Rels. Bd., 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690, at ¶ 18 (citing Carey v. Brown, 447 U.S. 455, 456 (1980) (syllabus); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 93-94 (1972)).

75. OHIO REV. CODE ANN. § 4117.11(B) (West 2022).

76. *Portage Cty. Educators* at ¶ 46 (Kennedy, J., concurring).

77. OHIO REV. CODE ANN. § 4117.11(B)(7) (West 2022); *Portage Cty. Educators* at ¶ 46.

78. *Portage Cty. Educators* at ¶ 9 (majority opinion); *id.* at ¶ 43 (Kennedy, J., concurring).

79. *Id*. at ¶ 43 (Kennedy, J., concurring) (emphasis in original).

80. *Id.* at ¶ 46.

81. In re Portage Cty. Educators Ass'n for Developmental Disabilities – Unit B, SERB No. 2018-002, at 2-3, 6 (May 3, 2018).

encouraged them to picket there, knowing that it was a board member's house.[82] Was the picketers' knowledge merely evidence that they had been encouraged to picket by the organization, or were the picketers themselves being regulated?[83]

If the association had not stipulated that they had encouraged the picketing, would it have changed SERB's decision, or would the in-fact picketing have created a *per se* case of the organization's encouragement? If the organization stopped encouraging members to picket but one member decided to continue, would that be a violation? What if 30 members did? In execution, the law does not regulate "[i]nduce[ment] or encourage[ment]."[84] It regulates picketing through a legal fiction that assumes an employee organization's role in "[i]nduc[ing] or encourag[ing]" it.[85]

If the law was found to allow picketing but to prohibit an organization from encouraging it, would the right to picket be meaningful?[86] Organizing provides better working conditions and wages for employees because of the market power they can create collectively, but not individually.[87] An individual picketer cannot wield the influence of collective picketers. However, organizing the "concerted activities for the purpose of collective bargaining," as allowed by the Ohio code, requires communication.[88] Organizing workers to strike, protest, or use any protected expressive activity will inherently include asking the workers to perform that activity, or to "induce or encourage" them to.[89] Prohibiting organizations from "encouraging" or "inducing" their members to action undermines the employees' abilities to use their speech rights to advance their interests.[90] As Justice Kennedy noted in her concurrence, "prohibiting speech that encourages or induces picketing necessarily chills the right to picket itself."[91]

Neither the majority nor the concurrence address both the text and intent of the statute.[92] While the majority opinion waxes poetic on picketing rights, the concurrence merely applied an identical speech analysis on employee organization encouragement.[93] Neither fully consider the relationship

82. *Id.* at 6.
83. *Id.* at 3, 6.
84. OHIO REV. CODE ANN. § 4117.11(B)(7) (West 2022).
85. *Id*.
86. Portage Cty. Educators Ass'n for Developmental Disabilities-Unit B v. State Emp't Rels. Bd., 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690, at ¶ 46 (Kennedy, J., concurring).
87. WHAT DO UNIONS DO? (James Bennett & Bruce Kaufman eds., 2007).
88. OHIO REV. CODE ANN. §§ 4117.03(A)(1)-(2) (West 2022).
89. *Portage Cty. Educators* at ¶¶ 46-47 (Kennedy, J., concurring).
90. *Id.* at ¶ 46.
91. *Id.*
92. *See supra* text accompanying notes 78-79.
93. *Portage Cty. Educators* at ¶ 43 (Kennedy, J., concurring).

between encouragement and picketing, nor the relationship between encouragement and organizing.

C. Incitement vs. Inducement?

A limitation on the freedom of speech articulated by the U.S. Supreme Court in 1919 permitted the government to regulate speech designed to "bring about the substantive evils that Congress has a right to prevent."[94] In other words, speech used in the course of committing crimes is not protected.[95] This jurisprudence evolved over time, to "bad tendency," "gravity of the evil," and finally "incite imminent lawless action."[96] These tests attempted to distinguish advocacy and discourse from "lawless action."[97]

"Incitement" denotes a nexus between speech and action. Legislatures do not craft laws against inciting lawless action to stop the theoretical ideas from being discussed, but to prevent lawless action.[98] Laws against conspiracy do not aim to prohibit the discussion of crimes, but to prevent actualized crimes. Similarly, § 4117.11 was not enacted due to fear that employee organizations would discuss the merits of targeted picketing, but to prevent actual picketing. The statute's purpose was self-evident: to prevent picketing outside the residences and private workplaces of public officials.

Thus, the statute's use of "inducement" should be categorized with "incitement," the connection between speech and action.[99] "Inducement" refers to using speech to cause an action.[100] It is distinct from both the action and the speech but lies in their connection.

While this analysis is more precise than the considered opinions, it reaches the same conclusion: O.R.C. § 4117.11 is unconstitutional.[101] In *Brandenburg v. Ohio* the Court determined that the government could regulate language that was "directed to inciting or producing imminent lawless action" and was "likely to incite or produce such action."[102] When an employee association encourages or induces target picketing, their speech is both "directed to inciting or producing . . . action and is likely to incite or

94. Schenck v. United States, 249 U.S. 47, 52 (1919).

95. Stewart v. McCoy, 537 U.S. 993, 995 (2002); Whitney v. Cal., 274 U.S. 357, 371 (1927).

96. John Vile, *Incitement to Imminent Lawless Action*, FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/970/incitement-to-imminent-lawless-action.

97. *Id.*

98. *Id.*

99. Portage Cty. Educators Ass'n for Developmental Disabilities-Unit B v. State Emp't Rels. Bd., 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690, at ¶ 47 (Kennedy, J., concurring); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

100. *Portage Cty. Educators* at ¶¶ 46-47 (Kennedy, J., concurring).

101. *Id.* at ¶ 35 (majority opinion); *id.* at ¶ 50 (Kennedy, J., concurring).

102. *Brandenburg*, 395 U.S. at 447.

produce such action," as demonstrated by the employees' actual picketing.[103] However, the action produced is not lawless.[104] It is lawful and protected by the Constitution.[105] The statute attacked protected speech and prohibited the imminent incitement of *lawful* action.[106]

D. What Next?

Although the court unanimously and unambiguously struck down O.R.C. § 4117.11(B)(7) as an unconstitutional free speech restriction, it did not clarify whether it was possible for a restriction on residential picketing or alternative protections for public officials to pass constitutional scrutiny.[107]

The desire to promote residential peace is a "significant" governmental interest, and states have found several content-neutral approaches to balancing that interest against free speech guarantees.[108] Colorado included "unreasonable noise in a public place or near a private residence" in its definition of prohibited "disorderly conduct."[109] This solution precludes harassment aimed at public officials' residences without reference to content, similar to the municipal codes the majority cited as permissible.[110] Illinois banned all residential picketing in a statute that has not been challenged since its enactment in 1967.[111] However, because residential streets and sidewalks are traditional public forums, if it were challenged, the statute would likely be struck down for over-breadth.[112] Other states have outlawed "targeted picketing" in residential areas, leaving neighborhoods open to protests or marches but prohibiting singling out an individual home.[113] A targeted picketing ban could have protected board members' homes without specifying the identity of a party or their connection to a labor dispute. Because they are content-neutral, their burden on speech would only be subject to intermediate scrutiny.[114]

In *Frisby v. Schultz*, the U.S. Supreme Court considered a facial challenge to the constitutionality of a Wisconsin city ordinance that prohibited

103. *Id.*; *Portage Cty. Educators* at ¶ 3 (majority opinion); In re Portage Cty. Educators Ass'n for Developmental Disabilities – Unit B, SERB No. 2018-002, at 3, 6 (May 3, 2018).
104. OHIO REV. CODE ANN. §§ 4117.03 (A)(1)-(2) (West 2022).
105. *Portage Cty. Educators* at ¶ 9.
106. *Id.* at ¶¶ 9, 46; *Brandenburg*, 395 U.S. at 447.
107. *Portage Cty. Educators* at ¶¶ 35, 50.
108. *Id.* at ¶ 25.
109. COLO. REV. STAT. ANN. § 18-9-106(1)(c) (West 2023).
110. *Id.*; *Portage Cty. Educators* at ¶ 27.
111. 720 ILL. COMP. STAT. ANN. 5/21.1-1 (West 2022).
112. Frisby v. Schultz, 487 U.S. 474, 483-88 (1998).
113. MD. CODE ANN., LAB. & EMPL. § 3-904 (West 2022); HAW. REV. STAT. ANN. § 379A-1 (West 2022); ARIZ. REV. STAT. ANN. § 13-2909 (LexisNexis 2022).
114. *Portage Cty. Educators* at ¶ 11 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

picketing aimed an individual home.[115] Anti-abortion picketers wished to target the residence of a local doctor.[116] They brought suit, claiming the ordinance was an unconstitutional speech restriction because it banned all residential picketing.[117] The Court found that, despite the breadth of the statute, it was narrowly tailored to the significant government interest of residential peace and privacy.[118] It eliminated only the source of the disruption and allowed alternative channels of communication to disgruntled citizens who were still permitted to protest or march throughout the neighborhood.[119] This approach would restrict more speech than the unfair labor practice regulation the Ohio Supreme Court struck down, but it would meet the same end and pass constitutional scrutiny.

V. CONCLUSION

In *Portage Cty. Educators Ass'n for Developmental Disabilities-Unit B v. State Empl. Rels. Bd.* the Ohio Supreme Court struck down § 4117.11(B)(7) as an unconstitutional restriction on the freedom of speech.[120] The statute restricted encouraging or inducing picketing, a protected expressive activity if connected with a public labor dispute and done by an employee organization.[121] Because the restriction was conditioned on the identity of the speaker and topic of the activity, the court determined that the restriction was content-based and applied strict scrutiny.[122] They found the suggested government interests served were significant, but not compelling.[123] Further, the statute was not narrowly tailored because it prohibited all picketing, rather than specific disruptive acts.[124]

Although the text of the law banned encouraging or inducing picketing, its purpose was to prevent picketing at public officials' residences and private workplaces.[125] The statute banned speech aimed at producing an action, analogous to restrictions on speech that "incites to lawless action," but the action being incited (picketing) is a protected expressive activity.[126] Outlawing speech that is intended to incite a legal, even protected action, is itself a violation of free speech protections, and cannot be used as a loophole

115. *Frisby*, 487 U.S. at 476-77, 488.
116. *Id.* at 476.
117. *Id.* at 476-77.
118. *Id.* at 487-88.
119. *Id.* at 483.
120. Portage Cty. Educators Ass'n for Developmental Disabilities-Unit B v. State Emp't Rels. Bd., 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690, at ¶ 35.
121. OHIO REV. CODE ANN. § 4117.11(B)(7) (West 2022).
122. *Portage Cty. Educators* at ¶¶ 20-21, 23.
123. *Id.* at ¶ 25.
124. *Id.* at ¶¶ 27, 32.
125. *See supra* notes 98-100.
126. *See supra* notes 20-21, 99-100.

to stop a behavior that the government does not have the power to outlaw directly.[127]

The Ohio legislature could enact a content-neutral ban on targeted residential picketing, which would accomplish the stated aims of labor peace, residential privacy, and encouraging public service and be facially permitted under the First Amendment.[128] However, with public opinion at seventy-one percent pro-labor, their best political move may be to repeal the provision entirely, allowing peaceful picketing of public officials' residences and leaving the power to the people.[129]

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127. *See supra* notes 90-91.

128. Frisby v. Schultz, 487 U.S. 474, 488 (1998).

129. *Labor Unions*, GALLUP, https://news.gallup.com/poll/12751/labor-unions.aspx (last visited Apr. 12, 2023); JOHN LENNON, POWER TO THE PEOPLE (Apple Records 1971).