First Amendment Protection for Union Appeals to Consumers

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In 2010 after twenty-two years the National Labor Relations Board (NLRB) finally embraced fully the implications of a 1988 Supreme Court decision protecting union non-coercive appeals to consumers. In *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 (Carpenters)*, the Board held that a union’s non-obstructive display to the public of a large stationary banner declaring “shame on” a nearby business and announcing a “labor dispute” in smaller lettering was not a violation of § 8(b)(4)(ii)(b) of the National Labor Relations Act (NLRA). The display was not prohibited even though the nearby business’s involvement in the labor dispute derived from its dealing with another business whose labor policies or practices was the union’s underlying concern. The Board in *Carpenters* relied primarily on the Supreme Court’s interpretation of § 8(b)(4)(ii)(B) in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*. In *DeBartolo II* the Court had held that the NLRA does not proscribe a union’s peaceful distribution of handbills to prospective customers of a shopping mall urging the customers not to shop at the mall because a department store being built at the mall was using “contractors who pay substandard wages and fringe benefits.”

The Board in *Carpenters*, like the Court in *DeBartolo II*, could not and did not base its construction of § 8(b)(4)(ii)(B) solely on an analysis of the statutory language. Both the Court and the Board explained that their constructions were necessary to avoid the “serious” constitutional problem that would be posed by a first amendment challenge to a prohibition of the consumer appeals in each case. In this essay I explain that both the Board’s decision in *Carpenters* and the Court’s decision in *DeBartolo II* require and deserve the first amendment support they claim. While the Board’s interpretation of § 8(b)(4)(ii)(B) in *Carpenters* appropriately follows the Court’s interpretation of this provision in *DeBartolo*, neither interpretation is persuasive without that support. Both the Court and the Board, however, correctly highlighted what can be framed as a compelling
argument for first amendment protection of a union’s appeals to consumers to shun businesses because of their relations with employers to whose labor policies the union objects. This framing can build on a foundation for a consumer right to engage in concerted boycotts that I posited in an article I published several years before the DeBartolo II decision. In this essay I explore anew the implications of this right for protection of the kinds of appeals unions have made in DeBartolo, Carpenters, and other similar recent cases.