"SHIPPING" AWAY THE CAPTIVE AUDIENCE MEETING

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On November 14, 2024, the National Labor Relations Board (NLRB) overturned seventy-six years of labor law precedent by banning captive audience meetings in Amazon.com Services LLC. *Captive audience meetings, mandatory meetings where employers discuss unionization with their employees, were a powerful anti-union tool used by employers to coerce their employees into rejecting unionization. The NLRB argues that captive audience meetings are inconsistent with § 7 and § 8 of the National Labor Relations Act (NLRA). Employers reject the NLRB's assertion and contend that banning captive audience meetings infringes on their First Amendment right to communicate their views on unionization.*

This Note argues that the NLRB's position is correct and that banning captive audience meetings is consistent with the First Amendment and language of the NLRA. In particular, this Note maintains that the ban articulated by the NLRB in Amazon.com Services LLC *only regulates employer conduct, not employer speech, because it does not discriminate based on pro- or anti-union viewpoints and allows employers to continue to express their position on unionization through voluntary meetings. Additionally, this Note asserts that the NLRB's decision is consistent with the "right to refrain" in § 7 of the NLRA. This Note further contends that if a court does subject the NLRB's decision to heightened scrutiny under the First Amendment, the provision survives because it furthers the government's interest in protecting employees' rights under the NLRA and leaves employers fully able to express their views in a nonmandatory setting. This Note concludes by arguing that the NLRB's decision to ban captive audience meetings is consistent with the U.S. Supreme Court's "captive audience doctrine" that protects against compelled listening.*

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INTRODUCTION

With a flashy PowerPoint presentation and top executives in attendance, onlookers might have thought Mercedes-Benz was preparing to announce a new production line at their plant in Vance, Alabama.[1] Instead, the CEO of Mercedes-Benz U.S. International, Inc., Michael Göbel, spent the day addressing workers in mandatory twenty-minute meetings, trying to dissuade them from joining the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW").[2] In the meetings, Göbel espoused classic anti-union talking points, suggesting unionization would result in work stoppages, expensive dues, and obstacles to resolving conflicts.[3] Workers were displeased, calling the meetings a "waste of time" and suggesting the UAW "gained votes" among undecided workers.[4]

The meetings held by Mercedes-Benz in Alabama are an example of a captive audience meeting.[5] Captive audience meetings, a term of art in labor law, are mandatory meetings in which employers express their views on unionization to their employees.[6] On November 13, 2024, the National Labor Relations Board (NLRB or the "Board") issued a momentous decision in *Amazon.com Services LLC*[7] that banned employers from holding captive audience meetings, overturning seventy-six years of precedent in the process.[8] The Board's decision came in the wake of a decade-long effort to eliminate captive audience meetings, led by legislation at the state level and advocacy from former NLRB General Counsel Jennifer A. Abruzzo, at the federal level.[9] The Board held that captive audience meetings are inconsistent with the statutory language and legislative history of the National Labor Relations Act[10] (NLRA).[11]

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1. *See* Josh Eidelson, *Mercedes US Executive Warned Against Unionizing at Mandatory Meeting, UAW Says*, BLOOMBERG (Feb. 23, 2024, 12:59 PM), https://www.bloomberg.com/news/articles/2024-02-23/mercedes-alabama-executive-held-mandatory-anti-union-meeting-uaw-says [https://perma.cc/52EK-64UH]; Luis Feliz Leon, *With a Velvet Glove, Mercedes Tries to Punch Down Alabama Union Momentum*, LABORNOTES (Apr. 10, 2024), https://labornotes.org/blogs/2024/04/velvet-glove-mercedes-tries-punch-down-alabama-union-momentum [https://perma.cc/CTG9-N7GH].

2. *See* Eidelson, *supra* note 1.

3. *See id.*

4. *See* Leon, *supra* note 1.

5. *See id.*

6. *See Captive Audience*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/captive_audience [https://perma.cc/NK7D-Z6AT] (last visited Apr. 2, 2025).

7. 373 N.L.R.B. No. 136 (Nov. 13, 2024).

8. *See id.*

9. *See* Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Nat'l Lab. Rels. Bd. (Apr. 7, 2022); *see also* Chris Marr, *States Advance New 'Captive Audience' Bans Amid Court Challenges*, BLOOMBERG L. (Mar. 1, 2024, 1:10 PM), https://news.bloomberglaw.com/daily-labor-report/states-advance-new-captive-audience-bans-amid-court-challenges [https://perma.cc/K3QN-5F9Y].

10. 29 U.S.C. §§ 151–169.

11. *See* Amazon.com Servs. LLC, 373 N.L.R.B. No. 136, slip op. at 8–24 (Nov. 13, 2024).

Before the Board's decision, captive audience meetings were among the most common anti-union tactics, used by management at Amazon,[12] Starbucks,[13] Trader Joe's,[14] and countless other companies.[15] One analysis of NLRB documents found that 89 percent of employers facing unionization efforts held captive audience meetings.[16] This frequency presumably reflects a pervasive belief among employers[17] in the efficacy of such meetings in deterring workers from joining a union.[18] The same report found that captive audience meetings reduced the average union election success rate from 73 percent to 47 percent, demonstrating an apparent anti-union effect.[19]

Legal challenges to captive audience meeting bans are just beginning to take shape.[20] In claims filed thus far, employers have attacked actions taken by Abruzzo and state legislatures on First Amendment grounds.[21] Broadly, employers argue that regulating captive audience meetings violates their First Amendment right to express their views on unionization.[22] In contrast, the NLRB and states contend that such regulations are permissible because they only touch conduct, not speech, and employers are free to express their views so long as meetings discussing unionization are not mandatory.[23] Despite the growing number of cases, a court has yet to decide any challenge to the NLRB's position or state law on the merits.[24]

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12. *See* Josefa Velasquez, *Leaked Audio: Amazon Workers at 'Captive Audience' Meeting Push Back on Management Claims*, THE CITY (Mar. 25, 2022, 5:04 PM), https://www.thecity.nyc/2022/03/25/leaked-audio-amazon-workers-staten-island-captive-audience-meeting [https://perma.cc/E252-V82M].

13. *See* Rani Molla, *How a Bunch of Starbucks Baristas Built a Labor Movement*, VOX, https://www.vox.com/recode/22993509/starbucks-successful-union-drive [https://perma.cc/7F82-VAZP] (Apr. 8, 2022, 4:59 PM).

14. *See* Catalina Gonella, *Labor Board Complaint Accuses Trader Joe's of Pressuring NYC Store Not to Unionize*, GOTHAMIST (Sept. 19, 2024), https://gothamist.com/news/labor-board-complaint-accuses-trader-joes-of-pressuring-nyc-store-not-to-unionize [https://perma.cc/VBM8-RNDB].

15. *See* Dave Jamieson, *Workers Wanted a Union. Then the Mysterious Men Showed Up*, HUFFINGTON POST (July 24, 2023), https://www.huffpost.com/entry/workers-wanted-a-union-then-the-mysterious-men-showed-up_n_64b7dd60e4b0dcb4cab68347 [https://perma.cc/3DU4-SFA8].

16. *See* Daniel Perez & Jennifer Sherer, *Tackling the Problem of 'Captive Audience' Meetings*, ECON. POL'Y INST. (Oct. 24, 2023, 3:00 PM), https://www.epi.org/blog/captive-audience-meetings [https://perma.cc/8S3F-HUZL].

17. Although employers may have varied views on captive audience meetings, this Note uses "employer" to refer to employers who oppose banning captive audience meetings.

18. *See* Perez & Sherer, *supra* note 16.

19. *See id.*

20. *See generally* Burnett Specialists v. Abruzzo, No. 22-CV-00605, 2023 WL 5660138 (E.D. Tex. Aug. 31, 2023); Complaint, Chamber of Com. v. Bartolomeo, No. 22-CV-01373 (D. Conn. filed Nov. 1, 2022); Complaint, Minn. Chapter of Associated Builders and Contractors, Inc. v. Ellison, No. 24-CV-00536 (D. Minn. filed Feb. 20, 2024).

21. *See infra* Part II.B.

22. *See infra* Part II.B.

23. *See infra* Part II.A.

24. *Bartolomeo* and *Ellison* are still ongoing. A district court dismissed *Burnett Specialists* on jurisdictional grounds. *See Burnett Specialists*, 2023 WL 5660138, at *10. Although it is expected, there has yet to be a challenge to *Amazon.com*.

This Note examines the Board's ban on captive audience meetings in *Amazon.com* within the context of the NLRA and the First Amendment. Part I of the Note provides the key definitions and legal background to this issue, which exists at the intersection of labor law and First Amendment law. Subsequently, Part II considers the strongest arguments for and against banning captive audience meetings on First Amendment and statutory grounds. Finally, Part III argues that the Board's decision in *Amazon.com* is permissible under the First Amendment and the NLRA. This Note ultimately contends that the NLRB was correct in its decision to ban captive audience meetings.

I. CAPTIVE AUDIENCE MEETINGS IN THE BOUNDS OF CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE RIGHTS

The Board's decision in *Amazon.com* adds to a rich history of controversy surrounding captive audience meetings. As briefly mentioned above, a captive audience meeting is a mandatory meeting held by an employer to discourage employees from organizing or joining a labor union.[25] These meetings take place on company property during work hours.[26] Before the NLRB decided *Amazon.com* in November 2024, it was perfectly legal for an employer to discipline or discharge an employee for refusing to attend a captive audience meeting or leaving early.[27] For employers, captive audience meetings offer an opportunity to persuade workers to follow their views on unionization.[28] Yet, at the same time, workers often feel coerced into listening because of the threat of discipline.[29]

This part defines the scope of captive audience meetings and provides important context pertaining both to labor legislation and First Amendment jurisprudence. First, Part I.A considers First Amendment jurisprudence relevant to ongoing debates about captive audience meetings. Second, Part I.B explores the NLRB's changing precedent regarding captive audience meetings and reviews the decision in *Amazon.com*.

25. *See Banning Captive Audience Meetings*, CWA DIST. 1, https://cwad1.org/banning-captive-audience-meetings [https://perma.cc/2726-7CMZ] (last visited Apr. 2, 2025).

26. *See id.*

27. *See id.* Between 1953 and 2024, the only restriction the NLRB placed on captive audience meetings was prohibiting them within twenty-four hours of a union election, giving employers leeway to otherwise conduct captive audience meetings as they pleased. *See* Peerless Plywood Co., 107 N.L.R.B. 427, 429–30 (1953); *see also infra* notes 134–37 and accompanying text.

28. *See* Brian Joseph, *Democrats Seek to Protect Workers from Anti-Union Captive Audience Meetings*, LEXISNEXIS: STATE NET INSIGHTS (Sept. 11, 2024), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/democrats-seek-to-protect-workers-from-anti-union-captive-audience-meetings [https://perma.cc/9MB8-7MUE].

29. *See* Perez & Sherer, *supra* note 16.

A. The First Amendment in the Context of Captive Audience Meetings

The key to analyzing speech in the workplace is understanding the tension between an employer's right to deliver persuasive speech, an employee's right to avoid compelled listening, and the government's right to regulate conduct. This section addresses the complex First Amendment doctrine that applies to regulating captive audience meetings. Part I.A.1 focuses on differentiating content and conduct in the context of the First Amendment, and Part I.A.2 contemplates the conflict between the First Amendment rights of speakers and listeners under the U.S. Supreme Court's captive audience doctrine.

1. Regulating Employer Conduct or Content?

Captive audience meetings are at the nexus between an employer's conduct and the content of an employer's speech. The employer's message during a captive audience meeting is expressive content, but the mandatory nature of the meeting is arguably conduct.[30] An important distinction in First Amendment jurisprudence is between *conduct* and *content*-based regulations.[31]

Content is the substance of what a speaker conveys.[32] A regulation is content based when it applies to a speaker's idea or message.[33] In contrast, *conduct* has a far broader definition, namely, any behavior that a person or entity might engage in or not engage in.[34] A regulation is conduct based if it addresses behavior outside the message conveyed through speech or expression.[35]

Despite those clear-cut definitions, the line between regulations that target expressive content and regulations that target conduct is often murky.[36] As a general rule, the First Amendment does not absolutely prohibit restrictions directed at conduct from imposing incidental burdens on speech.[37] Conduct is not automatically classified as speech whenever an individual expresses an idea.[38] When considering regulations that affect conduct and speech, a court

30. *See infra* Part II.

31. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (reasoning a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (quoting Police Dep't. of Chi. v. Mosley, 408 U.S. 92, 95 (1972))).

32. *See Reed*, 576 U.S. at 163.

33. *See id.*

34. *Conduct*, BLACK'S LAW DICTIONARY (12th ed. 2024).

35. *See* United States v. O'Brien, 391 U.S. 367, 375 (1968) (referring to a law targeted at conduct as having "no connection with speech").

36. *See* VICTORIA L. KILLION, CONG. RSCH. SERV., R47986, FREEDOM OF SPEECH: AN OVERVIEW 3 (2024).

37. *Id.*

38. *See O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

may determine that a provision primarily restricts nonexpressive conduct and does not trigger First Amendment scrutiny.[39]

This issue is illustrated well in *Arcara v. Cloud Books, Inc.*,[40] where the Court considered whether a New York public health statute authorizing the closure of premises used for prostitution interfered with a bookstore's First Amendment rights after an undercover investigation found illicit prostitution occurring in the store.[41] The store owners argued that closing the bookstore would interfere with their First Amendment right to sell books.[42] Writing for the majority, Chief Justice Warren Earl Burger held that the public health statute did not violate the First Amendment because the statute regulated conduct that had nothing to do with books or other expressive activities.[43]

Notably, the decision in *Arcara* was far from unanimous. Justice Harry A. Blackmun dissented, arguing that the Court should examine the effect of legislation on speech in every case challenged under the First Amendment.[44] To support this proposition, Justice Blackmun referenced instances where the Court struck down provisions that did not attempt to censor speech on First Amendment grounds but still unduly affected speech.[45] For example, Justice Blackmun cited *Schneider v. State*,[46] where the Court invalidated a Milwaukee anti-litter ordinance, which allowed for the arrest of pamphlet distributors if those who received a pamphlet threw it in the street.[47] Justice Blackmun conceded that the state has an interest in preventing sexual acts in a bookstore.[48] Nonetheless, he argued that the majority's reasoning provided, in effect, a free pass for all regulations that primarily target conduct, thus creating an avenue for states to suppress undesirable speech without being confronted by the First Amendment.[49]

Central to Chief Justice Burger's analysis in *Arcara* was the finding that prostitution involved no element of protected expression.[50] However, the issue is more complex when an element of protected expression is present.[51] When a course of conduct involves both "speech" and "nonspeech" elements, there are First Amendment concerns.[52] Only a sufficiently important

39. *See* KILLION, *supra* note 36, at 3.
40. 478 U.S. 697 (1986).
41. *See id.* at 698–700.
42. *See id.*
43. *See id.* at 706–07 (observing that the First Amendment subjects such regulations to scrutiny only where "it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity").
44. *See id.* at 708–09 (Blackmun, J., dissenting).
45. *See id.*
46. 308 U.S. 147 (1939).
47. *See id.* at 163; *see also* Marsh v. Alabama, 326 U.S. 501, 507–08 (1946) (holding that an antitrespass statute was unconstitutional as applied to Jehovah's Witnesses in a company town).
48. *Arcara*, 478 U.S. at 711 (Blackmun, J. dissenting).
49. *Id.* at 711–12.
50. *Id.* at 705 (plurality opinion).
51. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).
52. *See id.*

governmental interest in regulating the *nonspeech* elements can justify limitations on First Amendment freedoms.[53] In *United States v. O'Brien*,[54] the Court established a three-part test to determine whether such regulations are justified.[55] The test asks (1) whether the regulation furthers an important governmental interest, (2) whether the governmental interest is unrelated to the suppression of free expression, and (3) whether the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.[56] A regulation that passes all three hurdles is constitutional under the First Amendment.[57]

Similarly, the Court often permits "time, place, and manner" regulations restricting the conduct affiliated with a form of expression.[58] Such a regulation, for example, might include controlling the volume of music played at a bandshell at a park.[59] These regulations face a similar form of intermediate scrutiny, where the Court asks (1) whether the regulation is narrowly tailored to serve a significant governmental interest and (2) whether the regulation leaves open ample alternatives for communication of the information.[60]

Although regulating conduct is generally permissible, regulating content or viewpoint is prohibited in most circumstances.[61] The Court has described classifying a law as conduct based as a "commonsense" exercise.[62] In *Reed v. Town of Gilbert*,[63] Justice Thomas wrote that a law is content based if it draws distinctions based on the message the speaker conveys, cannot be justified without reference to the content of the speech, or was adopted by

53. *See id.*

54. 391 U.S. 367 (1968).

55. *See id.* at 376–77.

56. *Id.*

57. In *O'Brien*, the Court applied the test and determined that a statute criminalizing the burning of selective service cards was constitutional because the statute substantially furthered the smooth and proper functioning of the draft system. *See id.* at 382. The U.S. Court of Appeals for the Ninth Circuit applied *O'Brien* in the labor context to indicate that an injunction against a union that limited their right to demonstrate could be constitutional if it served the government's interests under 29 U.S.C. § 158(b)(7) of the NLRA. *See* Miller v. United Food & Com. Workers Union, Loc. 498, 708 F.2d 467, 472 (9th Cir. 1983).

58. KILLION, *supra* note 36, at 7.

59. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981) (permitting the confinement of literature distribution and fundraising activities by religious organizations to fixed locations at a fairground). *But see* United Food & Com. Workers Loc. 99 v. Bennett, 934 F. Supp. 2d 1167, 1213–15 (D. Ariz. 2013) (rejecting an argument that a labor regulation imposing liability for "concerted interference with lawful exercise of business activity" was a permissible "time, place, and manner" restriction).

60. KILLION, *supra* note 36, at 7.

61. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional.").

62. *See id.*

63. 576 U.S. 155 (2015).

the government because of disagreement with the message the speaker conveys.[64]

Under *Reed*, laws that regulate the content of speech are presumptively unconstitutional, and the First Amendment requires applying strict scrutiny to determine the law's validity.[65] In the *Reed* articulation of strict scrutiny, the Court considers if (1) the law furthers a compelling governmental interest and (2) the action is narrowly tailored to achieve said interest.[66] If the law or regulation passes both thresholds, it is permissible under the First Amendment.[67]

However, it is important to note that the *Reed* doctrine is far from settled.[68] In *Reed*, the majority led by Justice Thomas advocated for applying strict scrutiny to any law involving content regulation.[69] Joined by three other members of the Court, Justice Kagan wrote a concurring opinion that strongly rejected Justice Thomas's mechanical application of strict scrutiny.[70] Instead, Justice Kagan advanced a position that emphasized applying strict scrutiny based on "common sense" to not pointlessly burden "entirely reasonable" regulations.[71] Although a significant change, the implications of *Reed* on First Amendment jurisprudence are still being fleshed out.[72]

2. Weighing Employee Rights Under the Captive Audience Doctrine

Restrictions on captive audience meetings implicate the First Amendment "captive audience doctrine" or "freedom not to listen."[73] Under the captive

64. *See id.* at 163; *see also* United States v. Eichman, 496 U.S. 310, 315 (1990) (subjecting a facially neutral law to strict scrutiny after determining the government's interest was in suppressing free expression).

65. *See Reed*, 576 U.S. at 163.

66. *See id.*

67. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (holding that preventing discrimination was a compelling state interest, but an ordinance prohibiting the display of certain symbols was not necessary to achieve such ends because the same effect could be achieved through other means); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 120 (1991) (reasoning that the state had a compelling interest in compensating victims for crimes, but a law requiring proceeds from a convicted criminal's book to be deposited in an escrow account for victims was overbroad because it discouraged publication from too wide a range of books and extended state control past the statute of limitations on a crime).

68. *See generally* Comment, City of Austin v. Reagan National Advertising of Austin, LLC, 136 HARV. L. REV. 320 (2022) (arguing that the Supreme Court has already begun to narrow, or at least clarify, the scope of *Reed*).

69. *See Reed*, 576 U.S. at 163.

70. *See id.* at 183 (Kagan, J., concurring).

71. *See id.*

72. Courts have yet to apply *Reed* in the labor context. *See, e.g.*, 520 S. Mich. Assocs., Ltd. v. Unite Here Loc. 1, No. 10 C 01422, 2016 WL 11943350, at *6 (N.D. Ill. Mar. 25, 2016) (rejecting the application of *Reed* to a challenge to secondary picketing).

73. *See* Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 89–90 (2010).

audience doctrine, the government may prohibit offensive speech when a "captive" audience cannot avoid objectionable speech.[74] An unwilling individual is considered part of a captive audience if the circumstances make it impractical, but not impossible, for them to avoid exposure to some form of objectionable speech.[75]

The earliest conceptions of the captive audience doctrine involved objectionable speech in the home, at school, and on public transportation.[76] For example, in *Breard v. City of Alexandria*,[77] the Court upheld an ordinance prohibiting door-to-door canvassing by salesmen because "[r]ights other than those of the advocates [were] involved."[78] Similarly, in *Lehman v. Shaker Heights*,[79] the Court upheld a ban on political advertising on buses on the grounds that "[t]he radio can be turned off, but not so the billboard or street car placard."[80]

The captive audience doctrine reached its zenith in *Madsen v. Women's Health Center*.[81] There, the Court sustained a thirty-six-foot buffer zone around an abortion clinic on the grounds that the patients were a captive audience.[82] The Court reasoned that antiabortion picketing could affect the psychological and physical well-being of patients, and the buffer zone was a reasonably tailored measure to protect their interests.[83]

B. The Road to Amazon.com

Understanding employer captive audience meetings requires a broader understanding of labor law in the United States in addition to the First Amendment jurisprudence discussed above. Part I.B.1 provides background on the NLRA and examines how the NLRB functions as an administrative body. Part I.B.2 considers the Board's application of the NLRA to captive audience meetings in decisions before *Amazon.com*. Finally, Part I.B.3 unpacks the reasoning of the Board's decision in *Amazon.com*.

74. *See* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 541–42 (1980).

75. *See* Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975).

76. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (lewd speech in school); Laws Packer Corp. v. Utah, 285 U.S. 105 (1932) (tobacco billboards).

77. 341 U.S. 622 (1951), *overruled by* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

78. *Id.* at 642; *see also* Frisby v. Schultz, 487 U.S. 474 (1988) (upholding a ban on residential picketing).

79. 418 U.S. 298 (1974).

80. *Id.* at 302 (quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)).

81. 512 U.S. 753 (1994).

82. *See id.* at 770.

83. *See id.* at 768–74.

1. The NLRA and the Creation of the NLRB

What is referred to as the NLRA today is a product of the "Wagner Act,"[84] major amendments added through the "Taft-Hartley Act"[85] in 1947, and minor amendments added by the "Landrum-Griffin Act"[86] in 1959.[87] In its present form, the largely unamended statute is the preeminent labor law in the United States.[88]

The NLRB is the independent agency tasked with administering and enforcing the NLRA.[89] The NLRB is composed of a five-member board and the Office of the General Counsel ("General Counsel").[90] The Board is a quasi-judicial body that resolves objections to secret ballot elections, decides questions about the composition of bargaining units, and hears appeals of unfair labor practices.[91] The president appoints Board members for five-year terms.[92] The General Counsel investigates and prosecutes unfair labor practice cases and conducts union elections.[93] The president appoints the General Counsel, who serves for a four-year term.[94] Both the General Counsel and the Board are independent entities.[95]

Although the Board has adjudication and notice-and-comment rulemaking powers, the NLRB has only used its notice-and-comment power a handful of times in its history.[96] Instead, the NLRB relies heavily on adjudications to change policy.[97] Under this framework, the General Counsel selects cases to bring before the Board to advance precedent.[98] After the Board delivers a

84. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

85. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–187).

86. Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

87. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532 (2002).

88. *See id.* at 1535 (observing the text of the NLRA has remained virtually untouched since 1959). *See generally* James J. Brudney, *Gathering Moss: The NLRA's Resistance to Legislative Change*, 26 A.B.A. J. LAB. & EMP. L. 161 (2011).

89. JON O. SHIMABUKURO, CONG. RSCH. SERV., RL32930, THE NATIONAL LABOR RELATIONS ACT (NLRA): UNION REPRESENTATION PROCEDURES AND DISPUTE RESOLUTION 2 (2013).

90. *See id.*

91. *See id.*

92. *The Board*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/the-board [https://perma.cc/K57M-WDZG] (last visited Apr. 2, 2025).

93. SHIMABUKURO, *supra* note 89, at 2.

94. *General Counsel*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/bio/general-counsel [https://perma.cc/JL78-6GY6] (last visited Apr. 2, 2025).

95. *See id.*

96. Blake Phillips, *NLRB Case Surge: What It Means and What the Board Can Do About It Right Now*, GEO. J. ON POVERTY L. & POL'Y: BLOG (Feb. 16, 2023), https://www.law.georgetown.edu/poverty-journal/blog/nlrb-case-surge-what-it-means-and-what-the-board-can-do-about-it-right-now [https://perma.cc/J9MX-ZQRV].

97. *See id.*

98. *See id.*

favorable decision, the General Counsel must entrench the new rule by bringing several cases where the Board reiterates its interpretation.[99]

The Board's decision in *Amazon.com* and much of the legal history of captive audience meetings on the federal level centers around two key provisions of the NLRA. One provision, 29 U.S.C. § 157 ("§ 7"), broadly protects workers' right to self-organization and collective bargaining.[100] It also explicitly protects a worker's right to *refrain* from any organizing activities.[101] The other provision, 29 U.S.C. § 158 ("§ 8"), regulates unfair labor practices—unlawful activities by employers and labor organizations that disrupt the balance of power between employers and employees.[102] These provisions work in tandem, as an activity by an employer that interferes with, restrains, or coerces an employee in exercising their § 7 rights is considered an unfair labor practice under § 8.[103] If an employer or union commits an unfair labor practice under § 8, the NLRB may order the offending party to cease the activity.[104] The remedies for unfair labor practices include reinstatement and payment of lost wages and benefits.[105]

The Board's change in policy toward captive audience meetings tracked this process closely. In 2022, Abruzzo published a memo indicating her intention to bring a case where she believed she could persuade the Board to alter precedent to ban captive audience meetings.[106] Two years later, the Board answered by deeming captive audience meetings an unfair labor practice in *Amazon.com*.[107] Although Abruzzo could not enforce the Board's policy before the end of her term, many employers regard the decision to be the law of the land.[108]

2. Captive Audience Meetings Before *Amazon.com*

In the early years of the NLRA, the NLRB staked out a position that emphasized employer neutrality and limited employer speech.[109] In *Virginia Electric & Power Co.*,[110] for example, the Board held that Virginia Electric

99. *See id.*
100. *See* 29 U.S.C. § 157.
101. *Id.* This portion of § 7 was not added until the passage of the Taft-Hartley Act in 1947.
102. *See* 29 U.S.C. § 158.
103. *Id.* § 158(a)(1).
104. *See* SHIMABUKURO, *supra* note 89, at 5–6.
105. *See id.*
106. *See* Memorandum from Jennifer A. Abruzzo, *supra* note 9.
107. *See infra* Part I.B.3.
108. *See* David Weisenfeld, *Don't Try to Wait Out Trump Change to NLRB Captive-Audience Ban, Attorneys Say*, LEGAL DIVE (Nov. 22, 2024), https://www.legaldive.com/news/dont-wait-out-trump-change-nlrb-captive-audience-ban-hyman-wickens-theodore-proskauer/733742 [https://perma.cc/825D-PLYT] (advising employers to give the Board's decision deference).
109. *See generally* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995).
110. 20 N.L.R.B. 911, *enforcement denied*, 115 F.2d 414 (4th Cir. 1940), *rev'd*, 314 U.S. 469 (1941).

& Power Co. violated § 7 of the NLRA when it circulated a bulletin and made speeches encouraging its employees to join an "inside" company union.[111]

The Supreme Court expressed concern about this approach. Considering the same issue in *NLRB v. Virginia Electric & Power Co.*,[112] the Court reversed the NLRB's decision and held that the speeches were not unfair labor practices.[113] In its decision, the Court reasoned that to find an unfair labor practice, conduct could be evidenced *in part* by speech and amount to coercion if the *total activities* restrained or coerced an employee.[114]

Soon after, in *Thomas v. Collins*,[115] the Court considered a Texas law that required union organizers to obtain an organizer's card before soliciting possible members.[116] The Court held that the law violated the First Amendment.[117] Echoing *Virginia Electric*, the Court reasoned that when persuasion by an employer "bring[s] about coercion, or give[s] it that character," First Amendment protections do not apply.[118] However, short of that limit, the Court affirmed that an "employer's freedom cannot be impaired."[119]

Shortly after *Virginia Electric* and *Thomas v. Collins*, the NLRB addressed the issue of captive audience meetings in *Clark Bros. Co.*,[120] where employees were compelled to assemble and listen to anti-union speeches from managers mere hours before a union runoff election.[121] These meetings occurred during work hours.[122] The only way employees could have avoided the speeches was by leaving the premises—something they were not permitted to do during working hours.[123] The Board reasoned that using economic power to coerce employees to listen to speeches regarding unionization activities independently violated § 7 and § 8(a)(1) by interfering with the employees' choice.[124] According to the Board, the coercive effect of the mandatory meetings was not, as in *Virginia Electric*, inseparable from the speech.[125] In effect, *Clark Bros.* banned captive audience meetings for the ensuing years.

However, this period in which the NLRB banned captive audience meetings did not last long. Congress may have been aware of *Clark Bros.* when it passed the Taft-Hartley Act in 1947.[126] The Taft-Hartley Act

111. *Id.* at 919–23.
112. 314 U.S. 469 (1941).
113. *See id.* at 479.
114. *See id.* at 477.
115. 323 U.S. 516 (1945).
116. *See id.* at 519 n.1.
117. *See id.* at 533–34.
118. *Id.* at 537–38.
119. *Id.* at 538.
120. 70 N.L.R.B. 802, 805 (1946), *enforced as modified*, 163 F.2d 373 (2d Cir. 1947).
121. *Id.* at 804.
122. *Id.*
123. *Id.*
124. *Id.* at 804–05.
125. *Id.* at 805.
126. 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 429–30 (Nat'l Lab. Rels. Bd. ed., 1985) (referencing the holding of *Clark Bros.*).

amended the NLRA to be more favorable to employers by placing restrictions on the behavior of unions and protecting the right of employees to refrain from organizing activities.[127] Notably, the newly added § 8(c) stated, "[T]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."[128]

The addition of § 8(c) thus seemingly expanded the ability of employers to express their views beyond the bounds of *Clark Bros.*[129] In the Senate committee report on the original Taft-Hartley Act amendment, the Committee on Labor and Public Welfare called *Clark Bros.* "too restrictive" and contended that such meetings should be allowed under the new § 8(c) so long as they did not contain a threat of force or offer of benefit.[130] Soon thereafter, in 1948, the NLRB had the opportunity to reconsider the issue of captive audience meetings in *Babcock & Wilcox Co.*[131] With one sentence, the Board dealt a swift kick to *Clark Bros.*, holding that after the addition of § 8(c), "the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices."[132] In other words, captive audience meetings were once again a fair game for employers.[133]

Notably, the Board's permissive attitude toward captive audience meetings came with an important caveat. In *Peerless Plywood Co.*,[134] the Board was presented with the issue of whether a captive audience meeting held within a few hours of a union election gave an unfair advantage to the employer.[135] The Board established a rule that, regardless of content, captive audience meetings were prohibited within twenty-four hours of an election because, in this context, such meetings created a "mass psychology" that could unduly influence an employee.[136] If an employer held a captive audience meeting within twenty-four hours of a union election, the Board would set aside the results and hold a new election.[137]

The Court's 1969 decision in *NLRB v. Gissel Packing Co.*[138] formally recognized that § 8(c) implements the First Amendment.[139] Chief Justice

127. *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions [https://perma.cc/463Z-F8Y8] (last visited Apr. 2, 2025).

128. 29 U.S.C. § 158(c).

129. *See id.*

130. 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, *supra* note 126, at 429–30. However, the Senate committee report is the only mention of *Clark Bros.* in the congressional record, raising a question of the extent to which ordinary members of Congress voted on Taft-Hartley with the specific intent of rebuking the NLRB's decision. *Id.*

131. 77 N.L.R.B. 577 (1948).

132. *Id.* at 578.

133. *See* Abruzzo, *supra* note 9.

134. 107 N.L.R.B. 427 (1953).

135. *See id.* at 428.

136. *See id.* at 429.

137. *See id.*

138. 395 U.S. 575 (1969).

139. *See id.* at 617 ("Thus, Section 8(c) . . . merely implements the First Amendment.").

Earl Warren wrote that an employer's right to express its views could not be infringed by unions or the Board.[140] However, Chief Justice Warren added that this right to expression could not outweigh an employee's equal right to associate freely under the NLRA.[141] When balancing rights to assess unfair labor practices, Chief Justice Warren contended that any analysis must consider the economic dependence of employees on their employer.[142] Chief Justice Warren drew a distinction between speech in public, where a person is more free to listen objectively, and speech in the workplace, where an employee hearing such speech might be less objective because of their economic dependence on their employer.[143]

The framework above served as the status quo for a long time.[144] Specifically, *Babcock & Wilcox Co.* and *Peerless Plywood Co.* remained the law of the land until 2009, when Oregon became the first state to ban captive audience meetings.[145] Then, between 2009 and 2024, thirteen more states banned or considered similar bans on captive audience meetings.[146] Most states employed language similar to the original Oregon statute, which prohibits penalizing employees for not attending meetings held by their employer to communicate views on "religious or political matters."[147] Such statutes define "political matter" in part to include activity related to the decision to join or not join a union.[148] Thus, in effect, the state laws operate as a bar on holding captive audience meetings independent from any NLRB decision.[149]

At the federal level, there has been some effort to make similar legislative changes to prohibit captive audience meetings.[150] The Protecting the Right

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140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.*
144. *See generally* Memorandum from Jennifer A. Abruzzo, *supra* note 9.
145. Jessica Harris, *Captive Audience Meetings: A Backgrounder*, ONLABOR (Apr. 2, 2014), https://onlabor.org/captive-audience-meetings-a-backgrounder [https://perma.cc/AHH2-M7ME].
146. *See* Marr, *supra* note 9.
147. *See, e.g.*, OR. REV. STAT. § 659.785 (2009).
148. *See, e.g.*, *id.* § 659.780 (including "labor organizations" in the definition of "constituent group" and "political matters" to include "the decision to join, not join, support or not support any lawful political or constituent group").
149. Because these state laws arguably touch federal labor law, they implicated preemption concerns under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). Under *Garmon* preemption, when an activity is arguably subject to § 7 or § 8 of the NLRA, the states and the federal courts must defer to the expertise of the NLRB. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 237–47 (1959). Under *Machinists* preemption, states and the NLRB are prohibited from regulating conduct that Congress intended to be left unregulated and instead "controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140 (quoting NLRB v. Nash Finch Co., 404 U.S. 138, 144 (1971)). Although this Note refers to preemption in the footnotes, it is generally outside the scope of the inquiry.
150. *See* Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *How the PRO Act Restores Workers' Right to Unionize*, ECON. POL'Y INST. (Feb. 4, 2021), https://www.epi.org/publication/pro-act-problem-solution-chart [https://perma.cc/W6TN-Q8L7].

to Organize Act[151] (the "PRO Act"), proposed in recent sessions of Congress, would make captive audience meetings an unfair labor practice.[152] The proposed text read, "[I]t shall be an unfair labor practice . . . for any employer to require or coerce an employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties."[153] Despite fervent support from organized labor, the PRO Act has yet to pass both chambers of Congress.[154] In the wake of the 2024 elections, garnering the requisite support for the PRO Act is highly unlikely. That said, it is noteworthy that if enacted, the PRO Act would outlaw captive audience meetings at the federal level without the need for approval by the Board.[155]

3. *Amazon.com*

In late 2024, the NLRB shifted the status quo when it answered calls to ban captive audience meetings in *Amazon.com*. In its ruling, the Board held that captive audience meetings are inconsistent with the plain language and legislative history of the NLRA.[156] The Board argued that captive audience meetings are impermissible under the language of § 8(a)(1) because they are coercive and "interfere with" an employee's exercise of their § 7 rights.[157] The Board noted that employers "interfere with" an employee's exercise of their § 7 rights when "they intrude on the privacy and autonomy of employees by, for instance, surveilling, interrogating, or polling them with regard to their exercise of Section 7 rights."[158]

The Board found that captive audience meetings violate § 8(a)(1) on three separate grounds.[159] First, it concluded that captive audience meetings interfere with an employee's right to choose the degree to which they will participate in the debate regarding unionization.[160] According to the Board, mandatory employer-led meetings discussing unionization impede an employee's "right to refrain" under the plain language of § 7.[161] More broadly, compelled participation is "irreconcilable with American law's more general focus on protecting the 'unwilling listener's interest in avoiding

151. Richard L. Trumka Protecting the Right to Organize Act of 2023, H.R. 20, 118th Cong. (2023).

152. *See* H.R. 20 § 104(3).

153. *Id.*

154. In both 2020 and 2021, the PRO Act was passed in the House but failed to garner enough support in the Senate. *See* Nicholas Fandos, *House Passes Labor Rights Expansion, but Senate Chances Are Slim*, N.Y. TIMES (Mar. 19, 2021), https://www.nytimes.com/2021/03/09/us/politics/house-labor-rights-bill.html [https://perma.cc/69VM-6XL7].

155. *See generally* Christopher Adinolfi, Note, *Can Private Sector Unionization Be Saved?: An Analysis of the PRO Act as a Model for Effective NLRA Reform*, 90 FORDHAM L. REV. 103 (2021) (providing additional discussion on the PRO Act).

156. *See* Amazon.com Servs. LLC, 373 N.L.R.B. No. 136, slip op. at 12–13 (Nov. 13, 2024).

157. *See id.* slip op. at 13.

158. *See id.*

159. *See id.* slip op. at 13–14.

160. *See id.*

161. *See id.* slip op. at 14.

unwanted communication,' despite the communicators' wish to express their views."[162]

Second, the Board noted that captive audience meetings interfere with an employee's § 7 rights because they serve as a mechanism for employers to surveil employees during discussions on unionization.[163] In the Board's view, behaviors as simple as asking questions, scoffing at employer talking points, or moving seats to be near a known union supporter can provide employers with important information about where an employee may stand during a unionization drive.[164] Therefore, although seemingly innocuous, captive audience meetings can be a tool to violate an employee's § 7 right to privacy and autonomy while making a decision about unionization.[165]

Third, the Board explained that captive audience meetings are inherently coercive expressions of an employer's economic power because the employer's ability to compel attendance inhibits employees from acting freely.[166] Applying *Gissel Packing Co.*, the Board argued that when employers direct employees to attend captive audience meetings, the threat of discipline or discharge sends a message to employees that the employer controls their participation in the unionization campaign.[167] Thus, the Board reasoned that captive audience meetings communicate a lack of genuine freedom to employees regarding exercising their § 7 rights.[168]

The *Amazon.com* decision also addressed the potential First Amendment concerns at play. On the issue of free speech, the Board argued that the First Amendment does not entitle employers to push their views on unwilling recipients.[169] The Board, instead, concluded that banning captive audience meetings balances an employer's right to convey their thoughts on unionization with an employee's right not to listen.[170] Considering statutory protections for speech in § 8(c), the Board argued that its analysis "starts and ends with the text."[171] That is, § 8(c) is unambiguous in providing employers the right to noncoercively "express" their views on unionization while prohibiting employers from compelling employees to listen to them through threats or force.[172]

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162. *See id.* (quoting Hill v. Colorado, 530 U.S. 730, 716–17 (2000)).
163. *See id.* slip op. at 15.
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.* slip op. at 15–16.
169. *See id.* slip op. at 19.
170. *See id.* The Board argues that if its decision did trigger strict scrutiny, it would survive because it is narrowly tailored to serve its congressional charge of protecting workers' freedom of association, self-organization, and designation of representatives of their own choosing. *See id.* slip op. at 24 n.50.
171. *See id.* slip op. at 16.
172. *See id.* slip op. at 16–17. The Board also notes that § 8(c)'s prohibition on using speech as "evidence" of an unfair labor practice is inapplicable to captive audience meetings because finding a violation of § 8(a)(1) rests on the conduct of compelling an individual to attend a captive audience meeting, not any specific message delivered during the meetings. *Id.* slip op. at 17.

The Board supported its view on § 8(c) with a brief analysis of legislative history. First, the Board argued, the addition of § 8(c) in the Taft-Hartley Act was not intended to rebuke *Clark Bros.* or permit captive audience meetings.[173] Considering the conference report, the Board found that the primary purpose of § 8(c) was to prevent the Board from ascribing an anti-union motive to an employer based on the substance of the employer's earlier lawful statement in opposition to unionization.[174] In doing so, the Board called into question the reasoning in *Babcock & Wilcox Co.*, which based its decision on a single reference to *Clark Bros.* in the Senate report—the only reference in the entire legislative history.[175]

Lastly, in *Amazon.com*, the Board established guidelines for lawful voluntary meetings.[176] Under these guidelines, an employer will be found not to have violated § 8(a)(1) if (1) the employer intends to express its views on unionization at a meeting at which attendance is voluntary; (2) employees will not be subject to discipline, discharge, or other consequences for failing to attend the meeting or leaving the meeting; and (3) the employer will not keep records of which employees attend, fail to attend, or leave the meeting.[177] The Board held that if an employer gives these assurances and follows through with them, they may lawfully hold a voluntary meeting about unionization on company time.[178]

Dissenting from this decision, then–NLRB Member Marvin E. Kaplan argued that captive audience meetings are acceptable under the NLRA and the First Amendment.[179] Kaplan concluded that an employer's right to hold captive audience meetings is protected by § 8(c), which he interprets as solely focused on protecting expression, leaving employers free to make meetings mandatory.[180] In Kaplan's view, captive audience meetings do not violate § 7 rights because there is no meaningful difference between a mandatory meeting and current employer activities the Board permits, such as

173. *See id.* slip op. at 18.

174. *See id.* The Board considered the conference report to be the "most persuasive evidence of congressional intent." *Id.* slip op. at 17 (quoting Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981)).

175. *See id.* slip op. at 18–19. According to the Board's interpretation of the conference report, the final § 8(c) principally came from the House version of the bill, further discrediting reliance on the Senate report. *Id.* The Board believed the Senate report describing *Clark Bros.* as "too restrictive" may have been intended to ensure that employers were free to express their views on § 7 activities in a speech made on working time. *Id.* slip op. at 18. The Board argued this view referenced the broad holding of *Clark Bros.* that such a speech was unlawful but not the independent holding that the conduct compelling the employee to attend the speech was separately unlawful. *See id.* slip op. at 19.

176. *See id.* slip op. at 19.

177. *See id.*

178. *See id.* The Board added that failure to give these assurances will not itself result in a violation of § 8(a)(1). *See id.* slip op. at 20.

179. *See id.* slip op. at 27 (Kaplan dissenting).

180. *See id.* slip op. at 28 ("The text of Section 8(c) makes clear that Congress intended that the inquiry into the lawfulness under the Act of the 'expressing of any views, argument, or opinion,' or the 'dissemination' of those views, focus on the content of the employer or union 'expression' itself rather than on the circumstances surrounding it.").

distributing literature.[181] Kaplan thus asserted that permitting captive audience meetings would simply recognize that employers can reasonably dictate what employees can do on company time, "a routine application of the longstanding rule that 'working time is for work.'"[182] On the issue of free speech, Kaplan argued that the Board's action targets speech based on its content and thus is presumptively unconstitutional.[183] Kaplan ultimately concluded that the majority's ban unconstitutionally discriminates based on content because it bans mandatory unionization meetings while permitting mandatory meetings on other subjects.[184]

II. EVALUATING A BAN ON CAPTIVE AUDIENCE MEETINGS IN THE WORKPLACE SETTING

The Board's decision in *Amazon.com* comes amid controversy on the legal status of captive audience meetings. Proponents of banning captive audience meetings believe these bans only regulate conduct and thus are within the bounds of the First Amendment and prohibited by the text of the NLRA. Opponents of banning captive audience meetings argue that the bans impermissibly regulate employer speech and fail First Amendment strict scrutiny. This part examines arguments for and against captive audience meetings in the context of the First Amendment. Part II.A considers grounds for banning captive audience meetings. Part II.B considers arguments for protecting captive audience meetings.

A. The Legal Grounds for Banning Captive Audience Meetings

The Board, Abruzzo, and proponents in the states[185] have advanced grounds for banning captive audience meetings that they argue are within the bounds of the First Amendment. These groups argue that (1) captive audience meeting bans regulate conduct, not speech; (2) such bans survive First Amendment scrutiny; and (3) captive audience meetings themselves are unconstitutional under the Supreme Court's "captive audience doctrine." This section considers each of these arguments in turn.

1. Regulation of Conduct, Not Speech

Proponents of banning captive audience meetings believe a ban would regulate conduct, not speech, thus not implicating any First Amendment

181. *See id.* slip op. at 29.
182. *See id.* slip op. at 31.
183. *See id.* slip op. at 35–36 (applying a *Reed* analysis).
184. *See id.* slip op. at 36.
185. State laws banning captive audience meetings are preempted by *Amazon.com* under *Garmon*. *See* Benjamin Sachs, *The Road Ahead for Captive Audience Meetings*, ONLABOR (Nov. 19, 2024), https://onlabor.org/the-road-ahead-for-captive-audience-meetings [https://perma.cc/XCM4-HUTB]. However, this Note still considers arguments previously advanced by the states on First Amendment issues. State laws will be relevant if the NLRB reverses course in the future due to the change in political administrations. *Id.*

concerns.[186] Under *Amazon.com*, employers are still free to express their views about § 7 rights and the risks of unionization to their employees.[187] Proponents emphasize that *Amazon.com* only bans employers from *compelling* employees to listen to their speech by threatening dismissal or other forms of punishment.[188] In this view, regulations only touch the narrow act of compulsion and do not affect the speech itself.[189] Proponents argue that "[employers] can say whatever they want. What they cannot do is retaliate, or threaten to retaliate, against employees for refusing to listen."[190]

Proponents believe the function of captive audience meetings as conduct is underscored by their effect on employees.[191] In defending her 2022 memo preceding *Amazon.com*, NLRB General Counsel Abruzzo asserted that compelling listening through a captive audience meeting is a form of conduct that interferes with an employee's § 7 right to *refrain* from labor organizing activities.[192] Abruzzo argued that a reasonable employee would feel threatened by the potential for discharge or punishment if they desired to avoid listening to their employer's views on unionization.[193] Abruzzo drew a comparison to laws prohibiting race discrimination, which require employers to take down signs reading "White Applicants Only."[194] These signs function as conduct by denying non-White applicants fair treatment in hiring because a reasonable person would not bother applying.[195] Similarly, Abruzzo reasoned that captive audience meetings function as conduct by interfering with employees' rights under the NLRA because a reasonable employee would not risk losing their job to exercise their § 7 right to refrain.[196]

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186. *See, e.g.*, Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment at 11, Burnett Specialists v. Abruzzo, No. 22-CV-00605, 2023 WL 5660138 (E.D. Tex. Aug. 31, 2023); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment at 24, Chamber of Com. of the U.S. v. Bartolomeo, No. 22-cv-01373 (D. Conn. filed Nov. 1, 2022).

187. *See supra* notes 176–78 and accompanying text.

188. *See id.*

189. *See* Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 13 ("Section 8(a)(1) proscribes the threat not for what it says but for what it does.").

190. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Their Cross-Motion for Summary Judgment, *supra* note 186, at 24; *see also supra* notes 166–68 and accompanying text (discussing employer threats and retaliation); Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 12 (framing bans as burdening economic conduct as opposed to speech).

191. *See* Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 12–13.

192. *See id.*

193. *See id.*

194. *See id.*; *see also* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 62 (2006).

195. *See Rumsfeld*, 547 U.S. at 62.

196. *See* Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 12–13.

If captive audience meeting regulations only target coercive conduct, scrutiny under the First Amendment may be passed entirely.[197] In determining whether an employer interfered with an employee's § 7 rights, *Virginia Electric* permits the Board to examine both an employer's actions and assertions.[198] Extending *Gissel Packing Co.* in defense of her 2022 memo, Abruzzo argued that so long as the Board deems an utterance to be coercive in the context of the employer-employee relationship, there is no First Amendment right to hold a captive audience meeting.[199] In this case, an employer's right to address their employees through mandatory meetings would be outweighed by an employee's right to avoid coercion under § 8 and associate freely or refrain from doing so under § 7.[200] Adopting this view, there would be no need for a court to apply First Amendment strict scrutiny to any proposed ban on captive audience meetings by the NLRB.[201]

2. A Ban Within the Bounds of the First Amendment

Additionally, proponents of captive audience meeting bans argue that even if a ban on captive audience meetings *does* target speech, subtly crafted "banning" provisions are still permissible because they survive strict scrutiny.[202] The Board argued they have a strong, congressionally mandated interest in protecting workers' freedom of association, self-organization, and choice of representatives under the NLRA.[203] Other proponents cite interests in protecting intrusions on employee privacy, preventing psychological harm, and allowing workers to resist being pressured into activities they oppose by limiting captive audience meetings.[204]

Considering the issue of coercion, Professors Alexander W. Hertel-Fernandez and Paul M. Secunda analyzed the harms of captive audience meetings that *Amazon.com* and earlier actions in the states sought to remedy.[205] Like captive audience meetings on unionization matters, workers are often coerced into mandatory meetings regarding an employer's

197. *See id.*

198. *See id.* at 12 ("[T]he Board has a right to look at what the Company has said, as well as what it has done." (quoting NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 478 (1941))).

199. *See id.* at 13.

200. *See id.*

201. *See id.*

202. *See id.* at 19; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Their Cross-Motion for Summary Judgment, *supra* note 186, at 32.

203. *See supra* note 170 and accompanying text; *see also* Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 19–22.

204. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Their Cross-Motion for Summary Judgment, *supra* note 186, at 33–36.

205. *See* Alexander Hertel-Fernandez & Paul Secunda, *Citizens Coerced: A Legislative Fix for Workplace Political Intimidation Post*-Citizens United, 64 UCLA L. REV. DISCOURSE 2, 4–7 (2016).

political views.[206] Professors Hertel-Fernandez and Secunda found that, in many instances, employers deployed threats of job loss, wage cuts, or plant closures during these meetings to coerce workers into supporting their views.[207] In a 2015 survey, Professors Hertel-Fernandez and Secunda discovered that 20 percent of workers contacted by their employers about political matters received some sort of economic threat.[208] In response, Professors Hertel-Fernandez and Secunda advocate for a broad ban of captive audience meetings to prevent employers from taking adverse actions against employees based on their political opinions.[209]

Proponents of captive audience meeting bans argue that such provisions are narrowly tailored to advancing the above interests.[210] Abruzzo and other supporters assert that bans only reach the coercive nature of an employer's conduct in holding a mandatory meeting and do not limit the content of an employer's speech in any way.[211] Under *Amazon.com*, employers are only prohibited from making a meeting regarding unionization mandatory, disciplining or discharging workers for not attending the meeting, and keeping attendance at the meeting.[212] Considering similar prohibitions suggested in her 2022 memo, Abruzzo argued that such narrowly tailored restrictions do not affect employers' freedom to express themselves on § 7 matters.[213] Employers have full authority to use noncoercive methods like posters, emails, text messages, or spoken communication to share their views on unionization.[214]

3. Unconstitutional Under the Supreme Court's Captive Audience Doctrine

The third and perhaps most provocative argument made by supporters of banning captive audience meetings is the assertion that captive audience meetings are unconstitutional under the Supreme Court's captive audience doctrine.[215] Abruzzo and other proponents argue that captive audience

206. *See id.* Many of the state laws that Professors Hertel-Fernandez and Secunda reference define discussion about unionization as political matter. *See supra* notes 147–48 and accompanying text.

207. *See* Hertel-Fernandez & Secunda, *supra* note 205, at 9–11.

208. *Id.* at 10.

209. *See id.* at 12–16.

210. *See* Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 22–25; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Their Cross-Motion for Summary Judgment, *supra* note 186, at 36–37.

211. *See* Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 22–25.

212. *See supra* notes 176–78 and accompanying text.

213. *See* Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 22–23.

214. *See id.* at 23.

215. *See* Amazon.com Servs. LLC, 373 N.L.R.B. No. 136, slip op. at 19 (Nov. 13, 2024) (referencing the effect of employer speech on the "unwilling recipient"); *see also* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Their Cross-Motion for Summary Judgment, *supra* note 186, at 29–32; Defendants

meetings are unlawful because the degree of captivity makes it impractical for the unwilling employee to avoid unwanted speech about unionization.[216] Although the Court has yet to apply the captive audience doctrine to the workplace, proponents point out that lower courts have already recognized employees as a captive audience because they are required to be on the jobsite during the workday.[217]

Considering the doctrine, Abruzzo likens captive audience meetings to the circumstances of *Santa Fe Independent School District v. Doe*[218] and *Lee v. Weisman*.[219] Both cases involved school assemblies, whose attendees the Court later held to be a captive audience.[220] Abruzzo reasons that in both cases, "the Court looked past whether participation was mandatory . . . to examine whether individuals would realistically feel an obligation," concluding that "[t]he economic compulsion to maintain one's livelihood . . . is at least as strong as . . . the social pressure to attend a football game or graduation ceremony."[221]

In that vein, Professor Roger C. Hartley writes that captive audience meetings are unconstitutional because of the captive audience doctrine.[222] Professor Hartley argues that the Constitution protects employees from being "force-fed" an employer's religious or political ideology at the workplace.[223] On this basis, Hartley explains, anti–captive audience meeting laws and similar federal provisions are powerful tools to protect citizens' constitutionally recognized interests.[224]

Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 14–16.

216. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Their Cross-Motion for Summary Judgment, *supra* note 186, at 29–32; Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 14–16.

217. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Their Cross-Motion for Summary Judgment, *supra* note 186, at 30. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (referring to workers at a shipyard as a captive audience); Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (E.D. Pa. 1980) (classifying workers at a construction site threatened by protesters as a captive audience).

218. 530 U.S. 290 (2000).

219. 505 U.S. 577 (1992).

220. Defendants Jennifer Abruzzo & National Labor Relations Board's Response in Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 186, at 14–15.

221. *Id.* at 15.

222. *See* Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 65 (2010).

223. *Id.*

224. *See id.* at 110–111; *see also* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 940 (2009) (arguing for a right against compelled listening).

B. Protecting Captive Audience Meetings as a First Amendment Right of Employers

Employers have broadly challenged administrative action and legislation banning captive audience meetings in the court.[225] Employers argue that banning captive audience meetings unconstitutionally regulates employer speech and discriminates based on viewpoint. This part first examines employer arguments about the regulation of speech and follows with consideration of viewpoint discrimination and strict scrutiny.

1. Regulation of Speech

Employers assert that captive audience meeting bans such as *Amazon.com* regulate speech and are impermissible under the First Amendment.[226] Under most bans, employers are only restricted from making a meeting mandatory if their speech specifically involves § 7 matters.[227] Thus, employers argue that the prohibition on conduct is conditioned on the content of the speech.[228] In turn, such restrictions burden employer speech by complicating expressing views on § 7 matters.[229]

Employers believe a recent case out of the U.S. Court of Appeals for the Eleventh Circuit, *Honeyfund.com v. Governor*,[230] supports their position.[231] In *Honeyfund.com*, the court considered a portion of Florida's Individual Freedom Act,[232] which sought to ban mandatory meetings for viewpoints the state found offensive—chiefly workplace diversity trainings.[233] The court rejected Florida's attempt to recharacterize the law as conduct.[234] Instead, the court held that the law was an unconstitutional control of speech.[235] Indeed, in his dissent in *Amazon.com*, then–NLRB Member Kaplan cited *Honeyfund.com*, arguing that by targeting speech on unionization, the Board's decision was unconstitutional because "[e]ven assuming that this prohibition does not discriminate on the basis of viewpoint, it is plainly a

225. *See supra* note 20.

226. *See* Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment at 17–19, Chamber of Com. of the U.S. v. Bartolomeo, No. 22-cv-01373 (D. Conn. filed Nov. 1, 2022).

227. *See id.* at 17–18.

228. *See id.*

229. *See id.*

230. 94 F.4th 1272 (11th Cir. 2024).

231. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 226, at 18–19.

232. 2022 Fla. Laws 72 (amending FLA. STAT. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40 (2022)).

233. *See Honeyfund.com*, 94 F.4th at 1275–76; *see also* Brendan Farrington, *Florida Gov. DeSantis Signs Bill to Limit Discussion of Race*, ASSOCIATED PRESS, https://apnews.com/article/stop-woke-florida-race-unconstitutional-fcf6c1678bb90709f5941f89d0c193af [https://perma.cc/U64D-JCTV] (Mar. 5, 2024, 12:09 PM).

234. *See Honeyfund.com*, 94 F.4th at 1275.

235. *See id.* It's notable that the Individual Freedom Act only prohibited mandatory attendance for sessions *endorsing* topics related to diversity. *Id.* at 1276.

content-based speech restriction for the same reasons that the Florida law was."[236]

2. Viewpoint Discrimination and Strict Scrutiny

Employers further contend that attempts to regulate captive audience meetings unconstitutionally discriminate based on viewpoint and fail strict scrutiny.[237] Employers argue that although restrictions apply regardless of an employer's view on unionization, prohibitions on discussing § 7 matters silence only one viewpoint because employers rarely support the unionization of their employees.[238] Although employers can support unions or remain neutral during union elections, one study found that employers agreed to remain neutral in just 9 percent of union elections between 2016 and 2021.[239] Thus, although the phrasing of the ban is neutral, employers believe that captive audience meeting bans disproportionately impact anti-union views.[240]

In one articulation of this position, Daniel V. Johns argues that sheltering employees from speech during union elections discriminates based on viewpoint and suppresses free choice.[241] Although concerned with efforts to curtail speech throughout the unionization process, Johns asserts that banning captive audience meetings violates free speech principles because proposed policies are driven by an interest in suppressing anti-union speech to achieve the desired result of unionization.[242] According to Johns, banning captive audience meetings contradicts the longstanding protections on employer speech embedded in § 8(c).[243] Furthermore, in Johns's view, banning captive audience meetings "potentially deprives employees of the benefit of

236. *See* Amazon.com Servs. LLC, 373 N.L.R.B. No. 136, slip op. at 35 (Nov. 13, 2024) (Kaplan dissenting); *see also* Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 226, at 18–19 (discussing *Honeyfund.com* in the context of state-level captive audience meeting bans).

237. *See id.* at 19–27; Plaintiffs' Motion for Summary Judgment at 12–19, Burnett Specialists v. Abruzzo, No. 22-CV-00605, 2023 WL 5660138 (E.D. Tex. Aug. 31, 2023).

238. *See* Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 226, at 21; *see also* Plaintiffs' Motion for Summary Judgment, *supra* note 237, at 15 (arguing the Abruzzo memo is not concerned with employers who favor union representation).

239. *In Solidarity: Removing Barriers to Organizing Before the H. Comm. on Educ. and Lab.*, 117th Cong. 9 (2022), https://democrats-edworkforce.house.gov/imo/media/doc/091422%20-%20BronfenbrennerTestimony.pdf [https://perma.cc/B4P7-JKBZ] (testimony of Dr. Kate Bronfenbrenner, Cornell School of Industrial and Labor Relations).

240. *See* Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 226, at 21; Plaintiffs' Motion for Summary Judgment, *supra* note 237, at 15.

241. *See* Daniel V. Johns, *The Coddling of the American Worker's Mind: The Anti-Free Speech Nature of Popular Labor Law Reforms*, 30 WM. & MARY BILL RTS. J. 755, 755–56 (2022).

242. *See id.* at 764.

243. *See id.*

hearing those views while they make their decision on the unionization question."[244]

In some instances, courts have considered the suppression of anti-union viewpoints as grounds to strike down labor laws.[245] Recently, in *New York State Vegetable Growers Ass'n v. James*,[246] a court granted an injunction against a New York law that made it an unfair labor practice for employers to discourage farmworkers from exercising their right to organize.[247] The court held that the law discriminated based on viewpoint and thus was "presumptively unconstitutional" because it blatantly disfavored expressing views discouraging union organizing while permitting pro-union speech.[248] Although the language of the New York statute is more expansive than *Amazon.com* because it prohibits discouraging and discussing unions in both voluntary and involuntary settings, employers believe that more limited restrictions on captive audience meetings should similarly be presumptively unconstitutional and exacted to strict scrutiny.[249]

Employers argue that captive audience meeting bans fail strict scrutiny because the government has no compelling interest in regulating captive audience meetings.[250] According to employers, a compelling government interest is typically reserved for safety or national security.[251] Moreover, employers assert that banning captive audience meetings does nothing to further the purposes of the NLRA because it deprives workers of information they might use to decide on unionization.[252]

Furthermore, employers believe that the state has no interest in protecting employees from "hearing speech with which they disagree."[253] Employers reject the application of the captive audience doctrine to captive audience meetings.[254] In *Honeyfund.com*, the Eleventh Circuit dismissed arguments concerning the captive audience doctrine in a footnote, reasoning that it only applied in the home or when the degree of captivity made it impractical for the unwilling listener to avoid exposure.[255] The court declined to extend the doctrine to what they viewed as a speaker-focused and content-based restriction on speech, instead writing, "Enduring speech we dislike is a necessary price."[256]

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244. *Id.*

245. *See, e.g.*, N.Y. State Vegetable Growers Ass'n v. James, No. 23-CV-1044, 2024 WL 1161115, at *3–5 (W.D.N.Y. Feb. 21, 2024).

246. No. 23-CV-1044, 2024 WL 1161115 (W.D.N.Y. Feb. 21, 2024).

247. *See id.* at *7.

248. *See id.* at *4 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

249. Plaintiffs' Motion for Summary Judgment, *supra* note 237, at 15.

250. *See id.* at 16–18; Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 226, at 22–26.

251. *See* Plaintiffs' Motion for Summary Judgment, *supra* note 237, at 16.

252. *See id.* at 17.

253. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, *supra* note 226, at 24.

254. *See* Plaintiffs' Motion for Summary Judgment, *supra* note 237, at 17 (discussing the "right to refrain").

255. *See* Honeyfund.com v. Governor, 94 F.4th 1272, 1281 n.5 (11th Cir. 2024).

256. *Id.* at 1281–82.

In addition, employers believe there are less restrictive means to ensure employees do not feel coerced when voting in union elections.[257] Employers argue that the NLRB already has the power to prosecute specific instances of coercion under § 7, achieving the same effect through less restrictive means than a blanket ban.[258] According to employers, pursuing the pre-*Amazon.com* policy by which the Board allowed captive audience meetings but punished specific instances of bad conduct would minimize infringement on employers' First Amendment rights.[259]

III. *AMAZON.COM*'S BAN ON CAPTIVE AUDIENCE MEETINGS IS CONSISTENT WITH THE FIRST AMENDMENT AND THE NLRA

This Note concludes that the Board's decision in *Amazon.com* is within the bounds of the First Amendment and the NLRA. The regulatory force of *Amazon.com* is limited to the employer's conduct, not speech or specific viewpoint. Additionally, the Board's decision aligns with the thrust of the Supreme Court's captive audience doctrine. Accordingly, this Part argues in support of the Board's decision in *Amazon.com*. Part III.A argues that *Amazon.com* is a valid regulation of employer conduct under the First Amendment. Subsequently, Part III.B argues that captive audience meetings are prohibited under the captive audience doctrine.

A. Amazon.com *Only Affects Conduct Within the Bounds of the First Amendment*

This section argues that the Board's decision in *Amazon.com* is permissible under the First Amendment. Part III.A.1 argues that banning captive audience meetings is a constitutional regulation of conduct prohibited by the plain text of the NLRA. Part III.A.2 argues that, even if subjected to scrutiny under the First Amendment, the Board's regulation of employer conduct is valid under *Reed* and *O'Brien*.

1. A Ban on Captive Audience Meetings Regulates Conduct Prohibited by the Plain Text of § 7 and § 8

At their core, captive audience meeting bans only regulate the coercive nature of captive audience meetings. The Board's decision in *Amazon.com* only prohibits three types of conduct: holding mandatory meetings on unionization, retaliating against employees for not attending the meetings, and taking attendance at those meetings.[260] Employers are still free to speak on matters related to unionization in any way they please so long as the meeting is voluntary, and their speech is within the bounds of the NLRA.[261]

257. *See* Plaintiffs' Motion for Summary Judgment, *supra* note 237, at 18.
258. *See id.*
259. *See id.*
260. *See supra* notes 176–78 and accompanying text.
261. *See id.*

In that regard, banning captive audience meetings is supported by the plain text of § 7 and § 8 of the NLRA.[262] Section 7 grants employees the "right to refrain from any or all of such [organizing related] activities."[263] The usage of "any or all" suggests Congress did not intend to exempt certain types of meetings from the statute's reach.[264] Thus, on text alone, this right extends to captive audience meetings.[265] Workers have the right to refrain from attending captive audience meetings just as they would have the right to refrain from attending an optional anti-union meeting after hours or a union-organizing meeting at any time.[266]

Employees cannot have their statutory right to refrain from organizing activities infringed just because they are on the clock. The purpose of the Taft-Hartley Act was to equalize the legal responsibilities of labor organizations and employers.[267] It would be an incongruous result to allow employers unrestricted access to the ears of their employees while limiting union organizers to holding meetings with employees on off-hours.[268] Furthermore, the Court often recognizes situations where employers have a significant power imbalance over unions by modifying rights.[269] For example, the Court allows union organizers to access private employer property when workers are isolated.[270] Adopting a plain text reading of § 7 as applied to captive audience meetings would align with such jurisprudence.

Although *Gissel Packing Co.* suggests there is some special treatment of employer speech under the First Amendment, the language of § 8(a)(1) and § 8(c) indicates that captive audience meetings can be appropriately deemed an unfair labor practice because of their coercive nature.[271] Under § 8(a)(1), it is an unfair labor practice to "interfere with, restrain, or coerce" an employee's exercise of their § 7 rights, including the right to refrain.[272] Section 8(c) prevents speech and other forms of expression from being deemed an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit."[273] Using the threat of discipline or

262. *See supra* notes 159–62 and accompanying text.
263. 29 U.S.C. § 157.
264. *See id.*
265. *See supra* notes 159–62 and accompanying text.
266. *See id.*
267. *See* 29 U.S.C. § 141(b) (stating a purpose of the Taft-Hartley Act as "preventing the interference by either [unions or employers] with the legitimate rights of the other").
268. Traditionally, many viewed an employer's unrestricted access to employees at work as the same as a union's unrestricted access to employees at the union hall, where workers would often go to socialize after work. *See* Livingston Shirt Corp., 107 N.L.R.B. 400, 406 (1953). However, today, union halls are a much less common place for workers to congregate. *See* Alex Hogan, *More Than a Union Hall*, COMPACT MAG. (Dec. 8, 2023), https://www.compactmag.com/article/more-than-a-union-hall [https://perma.cc/6AUJ-K39V]. Instead, organizers must use other means to reach employees outside the workplace, putting them at a disadvantage in reaching employee ears. *But see Livingston Shirt Corp.*, 107 N.L.R.B. at 406.
269. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 537–41 (1992).
270. *See id.*
271. *See generally supra* notes 166–72 and accompanying text.
272. *See* 29 U.S.C. § 158(a)(1).
273. *See id.* § 158(c).

discharge to coerce an employee to attend a meeting about unionization falls within the language of both sections.[274]

Balancing the First Amendment rights of employers and workers under *Gissel Packing Co.* further supports a ban on captive audience meetings.[275] *Gissel Packing Co.* not only implemented the First Amendment, as employers argue, but also recognized the broader power imbalance between employees and employers.[276] Applying Chief Justice Warren's reasoning in *Gissel Packing Co.*, the economic dependence of employees on employers creates an environment where employers can easily coerce workers into attending captive audience meetings.[277] When an employer directs a worker to take action, there is always an implicit threat that if the worker disobeys their employer's order, they will risk being disciplined or fired.[278] If workers miss a captive audience meeting to avoid anti-union speech, they risk more than on-the-job discipline, they risk their livelihood.[279]

Despite arguments by employers to the contrary,[280] *Amazon.com* fails to infringe upon the First Amendment rights of employers because it does not stop employers from holding optional meetings to express their views.[281] Employers can discuss unionization matters with workers as they please.[282] They are only prohibited from taking coercive action by making those discussions mandatory.[283] Workers will only be "deprived of the benefit" of hearing their employer's views to the extent that the workers themselves choose.[284] Thus, *Amazon.com* ultimately remedies coercive threats by employers within the bounds of *Gissel Packing Co.*, § 8(c), and the First Amendment.[285]

274. *See generally supra* notes 166–72 and accompanying text. The Board's position is strengthened by the legislative history. The Taft-Hartley Act was by no means a complete rebuke of *Clark Bros*. *See supra* notes 173–75 and accompanying text. It seems unlikely that members of Congress carefully considered the Board's decision when they voted. *See supra* notes 173–75 and accompanying text. To the contrary, the exception to § 8(c) for "threat[s] of reprisal or force" suggests that Congress was concerned with and considered an employer's power to coerce their employees. *See supra* notes 173–75 and accompanying text. Although the broader context of Taft-Hartley was to provide more rights to employers during organizing campaigns, evidence that Congress specifically intended to permit captive audience meetings by overturning *Clark Bros.* is weak at best. *See supra* notes 173–75 and accompanying text.

275. *See supra* notes 199–201 and accompanying text.

276. *See supra* notes 138–43 and accompanying text.

277. *See supra* notes 138–43 and accompanying text.

278. *See supra* notes 167–68 and accompanying text.

279. *See supra* notes 167–68 and accompanying text.

280. *See supra* notes 237–40 and accompanying text.

281. *See supra* notes 176–78 and accompanying text.

282. *See supra* notes 176–78 and accompanying text.

283. *See supra* notes 176–78 and accompanying text.

284. *But see supra* note 244 and accompanying text.

285. *See supra* notes 169–72 and accompanying text.

2. *Amazon.com* Survives Scrutiny Under *Reed* and *O'Brien*

As argued above, *Amazon.com* only touches coercive conduct and does not regulate speech, allowing the Board to permissibly regulate captive audience meetings on statutory grounds.[286] However, even if a court determined that *Amazon.com* is speech based, as Kaplan and employers assert, it would still be permissible under *Reed* because captive audience meeting bans are not content based restrictions.[287] Applying Justice Thomas's "commonsense" gut check, *Amazon.com* does not regulate content because it does not draw distinctions on the message the speaker conveys, can be justified without reference to the content of the speech, and was not adopted because of disagreement with the message the speaker conveys.[288] *Amazon.com* applies to both pro- and anti-union meetings held by employers.[289] In their decision, the Board justified their holding as a broad prohibition on coercion.[290] Furthermore, neither the Board's decision nor the Abruzzo memo explicitly referenced favoring pro- or anti-union viewpoints.[291] Thus, *Amazon.com* does not regulate content and avoids strict scrutiny.[292]

This notion is underscored by the impact *Amazon.com* may have on neutrality agreements between unions and employers. The prohibitions in *Amazon.com* apply regardless of whether an employer opposes unionization or supports unionization through a neutrality agreement.[293] Employers often sign neutrality agreements with unions to support the union's organizing attempt.[294] Employers do so for various reasons, including maintaining their relationship with the workforce, preventing potential work stoppages from strikes, and adding value to their business through access to a union's supply of skilled labor.[295] These neutrality agreements take many forms.[296] In some cases, neutrality agreements have provided for jointly held captive audience meetings, where the employer brings union officials to speak on the benefits

286. *See supra* Part III.A.1.

287. *But see supra* note 183 and accompanying text; *supra* notes 237–40 and accompanying text.

288. *See supra* notes 62–64 and accompanying text.

289. *See* Amazon.com Servs. LLC, 373 N.L.R.B. No. 136, slip op. at 19 (Nov. 13, 2024) ("Importantly, requiring employees to attend such meetings is unlawful regardless of whether the employer expresses support for or opposition to unionization.").

290. *See id.*

291. *See id.*; *see also* Abruzzo, *supra* note 9; *supra* note 9 and accompanying text.

292. *Cf. supra* notes 65–66 and accompanying text.

293. *See supra* note 289 and accompanying text.

294. *See generally* James J. Brudney, *Neutrality Agreement and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005) (providing analysis on the rise of neutrality agreements).

295. *See* Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements*, *in* JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 139, 144–50 (Richard N. Block, Sheldon Friedman, Michelle Kaminski & Andy Levin eds., 2006).

296. *See* Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 HOFSTRA LAB. & EMP. L.J. 173, 174 (2007).

of unionization.[297] Thus, although employers cite the disproportionate impact of captive audience meeting bans on anti-union viewpoints, such an impact on pro-union messaging is far from negligible, especially given the increasing tolerance for unions among employers over the past few decades.[298]

Of course, even if a court does not apply strict scrutiny, it could apply some level of heightened scrutiny on the basis that captive audience meetings are arguably a form of expression.[299] A ban on captive audience meetings has a speech element—the meeting itself—and a nonspeech element—the mandatory nature of the meeting.[300] The mandatory nature of the meeting does not seem so remote from the speech element as to avoid scrutiny altogether.[301] Unlike the statute aimed at preventing prostitution in *Arcara*, which can apply in numerous nonspeech circumstances, preventing coercion through captive audience meeting bans will always relate to the employer's ability to speak at specific types of meetings.[302]

Regardless, captive audience meeting bans easily pass the three-part test from *O'Brien*.[303] Captive audience meeting bans further an important governmental interest in ensuring the § 7 and § 8 rights of employees are not infringed on the job.[304] *Amazon.com* protects workers from choosing between their opinions on unionization and their livelihoods.[305] These interests only target coercion and are unrelated to the suppression of free expression.[306] The incidental restriction placed on expression through mandatory meetings is justified because employers can still express their views to workers so long as they do so in optional meetings.[307]

Furthermore, the precedent on mandatory meetings is far from dispositive. Although Kaplan and other proponents of captive audience meetings point to the Eleventh Circuit's holding in *Honeyfund.com* as justification for allowing employers to hold mandatory meetings at work, the facts of *Honeyfund.com* are distinguishable.[308] Florida's Individual Freedom Act discriminated based on viewpoint.[309] Employers were prohibited from holding mandatory meetings where they expressed prodiversity viewpoints but were allowed to hold mandatory meetings that expressed antidiversity viewpoints.[310] In

297. *See id.*
298. *See supra* notes 239–40 and accompanying text. Between 2016 and 2021, 9 percent of employers agreed to neutrality compared to 3 percent between 1999 and 2003. *In Solidarity: Removing Barriers to Organizing*, *supra* note 239, at 8.
299. *See supra* notes 25–29 and accompanying text.
300. *See supra* note 51 and accompanying text.
301. *See supra* notes 54–57 and accompanying text.
302. *Cf. supra* notes 40–43 and accompanying text.
303. *See supra* notes 54–57 and accompanying text.
304. *See supra* notes 203–04 and accompanying text.
305. *See supra* notes 167–68 and accompanying text.
306. *See supra* note 289 and accompanying text.
307. *See supra* notes 169–72 and accompanying text.
308. *See supra* notes 230–36.
309. *See id.*
310. *See id.* For example, a company could not hold a mandatory meeting where they expressed the view that a White person was inherently racist because of their skin color, but

contrast, captive audience meeting bans target conduct and prohibit mandatory meetings where employers express either pro- or anti-union viewpoints.[311] Thus, the thrust of the Eleventh Circuit's holding in *Honeyfund.com* is inapplicable to the Board's decision in *Amazon.com*.

B. Captive Audience Meetings Are Prohibited by the Captive Audience Doctrine

If provided the opportunity to consider captive audience meetings broadly, courts should expand the captive audience doctrine to the workplace under the First Amendment.[312] Captive audience meetings subject employees to objectionable or offensive speech by their employers.[313] Like political views, views on unionization are particularly contentious and hotly debated.[314] Being forced to listen to speech regarding unions can agitate workers and cause psychological duress.[315] Extending the captive audience doctrine to the workplace will protect workers' "freedom not to listen."[316]

The captive audience doctrine prohibits captive audience meetings on constitutional grounds because workers cannot exercise their right to avoid unwanted speech.[317] Employees are a captive audience for employer speech at work because they cannot avoid the speech without risking discipline or losing their livelihood.[318] When the Court expanded the captive audience doctrine to schools in *Santa Fe Independent School District* and *Weisman*, it extended the First Amendment "freedom not to listen" to situations where social pressure compelled listening to objectionable speech, such as graduations or football games.[319] The economic compulsion to maintain one's entire livelihood is at least as great as the social pressure to attend a graduation ceremony or football game.[320] In fact, it seems reasonable to conclude that the pressure to maintain one's livelihood far exceeds the social pressure to attend the football game at issue in *Santa Fe Independent School District*, which is only one component of the complex high school social experience.[321]

Although the Eleventh Circuit rejected the idea of expanding the captive audience doctrine to new situations, applying the captive audience doctrine to the workplace would merely fill in the bounds of the "freedom not to

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they could hold a mandatory meeting where they advocated never judging others based on skin color. *Id.*

311. *See supra* note 289 and accompanying text.
312. *See generally* Part II.A.3.
313. *See, e.g.*, Velasquez, *supra* note 12.
314. *See, e.g.*, *id.*
315. *See supra* note 204 and accompanying text.
316. *See supra* notes 73–75 and accompanying text.
317. *See supra* notes 216–17 and accompanying text.
318. *See supra* notes 216–17 and accompanying text.
319. *See supra* notes 218–20.
320. *See supra* notes 218–20.
321. *See generally supra* notes 218–20.

listen" already set by the Court.[322] If the Court has deemed it impractical for an unwilling listener to avoid exposure at an arguably optional football game or graduation, where an unwilling listener can avoid speech by momentarily stepping away, it seems more impractical for an unwilling worker to avoid exposure to speech by their employer when they are under the threat of discipline or discharge.[323] Extending the captive audience doctrine to cover mandatory speech in the workplace would not be a radical departure from the current doctrine.[324]

CONCLUSION

The Board's decision in *Amazon.com* is permissible under the First Amendment and the plain text of the NLRA. The Board's ban on captive audience meetings only affects employer conduct by preventing employers from making meetings mandatory where they discuss unionization. The Board's decision does not favor any viewpoint and conforms with the plain text of § 7 and § 8 of the NLRA. Furthermore, the Board's decision conforms to the Supreme Court's captive audience doctrine, establishing a "right not to listen." Although the Board's decision likely faces a long road in the courts and the potential for reversal due to changing political administrations, it should be affirmed.

322. *Cf. supra* notes 255–56 and accompanying text (considering the Eleventh Circuit's views on the captive audience doctrine).

323. *See supra* notes 167–68, 218–20 and accompanying text.

324. *See, e.g.*, *supra* note 217 and accompanying text (recognizing workers as a captive audience).