UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC

and

Case Nos. 14-CA-197985
14-CA-208242

CHARLES ROBINSON

BRIEF OF *AMICI CURIAE*
COALITION FOR A DEMOCRATIC WORKFORCE
THE AMERICAN HOTEL AND LODGING ASSOCIATION
ASSOCIATED BUILDERS AND CONTRACTORS
THE HR POLICY ASSOCIATION
INDEPENDENT ELECTRICAL CONTRACTORS
INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION
THE INTERNATIONAL FRANCHISE ASSOCIATION
THE NATIONAL ASSOCIATION OF MANUFACTURERS
THE NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS
THE NATIONAL RESTAURANT ASSOCIATION
THE NATIONAL RETAIL FEDERATION
THE RESTAURANT LAW CENTER
THE RETAIL INDUSTRY LEADERS ASSOCIATION
WESTERN ELECTRIC CONTRACTORS ASSOCIATION

James A. Paretti, Jr.
Michael J. Lotito
Maurice Baskin
LITTLER MENDELSON P.C.
815 Connecticut Avenue, NW
Washington, DC 20006
T: 202-842-3400
F: 202-842-0011
jparetti@littler.com
mlotito@littler.com
mbaskin@littler.com

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

Page

INTERESTS OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Response to Question One: Where an Employee Engaged in Otherwise Lawful Protected Activity Commits Egregious Misconduct, Including Profane Language or Sexually or Racially Insensitive Speech, Such Behavior Should Result in Per Se Forfeiture of the Act's Protection.. 5

A. Under Atlantic Steel, the "Nature of the Misconduct" Prong Should Be Dispositive Where Employee Conduct is Sufficiently Egregious 5

B. The Nature of Employee Misconduct Should Also Be Dispositive Under Other Tests Used by the Board in Determining When Misconduct Forfeits Section 7 Protection.. 8

C. The Board Should Use This Opportunity to Reexamine Its Holdings Regarding the Prohibition of Vulgar and Obscene Union Insignia.. 11

II. Response to Question Two: The "Realities of Industrial Life" as Recognized in Consumers Power Co. Should Not Be Used to Excuse Degrading or Repugnant Behavior Based on Race, Sex, or Any Other Protected Characteristic 13

III. Response to Question Three: The "Norms of the Workplace" Should Not Be Used to Excuse Egregious Employee Misbehavior, and Lawful Work Rules that Prohibit Profanity, Bullying, and Uncivil Behavior Are Directly Relevant to that Analysis 15

A. The "Norms of the Workplace" Can Not Be Used to Justify Employee Misconduct, Particularly Where Issues of Race and Sex Are Concerned 16

B. Employer Work Rules Are Directly Relevant to the Question of When Employee Misconduct Loses Section 7 Protection 17

IV. Response to Question Four: The Board Should Abandon Its Standard that Racially or Sexually Offensive Language on a Picket Line Does Not Lose the Protection of the Act 18

V. Response to Question Five: The Board Should Recognize the Critical Role of Title VII and Other Anti-Discrimination Laws, and Harmonize Its Holdings to Ensure that an Employer's Compliance with Those Laws Does Not Violate the Act 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB,
255 F.3d 19 (D.C. Cir. 2001) 14, 21, 22

Airo Die Casting,
347 NLRB 810 (2006) 4, 18, 19, 21, 23

Atlantic Steel,
245 NLRB 816 (1979) .... *passim*

Ayissi-Etoh v. Fannie Mae,
712 F.3d 572 (D.C. Cir. 2013) 23

Boyer-Liberto v. Fountainebleau Corp.,
786 F.3d 264 (4th Cir. 2015) (en banc) 23

Boys Markets, Inc. v. Retail Clerks Union, Local 770,
398 U.S. 235 (1970) 22

Calliope Designs,
297 NLRB 510 (1989) 18, 19

Castleberry v. STI Group,
863 F.3d 259 (3d Cir. 2017) 23

Clear Pine Mouldings,
268 NLRB 1044 (1984), *enf'd*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474
U.S. 1105 (1985) 18, 19

Consolidated Communications, Inc. v. NLRB,
837 F.3d 1 (D.C. Cir. 2016) 20, 21, 24

Consumers Power Co.,
282 NLRB 130 (1986) 13, 14

Cooper Tire,
363 NLRB No. 194 (2016) *enf'd*, 866 F.3d 885 (8th Cir. 2017) 4, 18, 19

EEOC v. Sunbelt Rentals, Inc.,
521 F.3d 306 (4th Cir. 2008) 16

Gloversville Embossing Corp.,
297 NLRB 182 (1989) 20

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993)....................16

Hoffman Plastic Compounds, Inc. v. NLRB,
535 U.S. 137 (2002)....................22

Honda of America Mfg., Inc.,
334 NLRB 746 (2001)....................13

Indian Hills Care Center,
311 NLRB 144 (1996)....................8

Komatsu America Corp.,
342 NLRB 649 (2004)....................12

Leister Construction LLC,
349 NLRB 413 (2007)....................12

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986)....................14

Nickell Moulding,
317 NLRB 826 (1995) *enf. denied sub nom, NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996)....................18, 20

NLRB v. Mead Corp.,
73 F.3d 74 (6th Cir. 1996)....................12

NLRB v. Pier Sixty, LLC,
855 F.3d 115 (2d Cir. 2017)....................9

NLRB v. W.C. McQuaide, Inc.,
552 F.2d 519 (3d Cir. 1977)....................19

Pacific Bell,
362 NLRB 885 (2015)....................12

Pier Sixty,
362 NLRB 505 (2015)....................9, 10, 11

Plaza Auto Center,
360 NLRB 972 (2014)....................13, 14

Plaza Auto Center v. NLRB,
664 F.3d 286 (9th Cir. 2011)....................6, 7, 8

Rodgers v. Western-Southern Life Ins. Co.,
12 F.3d 668 (7th Cir. 1993)....................23

Smith v. Sheahan,
189 F.3d 529 (7th Cir. 1999) 16

Southern S.S. Co. v. NLRB,
316 U.S. 31 (1942)....................22

Southwestern Bell Tel. Co.,
200 NLRB 667 (1972) 12

The Boeing Company,
365 NLRB No. 154 (2017) 18

Three D, LLC d/b/a Triple Play Sports Bar and Grille,
361 NLRB 308 (2014) 9, 11

Verizon Wireless,
349 NLRB 640 (2007) 14

Vollmar v. SPS Techs., LLC,
No. 15-2087, 2016 WL 7034696 (E.D. P.A. Dec. 2, 2016)....................16

Wayne Stead Cadillac,
303 NLRB 432 (1991) 20

Statutes

Civil Rights Act of 1964 Title VII, 42 U.S.C. §§ 2000e, *et seq* .... *passim*

National Labor Relations Act
§7.................... *passim*
§8(a)(1) 12
§8(a)(3) 5

Other Authorities

29 C.F.R. 1604.11(d) 23

"Proposed Enforcement Guidance on Unlawful Harassment," Section III.B.1,
U.S. Equal Opportunity Employment Commission (Jan. 10, 2017)....................23

Chai R. Feldblum and Victoria A. Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* (June 2016) 17

U.S. Equal Employment Opportunity Commission, *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment* (October 2018)....................15

Amici Curiae the Coalition for a Democratic Workplace, the American Hotel and Lodging Association, Associated Builders and Contractors, the HR Policy Association, Independent Electrical Contractors, the International Foodservice Distributors Association, the International Franchise Association, the National Association of Manufacturers, the National Association of Wholesalers-Distributors, the Restaurant Law Center, the National Restaurant Association, the National Retail Federation, the Retail Industry Leaders Association, and the Western Electric Contractors Association (collectively, "*Amici*") respectfully submit this brief in response to the National Labor Relations Board ("NLRB" or "the Board")'s September 5, 2019 Notice and Invitation to File Briefs ("Notice") in the above-captioned matter.

INTERESTS OF THE AMICI CURIAE

The **Coalition for a Democratic Workforce** ("CDW") represents hundreds of employer associations, individual employers, and other organizations that together represent millions of businesses of all sizes. CDW's members employ tens of millions of individuals working in every industry and every region in the United States.

The **American Hotel & Lodging Association** ("AHLA") represents all sectors in the lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. The AHLA represents 24,000 properties nationwide, which support over 8 million jobs.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 21,000 members. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

The **HR Policy Association** ("HRPA") is a public policy advocacy organization representing the CHROs of major employers. HRPA consists of more than 375 of the largest

companies doing business in the United States and globally; its members employ a total of more than 10 million employees in the United States, nearly 9 percent of the private sector workforce.

Independent Electrical Contractors ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,400 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition and economic opportunity for all.

The **International Foodservice Distributors Association** ("IFDA") is the non-profit trade association for the foodservice distribution industry, representing more than 135 companies. With a combined annual sales volume of almost $300 billion, foodservice distributors are vital drivers of the American economy. IFDA members play a critical role in the foodservice industry supply chain and providing hundreds of jobs in each of their communities.

The **International Franchise Association** ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA promotes the economic impact of the more than 733,000 franchise establishments, which support nearly 7.6 million jobs and $674.3 billion of economic output for the U.S. economy. IFA members include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law and business development.

The **National Association of Manufacturers** is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact on any major sector, and account for more than three-quarters of all private sector research and development in the nation.

The **National Association of Wholesaler-Distributors** ("NAW") is a non-profit trade association that represents the wholesale distribution industry. NAW is comprised of direct members and a federation of national, regional, state and local associations which include approximately 40,000 companies operating at more than 150,000 locations nationally. The wholesale distribution industry generates $6.1 trillion in annual sales volume and provides stable and well-paying jobs to more than 5.9 million workers.

The **Restaurant Law Center** is a public policy organization created with the purpose of providing the restaurant and foodservice industry's perspective on legal issues significantly impacting it. The restaurant industry is a labor-intensive industry comprised of over one million restaurants and foodservice outlets which employing almost 15 million people.

The **National Restaurant Association**, founded in 1919, is the leading business association for the restaurant and foodservice industry, representing more than 15.3 million employees, nearly 10 percent of the nation's workforce. Restaurants and foodservice providers are the second-largest private sector employer in the nation, with one million locations across the country, 90 percent of those being small businesses, making it a vital part of the U.S. economy. The restaurant industry makes up four percent of the U.S. GDP.

The **National Retail Federation** ("NRF") is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting 42 million working Americans, and contributing $2.6 trillion to annual GDP.

The **Retail Industry Leaders Association** ("RILA") is a trade association of retail companies. RILA members include more than 200 retailers, product manufacturers, and service

suppliers, which together account for more than $1.5 trillion in annual sales, more than 42 million American jobs and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

The **Western Electrical Contractors Association** ("WECA") is a regional construction industry trade association representing more than 200 members. WECA's membership represents electrical and low-voltage contractors within the western U.S. construction industry and is comprised of firms that work in the industrial, residential, public works, and commercial sectors.

Amici regularly advocate for their members on issues of labor law and workplace policy, including by submission of *amicus* briefs in matters before the NLRB and various courts. The questions presented by the Board in the Notice are of great importance to *Amici*, as the Board's determination will have immediate and long-lasting effects on their members' labor relations, workplace morale and productivity, and their legal and economic liability.

SUMMARY OF ARGUMENT

In response to the Notice, *Amici* respectfully submit that: (1) there are instances of employee misconduct that are so egregious that, even if committed in the course of otherwise lawful protected activity, should *per se* result in the forfeit of the Act's protection; (2) while employees are afforded "some leeway" when engaged in Section 7 activity, employers are not required to countenance insubordination, and particularly where profanity or language is racially or sexually based, that leeway must be construed narrowly; (3) the Board should align its holdings with those courts which have held that the "norms of the workplace" cannot be used as an excuse to protect harassment, bullying, and incivility in the workplace, and an employer's lawful, neutrally-applied work rules are relevant to that analysis; (4) the Board should abandon the standard applied in *Cooper Tire, Airo Die Casting,* and similar cases to the extent it protects sexual or racially offensive language that would otherwise not be tolerated in the workplace

simply because it occurs in the context of picketing; and (5) the Board should afford great weight to civil rights and antidiscrimination laws, and the requirements they place on employers, in determining whether an employee's misconduct loses the protection of the Act.

ARGUMENT

I. Response to Question One: Where an Employee Engaged in Otherwise Lawful Protected Activity Commits Egregious Misconduct, Including Profane Language or Sexually or Racially Insensitive Speech, Such Behavior Should Result in *Per Se* Forfeiture of the Act's Protection.

In examining the question of whether and when employee misconduct is so far beyond the pale as to forfeit Section 7 protection under the *Atlantic Steel* four-factor test, or by alternative tests the Board has employed in other circumstances, the Board should hold plainly that there are instances in which employee misconduct while engaged in otherwise protected activity is so egregious that the protections of the Act are forfeited *per se.*

A. Under Atlantic Steel, the "Nature of the Misconduct" Prong Should Be Dispositive Where Employee Conduct is Sufficiently Egregious.

For forty years, the Board has generally relied on the four-factor test articulated in *Atlantic Steel*, 245 NLRB 816 (1979), for determining whether employee misconduct in the course of otherwise protected activity forfeits the protection of Section 7 of the National Labor Relations Act ("NLRA" or "the Act").[1] In that case, the Board identified four considerations relevant to whether otherwise protected conduct loses its statutory protection: (1) the location of the conduct; (2) the subject matter of the discussion; (3) the nature of the misconduct; and (4) whether such conduct was provoked by an unfair labor practice. 245 NLRB at 816. The Board

[1] Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 29 U.S.C. § 157.

now asks whether and under what circumstances can factor (3)—the nature of the employee's misconduct—be dispositive in losing protection. As set forth below, *Amici* contend that where sufficiently egregious, the nature of an employee's misconduct can and should be dispositive in determining that otherwise protected Section 7 activity is unlawful under the Act, irrespective of the other *Atlantic Steel* factors. An employer should not be required to tolerate profanity—particularly sexually or racially motivated language or *ad hominem* attacks—in its workplace (and indeed, as discussed further in Section V *infra*, requiring an employer to do so may well cause it to violate state or federal anti-discrimination laws). The Board should take this opportunity to recognize that some employee behavior will be so egregious as to forfeit the Act's protection *per se* and without reference to any other *Atlantic Steel* factor.

"[W]here an employee engages in indefensible or abusive conduct, his concerted activity will lose the protection of the Act." *Plaza Auto Center v. NLRB*, 664 F.3d 286, 291 (9th Cir. 2011), *citing Trus Joist MacMillan*, 341 NLRB 369, 370 (2004). This observation of the Ninth Circuit notwithstanding, the *Plaza Auto* case offers an example of the remarkable lengths to which Board majorities have gone in recent years to find that under *Atlantic Steel*, employee misconduct, no matter its form or fashion, maintains its cloak of Section 7 protection. The Board should take this opportunity to reject these cases, and level the playing field for the fair balancing of interests that *Atlantic Steel* contemplated.

In *Plaza Auto*, an employee made "repeated, extensive, and personally derogatory statements to his employer, and "repeatedly reviled [him] in personally denigrating terms accompanied by menacing conduct and language." 664 F.3d at 293. Specifically, during a meeting with management, the employee berated the company's owner, calling him a "f*cking mother f*cking" [sic], a "f*cking crook" and an "a*shole," telling him that he was stupid, that

nobody liked him, and that everyone talked about him behind his back, and warning that if the company fired him, its owner would regret it. *Id.* at 290.[2]

An administrative law judge ("ALJ") found that the employee's behavior was "belligerent," "menacing," and "at least physically aggressive," and concluded that based solely on the nature of the employee's outburst,[3] his otherwise-protected conduct lost the protection of the Act. The Board rejected the ALJ's finding, and held that in the absence of evidence that the employee's conduct was "physically threatening or intimidating," the nature of his misconduct did not weigh against losing Section 7 protection, and his tirade was protected under the Act. On appeal, the Ninth Circuit held that the employee's behavior weighed in favor of losing protection, and remanded the case to the Board for a re-balancing of the *Atlantic Steel* factors.

On remand, the Board majority doubled down on its conclusion that because the employee's behavior did not unambiguously invoke a threat of physical harm or violence, his tirade was protected under the Act. In a ruling that strains credulity, the Board found that because the employee did not *actually* try to hit the owner (or "even" make a fist)—and notwithstanding that when the employee stood up and pushed his chair aside the two managers present got out of *their* chairs because they thought the employee intended to hit their boss—there was no evidence that the employee was "menacing, physically aggressive, or belligerent." *Id.* at 295. The Board grudgingly conceded that even absent such evidence, the nature of the employee's outburst tilted in favor of losing the Act's protection—but concluded that, even so, in balancing all of the other *Atlantic Steel* factors, his discharge was unlawful.

---

[2] Recognizing that the subject matter of this brief necessitates reference to profane and offensive language, *Amici* present such language only when necessary, and in the format above.

[3] Applying the *Atlantic Steel* factors, the ALJ concluded that the location, subject matter, and provocation factors each weighed in favor of maintaining the Act's protection.

The Board has long recognized that "an employee's *offensive and personally denigrating remarks alone* can result in loss of protection." *Plaza Auto Center*, 664 F.3d at 293-294 (emphasis added). *See also, e.g., Indian Hills Care Center*, 311 NLRB 144, 151 (1996) (vulgar, profane, and obscene language directed at supervisor or employer even when used in the course of concerted, protected activity may exceed protection of the Act). Given that fact, the majority's *Plaza Auto* decision flies in the face of *Atlantic Steel's* holding that it is inconsistent with the purposes of the Act to "shield any obscene insubordination short of physical violence." 245 NLRB at 817. *See also Plaza Auto Center*, 664 F.3d at 296 ("[U]nder the Board's own precedents, obscene, degrading, and insubordinate comments may weigh in favor of lost protection even absent a threat of physical harm.").

If left unchecked, the practical effect of *Plaza Auto* is that employers will be required to tolerate profane and menacing insubordination, so long as it is in some form or fashion connected to protected activity, and, apparently, does not culminate in an actual physical altercation. The Board should reject so cramped a definition of what constitutes the "opprobrious" behavior that forfeits the Act's protection, hold that where employee misconduct is sufficiently egregious the "nature of the outburst" prong of the *Atlantic Steel* test is dispositive, and for these reasons overrule *Plaza Auto*.

B. The Nature of Employee Misconduct Should Also Be Dispositive Under Other Tests Used by the Board in Determining When Misconduct Forfeits Section 7 Protection.

The Board asks broadly under which circumstances profane language or racially or sexually offensive speech should lose the protection of the Act. *Amici* urge the Board to address the contours of misconduct which forfeits Section 7 protection not only in those instances where the Board has applied the *Atlantic Steel* test, but also where it has adopted alternative analyses. *Amici* urge the Board to recognize that misconduct can be dispositive in

losing the protection of the Act under tests other than *Atlantic Steel*. Moreover, to the extent such tests are intended to more fairly balance an employer's interest in disciplining public misconduct, the Board should consider the full extent of those who may witness such misbehavior.

In *Pier Sixty*, the Board adopted the "totality of the circumstances" test insofar as it felt that the *Atlantic Steel* test was not well-suited to addressing an employee's use of social media to broadcast profane complaints about the employer, where the misconduct occurred in "a nonwork setting and did not occur during a conversation with a supervisor or management representative." 362 NLRB 505, 506 (2015); *see also Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB 308 (2014) (concluding that "the *Atlantic Steel* framework is tailored to workplace confrontations with the employer"); *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 122-123 (2d Cir. 2017) (courts have applied alternate tests in response to concern that the *Atlantic Steel* test "gave insufficient weight to employers' interests in preventing employees' outbursts 'in a public place in the presence of customers,'" *citing NLRB v. Starbucks Corp.*, 679 F.3d 70, 79 (2d Cir. 2012)).

Under the "totality of the circumstances" test, a court examining whether misconduct is sufficiently egregious to lose the Act's protection considers: (a) any evidence of anti-union hostility; (b) whether the conduct was provoked; (c) whether the conduct was impulsive or deliberate; (d) the location of the conduct; (e) the subject matter of the conduct; (f) the nature of the conduct; (g) whether the employer considered similar conduct to be offensive; (h) whether the employer maintained a specific rule prohibiting the conduct; and (i) whether the discipline imposed was typical for similar violations or disproportionate to the offense. *See id.* at 124 n.38.

In *Pier Sixty*, the employee, a catering company waiter, believed that his manager was treating him and his fellow coworkers "disrespectfully" in giving them incontrovertibly lawful

instructions as to how to perform their services. 362 NLRB at 505. The subject employee proceeded to take a break, step outside the catering hall, and post from his cellphone the following message on his personal Facebook page:

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!

Id. The employee's post was visible to his Facebook "friends"—which included coworkers—as well as others who visited his personal Facebook page. *See id.* at 506. A divided Board held that the employee's conduct was not so egregious as to fall outside the protection of the Act, notwithstanding the fact that, upset with his manager, the employee left the area in which he was working to take a break, went to the men's room, and then stepped outside the facility to compose and transmit his tirade, the Board majority found that the employee's outburst was impulsive rather than deliberate for purposes of the third prong of the "totality of circumstances" test (dissenting in part, Member Johnson reached the opposite conclusion, noting that the social media posting was "not 'impulsive' in the same sense generally seen in Board cases,") *Id.* at 509.

Notably, the majority also found that the location of the employee's misconduct weighed in favor of protection, because he was "alone, on break, and outside of the Respondent's facility." *Id.* at 507. Finally, the majority—with little basis—held that posting a curse-laden screed to social media which was immediately available to almost a dozen co-workers (some of whom commented in response) and *members of the public at large* did not "interrupt[] the Respondent's work environment or its relationships with its customers." In doing so, the majority appeared to have misapprehended how social media actually *works*, insofar as it failed to recognize that a message posted to social media can be seen, circulated, reposted, and viewed by literally millions of people in a very short time—certainly with the potential to interrupt relationships with an employer's customers. This in turn led the Board to incorrectly place

emphasis on the fact that profane language had been previously tolerated by the employer *in the workplace*—thus discipline for the employee's use of profanity in this instance, the majority held, was not justified (notwithstanding that the employee's outburst was visible to coworkers and members of the public). *Amici* submit that the correct analysis for when the use of profanity as in this case becomes unprotected cannot be limited to assessing the employer's previous tolerance for profanity within the workplace or at its worksite—but rather requires an examination of the broader audience to whom such profanity is directed or broadcast, or simply potentially viewable as a matter of course.

It is well settled (and recognized by the Board) that "an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation (and the reputations of its agents as to matters within the scope of their agency)..." *Three D, LLC,* 361 NLRB at 3. Where an employee engages in misconduct and spouts profanity which is "objectively vulgar and obscene" or an "*ad hominem* attack," *see Pier Sixty*, 362 NLRB at 509 (Member Johnson dissenting), the Board should apply that principle to find that such conduct loses the protection of the Act, and under that standard overturn its *Pier Sixty* decision.

C. The Board Should Use This Opportunity to Reexamine Its Holdings Regarding the Prohibition of Vulgar and Obscene Union Insignia.

The considerations supporting the Board's reversal of case law shielding profanity under Section 7 resound with respect to other non-verbal forms of expression or communication. As such, *Amici* respectfully suggest that the Board, as it addresses questions of when profanity and sexually or racially demeaning language or misconduct loses protection, should not limit itself to that narrow range of behaviors but rather should take the opportunity to revisit standards of protected conduct relating to profanity in the workplace irrespective of the form it takes. Specifically, *Amici* urge the Board to take this opportunity to revisit its position in cases where it

found vulgar or profane union insignia to be protected under the Act.

The Board has plainly held that an employee's Section 7 right to display a union insignia at work "may give way when 'special circumstances' override the employee's Section 7 interests and legitimize of the regulation of such insignia." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (finding employer lawfully prohibited T-shirts that made "clear appeal to ethnic prejudices"). Such special circumstances include, *inter alia*, those instances where the insignia are vulgar or obscene or restriction is necessary to achieve other legitimate business purposes. *See Leister Construction LLC*, 349 NLRB 413, 415 (2007); *see also Southwestern Bell Tel. Co.*, 200 NLRB 667, 670 (1972) (holding that "[i]n view of the controversial language used and its admitted susceptibility to derisive and profane construction," respondent did not violate Section 8(a)(1) by banning a sweatshirt stating "Ma Bell is a Cheap Mother"); *cf. NLRB v. Mead Corp.*, 73 F.3d 74, 79 (6th Cir. 1996) (special circumstances justifying employer's prohibition of displaying insignia arise where, *inter alia*, "the slogans are patently offensive or vulgar").

In *Leister Construction*, the Board found lawful the employer's prohibition of an employee wearing a sticker depicting someone urinating on a "non-union" rat because it was "unquestionably vulgar and obscene." 349 NLRB at 415. In contrast, in *Pacific Bell*, 362 NLRB 885 (2015), the Board engaged in linguistic legerdemain to hold that because the plainly offensive phrase "WTF AT$T" *could* have an innocuous meaning and thus "did not impugn the Respondent's business practices or product," the employer could not lawfully prohibit certain technicians in an upscale line of business from wearing them into customers' homes. *Amici* respectfully suggest that the Board take this opportunity to revisit those holdings which have stretched the bounds of credulity and common sense by finding plainly vulgar and offensive communication to be protected under Section 7. Rather, the Board should apply the clear-eyed

standard it has applied in prior cases to find such expression unprotected. *See, e.g., Southwestern Bell* ("Ma Bell is a Cheap Mother" was not susceptible to a non-offensive interpretation); *Honda of America Mfg., Inc.*, 334 NLRB 746, 748 (2001) (rejecting notion that "come out of the closet" and "bone us" could be innocuous where vulgarity was phrases' "common meaning").

II. Response to Question Two: The "Realities of Industrial Life" as Recognized in *Consumers Power Co.* Should Not Be Used to Excuse Degrading or Repugnant Behavior Based on Race, Sex, or Any Other Protected Characteristic.

The Board has asked to what extent its decades-old "realities of industrial life" principle should remain applicable with respect to profanity or offensive language based on sex or race. *Amici* respectfully submit that to the extent the "realities of industrial life" are considered in evaluating employee misconduct—particularly behavior involving sexually- or racially-based misconduct—the Board should do so with reference to what is considered to be acceptable "industrial realities" in the diverse workforce of the 21st century.

It is beyond debate that what is viewed as acceptable workplace behavior—and conversely, what is no longer tolerated by employers—has changed rapidly and dramatically over the last few decades and even years. Almost universally, corporate cultures today seek to foster workplaces that value tolerance, diversity, inclusion, and civility. To the extent that prior Board law has held that profanity, vulgarity, and obscenity are simply part and parcel of industrial life: "The Board is out of touch here." *Plaza Auto Center*, 360 NLRB 972, 986 (2014) (former Member Johnson, dissenting) ("The reality of the modern workplace is that employees do not typically curse each other and their superiors like characters in a Scorsese film.").

Board case law has recognized that "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses," and that, accordingly, to give meaning to Section 7 protections, the Board should take into account "the realities of industrial life." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). It may well be

the case that conflict with respect to the terms and conditions of employment generate employee passion—but the fact that working conditions may provoke strong feelings in employees can in no way be used to countenance or protect demeaning and repugnant behavior in the workplace, nor is it unreasonable for an employer to expect its employees to conduct themselves within the bounds of civil decency. As the U.S. Court of Appeals for the District of Columbia explained:

> Expecting decorous behavior from employees is apparently asking too much. Indeed, Union Intervenor suggests that it is unfair to expect union members to comport themselves with general notions of civility and decorum when discussing union matters of exercising other statutory rights. We do not share the Union's low opinion of the working people it purports to represent.

Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB, 255 F.3d 19, 26 (D.C. Cir. 2001). *Amici* do not dispute that "employees are permitted some leeway for impulsive behavior when engaging in concerted activity . . . balanced against an employer's right to maintain order and respect in the workplace." *Verizon Wireless*, 349 NLRB 640, 642 (2007). But as former Member Johnson correctly noted, "The standard is 'some leeway,' not substantial leeway, not maximum leeway, and certainly not unrestrained freedom." *Plaza Auto*, 360 NLRB at 985 (former Member Johnson, dissenting).

Consumers Power Co. was decided less than six months after the U.S. Supreme Court recognized that harassment based on sex was cognizable as unlawful discrimination under Title VII in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). *Amici* respectfully submit that the "realities of industrial life"—at least insofar as sexually- and racially-degrading speech and behavior are concerned—have changed dramatically in the last three decades.

The contours of what was once deemed permissible or harmless behavior—within and without the workplace—have narrowed considerably. Consider that in Fiscal Year 2018, the Equal Employment Opportunity Commission ("EEOC")—the agency charged with enforcing the scheme of federal civil rights laws—filed 66 lawsuits alleging unlawful workplace harassment

(41 alone alleging sexual harassment), a more than 50% increase over the prior year. Charges filed with the agency alleging sexual harassment increased by more than 12% over that same period, and the EEOC found cause to believe unlawful harassment had occurred in nearly 1,200 charges filed, an almost 25% increase over FY 2017. The agency recovered nearly $70 million for victims of harassment in FY2018, up from $47.5 million in FY 2017. *See* U.S. Equal Employment Opportunity Commission, *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment* (October 2018).[4] These facts make plain that in today's workplace, the prevailing "realities" reflect a commitment to preventing and rooting out discrimination that takes the form of sexually or racially profane or intimidating speech. *Amici* respectfully urge that to the extent the "realities of industrial life" principle remains applicable, the Board should acknowledge those changes, and adjust its view of those realities accordingly.

III. Response to Question Three: The "Norms of the Workplace" Should Not Be Used to Excuse Egregious Employee Misbehavior, and Lawful Work Rules that Prohibit Profanity, Bullying, and Uncivil Behavior Are Directly Relevant to that Analysis.

In its Notice, the Board asks whether it should continue to consider the "norms of the workplace" and consider, for example, whether profanity is commonplace or tolerated in determining whether and when employee activity loses the protection of the Act. Further, it asks "If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?" *Amici* respectfully submit that here the Board has unnecessarily conflated two separate inquiries, making the answer to the second question (regarding work rules) contingent on the answer to the first question (regarding workplace norms). Amici believe it is entirely consistent for the Board to hold that "norms of

---

[4] Available at: https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= .

the workplace" regarding profanity, racially- or sexually-charged misconduct, and the like, should not be used as an excuse to shield employee misconduct from discipline, while at the same time recognizing the important role that neutrally-applied rules and policies prohibiting uncivil or unlawful behavior play in allowing an employer to maintain a respectful workplace.

A. The "Norms of the Workplace" Can Not Be Used to Justify Employee Misconduct, Particularly Where Issues of Race and Sex Are Concerned.

Outside the context of the National Labor Relations Act, federal courts have had little difficulty in concluding that federal civil rights law does not contain a "prevailing culture" exception that excuses unlawful or discriminatory behavior simply because it occurs in a "rough and tumble" work setting. Rather, under Title VII, severe or pervasive harassment is unlawful if it is both objectively and subjectively unwelcome. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993). The Seventh Circuit has articulated the policy rationale for this, which *Amici* urge the Board well to adopt: "Employers who tolerate workplaces marred by exclusionary practices and bigoted attitudes cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII. There is no assumption-of-risk defense to charges of workplace discrimination." *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999). The Fourth Circuit has similarly explained that "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008). *See also Vollmar v. SPS Techs., LLC,* No. 15-2087, 2016 WL 7034696, at *6 (E.D. P.A. Dec. 2, 2016) (employer may be liable for Title VII hostile work environment even when foul language and joking are common in workplace).

As discussed in greater detail in Section IV, *infra,* the Board has extended Section 7 protection to profanity, vitriol, and abusive behavior that no employer should be required to tolerate. The Board should take this opportunity to align its standards with those courts which

have recognized that profanity (including but not limited to behavior based on racial, sexual, or other protected characteristics), should not be excused by a "rough and tumble" workplace, and that, in the 21st century, any variation on a "she had it coming" exception is simply indefensible.

B. Employer Work Rules Are Directly Relevant to the Question of When Employee Misconduct Loses Section 7 Protection

While the Board may hold that the "norms of the workplace" will not be used to excuse egregious behavior, it is wholly appropriate for it to consider employer work rules when determining whether otherwise protected conduct loses its Section 7 protection. In an effort to prohibit harassment and abuse in the workplace, employers almost uniformly maintain policies regulating employee conduct, both as a matter of productivity and employee morale, and as a legal matter with respect to their obligations under anti-discrimination laws. The Board should consider these rules when deciding whether misconduct loses the Act's protection.

In 2015, the EEOC empaneled a task force to study and report to the agency on the nature and scope of unlawful harassment in the workforce. In 2016, the Co-Chairs of the task force released a seminal report which has come to be the benchmark for examining workplace anti-harassment efforts. *See* Chai R. Feldblum and Victoria A. Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* (June 2016) (hereinafter, "EEOC Task Force Report").5 One emerging area which the Task Force found promising was workplace training programs that focused on promoting respect and civility in the workplace generally. As the Task Force observed, "Incivility in the workplace "is often an antecedent to workplace harassment, as it creates a climate of 'general derision and disrespect' in which harassing behaviors are tolerated." EEOC Task Force Report at 55.

Amici certainly do not suggest that the Board turn a blind eye to employer work rules that

[5] Available at: https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

are applied in a biased or disparate manner where Section 7 rights are implicated. However, where otherwise lawful rules are applied neutrally and consistently, the Board should, in assessing whether employee misconduct loses the protection act of the Act, consider and afford weight to those "policies, rules, and handbook provisions dealing with civility, decorum, and respect" which this Board has held to be presumptively lawful. *The Boeing Company*, 365 NLRB No. 154 (2017). In light of its decision in *Boeing*, the Board should make clear that it will consider lawful workplace conduct rules and employers' good-faith efforts to implement them, as relevant to the question of when employee misconduct loses Section 7 protection.

IV. Response to Question Four: The Board Should Abandon Its Standard that Racially or Sexually Offensive Language on a Picket Line Does Not Lose the Protection of the Act.

In Question Four, the Board asks whether it should adhere to, modify, or abandon the standard it has applied in cases such as *Cooper Tire*, 363 NLRB No. 194 (2016) *enf'd*, 866 F.3d 885 (8th Cir. 2017), *Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995) *enf. denied sub nom, NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989) to the extent these cases have held that racially or sexually offensive language on a picket line did not lose the protection of the Act because it occurred in the context of a strike. *Amici* respectfully submit that the Board should abandon this standard, and instead hold, consistent with their response to Question One, that certain behaviors are so egregious that the fact that they may occur on the picket line should not shield them under the Act, or prevent an employer from lawfully disciplining employees for engaging in outrageous misconduct, and overrule prior case law to the extent it is inconsistent with this principle.

For thirty-five years, the Board has addressed the question of picket line misconduct using the standard established in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enf'd*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1985). In *Clear Pine Mouldings*, the Board

adopted the objective standard first established by the Third Circuit in *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977): An employer may lawfully discipline a striking employee who engages in misconduct where such misconduct "may reasonably tend to coerce or intimidate employees in the rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB at 1046. The Board grounded its ruling in the legislative history and purposes of the Act: "[I]t is clear that Congress never intended to afford special protection to all picket line conduct, whatever the circumstances." *Id.* Finally, the Board expressly rejected a standard that words alone, in the absence of physical acts of violence, can never result in the loss of protection of the Act. *See id.* These facts notwithstanding, where issues of racially and sexually-motivated misconduct has occurred, the Board too often appears to have abandoned the metes and bounds of lawful, protected activity established by *Clear Pine Mouldings* and instead has strained to excuse behavior that any reasonable individual would find highly coercive and intimidating. Consider:

- *Calliope Designs*, 297 NLRB 510 (1989), wherein the Board found that calling a striking employee a "whore" and a "prostitute," and accusing her of having sexual relations with the employer's president, and calling a second striking employee a "whore" and suggesting that she could earn more money "selling" her daughter was protected activity.
- *Airo Die*, in which the Board held that an employer violated the Act when it discharged and refused to reemploy a striking worker who had raised his middle fingers at a black security guard and yelled "f*ck you n*gger" at him. 347 NLRB at 811. The Board adopted the ALJ's finding that he was "hard pressed to see any threatening or aggressive conduct" and held the employee's termination unlawful. *Id.* at 812.
- *Cooper Tire & Rubber Co.*, 363 NLRB No. 194 (2016). Here, the Board required the reinstatement of a picketer who engaged in racist hate-speech directed at African

American replacement workers, shouting that he "smelled fried chicken and watermelon" and asked if other workers could smell that as well.

- *Wayne Stead Cadillac*, 303 NLRB 432 (1991), where the Board found that a striking employee was entitled to shout "F*ck you" while simulating sexual acts and grabbing his testicles *in the presence of the employee's eight-year old daughter.*
- *Nickell Moulding*, 317 NLRB 826 (1995), *enf. denied sub nom., NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996). Here, the Board found that the singling out of one employee with a picket sign asking "Who is Rhonda FSucking today?" was "clearly offensive" and "abusive and uncalled for" but still held that the conduct was protected.
- *Gloversville Embossing Corp.*, 297 NLRB 182 (1989), in which the Board held that a male striker's exposing his genitals to a female employee fell within the bounds of permissible picket line misconduct.

As the Board acknowledges in its Notice, while some of these cases have been upheld in appellate courts, they have engendered "vehement" judicial criticism. Notice at 1 n.6. As Judge Millett observed in *Consolidated Communications*:

> So giving strikers a pass on zealous expressions of frustration and discontent makes sense. Heated words and insults? Understandable. Rowdy and raucous behavior? Sure, within lawful bounds. *But conduct of a sexually or racially demeaning and degrading nature is categorically different*. Calling a female co-worker a "whore" or exposing one's genitals to her is not even remotely a "normal outgrowth []" of strike-related emotions. In what possible way does propositioning her for sex advance any legitimate strike-related message? And how on earth can calling an African-American worker "n*gger" be a tolerated mode of communicating worker grievances?
>
> *Such language and behavior have nothing to do with attempted persuasion about the striker's cause.* Nor do they convey any message about workplace injustices suffered, wrongs inflicted, employer mistreatment, managerial indifference, the causes of employee frustration and anger, or anything at all of relevance about working conditions or worker complaints.

837 F.3d 1, 22 (2016) (Millett, J. concurring) (emphases added). There is no nexus between sexually- and racially-demeaning profanity and terms and conditions of employment or the right to engage in protected activity under Section 7. Because such language is wholly disconnected to any purposes of the Act, it should be categorically denied protection. *Amici* urge the Board to adopt the reasoning of former Members Schaumber and Kirsanow, and hold that even within the context of picketing, certain conduct or mere verbal expression may, even in the absence of violence or threat of violence, cause otherwise protected conduct to forfeit the Act's protection. *See Airo Die Casting*, 347 NLRB at 810 n.3 (Members Schaumber and Kirsanow concurring). *Amici* likewise urge the Board to adopt the reasoning set forth in Judge Millett's thoughtful and powerful concurrence in *Consolidated Communications*, and hold that insofar as employee misconduct which takes the form of racial or sexual degradation or harassment[6] is wholly divorced from the purposes of the Act, it should be beyond the protection of the Act.

V. Response to Question Five: The Board Should Recognize the Critical Role of Title VII and Other Anti-Discrimination Laws, and Harmonize Its Holdings to Ensure that an Employer's Compliance with Those Laws Does Not Violate the Act.

The Board asks what relevance it should accord antidiscrimination laws in determining whether employee misconduct loses the protection of the Act, and seeks comment on how to balance employers' duties to comply with such laws with its own duty to protect employee Section 7 rights. *Amici* submit that the Board should afford great deference to employers' requirements under anti-discrimination laws, and where employee misconduct potentially violates such laws, the Board should find that such conduct loses the protection of the Act.

In its *Adtranz* decision, the U.S. Court of Appeals for the District of Columbia's aptly

[6] For the reasons set forth in their response to Question One *supra*, *Amici* again urge that the Board not limit the contours of a standard regarding hate-based misconduct to only sexually or racially-related behaviors, but rather the panoply of protected characteristics civil rights laws.

addressed the conundrum faced by employers when the Board finds egregiously discriminatory or harassing behavior to be protected under the NLRA: "Under both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of facial, sexual, and other harassment. Abusive language can constitute verbal harassment under state or federal law . . . . *To bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a 'catch 22.'*" 253 F.3d at 27 (emphasis added).

The Supreme Court has long held that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("The *Southern S.S. Co*. line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield"); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970) (noting that agencies must consider "the total corpus of pertinent law" when issuing orders). "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern S.S. Co*., 316 U.S. at 47. In light of this, the Supreme Court has repeatedly struck down Board decisions which conflicted with, or frustrated the purpose of, other federal laws.[7]

---

[7] For example, in *Hoffman Plastic*, the Court held that the Board's "award of backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy." 535 U.S. at 151. Because federal immigration law forbids the employment of illegal aliens, the Court held that the Board's award of backpay to an illegal alien would undermine and "trivialize[] the immigration laws." *Id*. at 150. *See also Steam Ship Company*, 316 U.S. at 46-49 (Board's reinstatement of sailors whose employment was terminated because they engaged in

The tension between the National Labor Relations Act and Title VII's non-discrimination provisions are best captured in the Board's *Airo Die Casting* decision, which held that screaming "f*ck you n*gger" at an employer's security guard was lawful, protected activity. Compare this with numerous federal cases which have rightly held that even the single use of so vile an epithet constitutes actionable unlawful harassment under Title VII.[8] *See, e.g., Castleberry v. STI Group*, 863 F.3d 259 (3d Cir. 2017) ("It is clear that one such instance [of uttering n*gger] can suffice to state a claim."); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [the n-word] by a supervisor in the presence of his subordinates . . ."); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (single use of "n*gger" can be sufficient to establish Title VII hostile work environment claim); *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (calling African American employee "porch monkey" was "about as odious as the use of the word 'n____r'"). *Cf.* "Proposed Enforcement Guidance on Unlawful Harassment," Section III.B.1, U.S. Equal Opportunity Employment Commission (Jan. 10, 2017) ("Even a single serious incident of harassment can result in a hostile work environment.").[9]

An employer should not be placed in the position of having to violate one federal law in order to comply with another—yet that is exactly what happens where the Board countenances

---

strike while their vessel was docked away from its home port was improper because their actions constituted a "mutiny" under federal maritime law.

[8] Generally, under Title VII, an employer may be held liable for harassment by a non-supervisory co-worker only where it knew or should have known about the harassment and failed to take prompt corrective action. *See* 29 C.F.R. 1604.11(d). As such, there will be instances where even the most repugnant behavior by a co-worker does not result in employer liability. That said, even if there are instances where an employer is not liable for a co-worker's harassing or discriminatory misconduct, it should not be required by the Board to countenance or permit it.

[9] Available at https://www.regulations.gov/document?D=EEOC-2016-0009-0001.

egregious racially- or sexually-motivated misconduct[10] which courts have easily found to be actionable civil rights violations.[11] Conduct that is designed to humiliate and intimidate another individual because of and in terms of that person's gender or race should be unacceptable in the work environment. Full stop." *Consolidated Communications, Inc. v. NLRB*, 837 F.3d at 21 (Millett, J., concurring).

A key recommendation of the EEOC Task Force Report was that the Board and EEOC "confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes" insofar as they regulate permissible workplace behavior. EEOC Task Force Report at 43. The Board is here presented with the opportunity to do so. *Amici* submit that the Board should make clear that when conducting an analysis of whether misconduct in the court of otherwise lawful protected activity loses the protection of the Act, it will recognize and give significant weight to antidiscrimination and other laws governing the lawfulness of employee conduct and the employer's duty to maintain a workplace free of unlawful harassing, discriminating, or coercive behavior. Put simply, the Board should reject "[t]hose decisions [which] have repeatedly given refuge to conduct that *is not only intolerable by*

[10] Nor should the Board limit its holding only to language that is "sexually or racially insensitive," but instead should extend this standard to profane, insensitive, or demeaning language and conduct based on the range of personal characteristics protected under civil rights laws. It would be a travesty for the Board to adopt a standard under which an employee who calls a female supervisor a "c*nt" or a black manager a "n*gger" may be lawfully disciplined, but an employee who calls a co-worker with a mental disability a "r*tard," a gay foreman a "f*ggot," or a Jewish supervisor a "k*ke" is shielded under the Act.

[11] Member McFerran is correct in noting that under Supreme Court precedent, generally "isolated instances (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Dissent at 5 n.11, citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Her observation misses the mark, however, by failing to acknowledge that, as set forth above, the sorts of egregious behaviors which should result in the loss of protection under the Act are exactly those "extremely serious" cases in which courts have held that even a single instance of reprehensive behavior is actionable harassment and unlawful.

any standard of decency, but also illegal in every other corner of the workplace." *Consolidated Communications, Inc.*, 837 F.3d at 20.(Millett, J., concurring) (emphasis added).

CONCLUSION

For the reasons set forth above, the Board should adopt standards relating to employee misconduct that are in line with the realities of today's workplace, in particular the paramount interest of employers in ensuring workplaces that are free from harassment, discrimination, and bullying, and find that where such misconduct directly interferes with these interests, protection under the Act is forfeited. To be clear, *Amici* do not suggest that to stay within the Act's protection, employees must engage in protected activity as if they were in a high school production of *The Pajama Game.* Nonetheless, the Board must be mindful of the mores of the 21st century workplace, particularly where employees continue to face harassment and discrimination on the bases of race, sex, religion, disability and other protected statuses. An employer's effort to root out discrimination and comply with its legal obligations should not be hamstrung by theoretical concerns about the potential chilling of inchoate employee rights, nor should those rights be used to excuse repugnant, and intolerable workplace behavior.

Respectfully submitted this 12th day of November, 2019.

LITTLER MENDELSON P.C.

James A. Paretti, Jr.
Michael J. Lotito
Maurice Baskin
815 Connecticut Avenue, NW
Washington, DC 20006
T: 202-842-3400
F: 202-842-0011

Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

Pursuant to the Board's September 5, 2019 "Notice and Invitation to File Briefs," the undersigned hereby certifies that a copy of the foregoing amicus brief in Cases 14-CA-197985 and 14-CA-208242 was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on this 12th day of November, 2019.

/s/ James A. Paretti, Jr.
James A. Paretti, Jr.

Keith White, Esq.
Barnes & Thornburg, LLP
11 South Meridian Street
Indianapolis, IN 46204
E-mail: keith.white@btlaw.com

Charles Robinson
3229 N. 123rd Terrace
Kansas City, KS 66109
E-mail: chuckeejay@aol.com

Lauren Fletcher
Counsel for General Counsel
8600 Farley Street, Ste. 100
Overland Park, KS 66212
E-mail: lauren.fletcher@nlrb.gov

William F. LeMaster
Counsel for General Counsel
8600 Farley Street, Ste. 100
Overland Park, KS 66212
E-mail: william.lemaster@nlrb.gov