UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLASSIAN CORP.

Respondent

and **Case 16-CA-324971**

DENISE UNTERWURZACHER, an Individual

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46(b) of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files this Answering Brief in Response to Respondent's Exceptions to the Decision of the Administrative Law Judge (JD-43-26) and respectfully submits the following:

I. INTRODUCTION

This case involves a series of unfair labor practices committed by Atlassian Corporation (Respondent). A hearing was held on March 3, 2026, before the Honorable Susannah Merritt, Administrative Law Judge (ALJ). On July 1, 2026, the ALJ issued her Decision and Order finding that Respondent engaged in all the unfair labor practices alleged. (JD-43-26).[1] Contrary to Respondent's exceptions, as set forth in detail below, the ALJ properly found that Respondent unlawfully discharged Charging Party Denise Unterwurzacher in retaliation for her protected

[1] The General Counsel adopts the ALJ's summary of the facts in this case (as described throughout her Decision). As necessary, specific facts are also referenced herein.

concerted activities. Respondent's arguments otherwise rely heavily on a revisionist version of the facts and conclusory assertions unsupported by law or the record and thus should be rejected.

Since post-hearing briefs were filed, however, the General Counsel has determined to reconsider the Agency's position regarding certain Complaint allegations and legal theories in this case. Specifically, as discussed in more detail below, this includes the allegations related to the proffer of unlawfully overbroad severance agreements, the maintenance of unlawfully overbroad rules, and the appropriate test for determining whether certain conduct may lose the protection of the Act.

II. ARGUMENT & AUTHORITIES

A. The ALJ Correctly Found Respondent Unlawfully Discharged Charging Party Denise Unterwurzacher Under *Wright Line*

i. Unterwurzacher's June 22, 2023, Slack Post was Protected Concerted Activity (Exceptions 1, 2, 7, 8, 10, 28)

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in union activities and "concerted activities for the purpose . . . of mutual aid or protection." The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Concerted activity includes activity that is engaged in with or on the authority of other employees, but also activity where an individual employee brings truly group complaints to the attention of management. See *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented

Meyers Industries, 281 NLRB 882, 887 (1986) (*Meyers II*), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The Board has repeatedly recognized employees have a fundamental Section 7 right to discuss their terms and conditions of employment with one another. *Union Tank Car Co.*, 369 NLRB No. 120, slip op. at 2 (2020) ("It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity."). See also, *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 471 (2014) (Conversations among employees about their working conditions is the "very essence of activity which the Act protects because all other actions contemplated by the statutory scheme flow out of employees' discussions about their wages, hours, and other terms and conditions of employment."); *Cmty. Counseling & Mentoring Servs., Inc.*, 371 NLRB No. 39 at n. 21 (2021) ("[E]mployee discussions among themselves regarding work-related concerns is protected activity without regard to whether those discussions result in the employees bringing the concerns to the [r]espondent at all–singly or as a group."). The way a supervisor (including a CEO) treats their employees is certainly a term or condition of employment. *KSL Claremont Resort, Inc.*, 344 NLRB 832 (2005) (Protected activity includes "an employee complaining to a coworker about a supervisor."). See also, *Reef Indus., Inc. v. NLRB*, 952 F.2d 839, 840 (5th Cir. 1992) (finding employees' sarcastic t-shirt and letter aiming criticism at company executive protected because "the essential purpose of the employees' action was to make known their unhappiness at what they perceived to be management's unfair and condescending treatment of them during this unionization period.").

The evidence overwhelmingly shows that Unterwurzacher engaged in significant protected activity over the course of the events in this case. In 2019, Unterwurzacher joined with her colleagues to express concern and ask questions regarding Respondent's decision to change

employee titles. (GC Exh. 2). Unterwurzacher's concerns were clearly shared by coworkers given the sheer volume of commentary the announcement elicited. (Id.) Moreover, other employees expressed similar concerns about the lack of information provided about the decision-making process. (GC Exh. 2 at 7, 23, 26, 31, 57, 71). While Farquhar took issue with Unterwurzacher daring to ask if anyone from Employee Relations was drafting a response to her initial questions, that question too amounts to protected activity.[2] *Prescott Indus. Prods. Co.*, 205 NLRB 51 (1973); *J.P. Stevens & Co., Inc.*, 219 NLRB 850 (1975) (employee discharge for insisting a question be answered and that employees had a right to an answer was unlawful).

In Spring 2023, in the months leading up to her discharge, Unterwurzacher also engaged in a series of acts of protected activity, including publicly expressing support for a union (GC Exh. 3) and bringing group complaints to management's attention by sharing the adverse experience she and her coworkers experienced during the stack ranking dry run and by warning her colleagues on how best to protect themselves from a similar experience (GC Exh. 4). *Meyers I*, supra. Respondent's internal records concede that the post was protected under the Act. (Jt. Exh. 2 at 3).

Despite Respondent's protestations to the contrary, Unterwurzacher's June 2023 Outrage Notifications post was also protected concerted activity. Respondent correctly observes that the *Meyers* line of cases stands for the proposition that, in order to be "concerted," activity must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." (R. Brf. at 6) (quoting *Meyers Industries*, 268 NLRB 493, 497 (1984)). Respondent also correctly acknowledges that activity is concerted when it brings a truly group complaint to management's attention. (Id.).

[2] Respondent's counsel, in his opening statement, accused Unterwurzacher of making "offensive demands" of employees who did not report to her. (Tr. 157; LL. 5-9). It remains unclear what is "offensive" about simply asking whether anyone was going to answer her questions.

Respondent errs, however, when it continually insists that Unterwurzacher's Outrage Notifications post was purely an individual gripe. (R. Brf. at 5-7). This claim is particularly bizarre when Respondent concedes, as it must, that many other employees expressed similar criticisms about the same subject matter. (R. Brf. at 6, 11). Beyond the shared criticisms acknowledged by Respondent, the ALJ correctly cited a lengthy list of other complaints made contemporaneous with Unterwurzacher's post. (ALJD at 11-12). Specifically, the discussion includes the following examples:

- "Macroeconomic conditions == 'My free money faucet turned off'" (Id. at 6).
- "more Cult of Personal Responsibility nonsense coming from techbros" (Id. at 7).
- "With frontline managers potentially doubling or tripling their number of direct reports, will IC's like myself get the same level of care and attention for our individual career development? I meet with manager weekly to talk career obj. and can't imagine that system working with >15 direct reports." (Id. at 11).
- "I've never felt MCB [Mike Cannon-Brookes] so disconnected before" (Id. at 14).
- "he's got a solar farm to run now. No time for the cash cow anymore." (Id.).
- "I guess with enough money everyone becomes tone-deaf" (Id. at 15).
- "yes they talked with other executives and felt they all came off as sufficiently human" (Id. at 24).
- "wtf [what the fuck] lmao [laughing my ass off] mike" (Id.).
- "shut up and go back to your mines, peasant" (Id. at 25).
- "I bet this wasn't in the script" (Id).
- "love to be scolded by the founder" (Id. at 27).
- "Pretty much the town hall makes it clear any dissent around changes will be considered hostile" (Id. at 33).
- "imo [in my opinion] it's still 100% not appropriate for the founder to go off at someone in front of 1000s of their coworkers" (Id. at 36).
- The following exchange:
    - "open company no bullshit and all that"
    - "not open if you're suppressing dissent"
    - "I like my leaders to lead by example"
    - "I mean we can just agree that value is fucking dead a buried" (Id. at 39).
- "When are the values going to be updated to reflect Atlassian 2.0?" (Id. at 57).
- "Only questions that are positive and seeking to understand the changes because if you question the changes you're clearly just resisting it because you don't like change". (Id.)
- "It's clear now there's zero interest in showing the working on these things and taking any negative feedback on them so just roll with it till you can't no more." (Id. at 59).

- "tbh I am really worried about mine and others mental & physical health at this stage" (Id. at 60).
- The following meme:



(Id. at 61).

Although Respondent argues Unterwurzacher's post only "gesture[d]" at the above criticisms the ALJ correctly found that text of her post clearly speaks both to the loss of jobs caused by Respondent's re-leveling decision as well as the unacceptable nature of Cannon-Brookes' outburst. (ALJD at 21). Thus, when Unterwurzacher joined her colleagues to express her dissatisfaction, she clearly engaged "with" them in collective protest regarding important terms and conditions of employment. *Meyers*, supra. No matter how hard Respondent may try, it cannot arbitrarily pull Unterwurzacher's statement out of the context of the larger discussion in a dubious attempt to insulate itself from liability.

Respondent's claim that Unterwurzacher's post was merely an attempt to "mock" Cannon-Brookes because of his wealth and ownership of a professional basketball team falls flat simply by reading what she actually said. Whether Unterwurzacher's post was an ad hominem attack or not, it was an accurate description of what happened. Specifically, it appeared that Cannon-Brookes was calling into the AMA from the Utah Jazz headquarters and he angrily interjected when employees questioned Rajan's attempts to minimize the impact of the re-leveling. Thus,

when Unterwurzacher stated, "Just dialling [sic] in from my NBA team's headquarters to yell at the people whose careers I've just pummelled [sic]" she was simply describing what she believed happened.[3] That she phrased her post in a joking tone in order to make her point does not make the substance of it any less true nor any less protected. See *Pontiac Osteopathic Hosp.*, 284 NLRB 442, 452 (1987) ("[T]he fact that the authors used the literary techniques of satire and irony to make their point, as opposed to a more neutral factual recitation of their dissatisfaction, does not deprive the communication that they produced of any protection under Section 7 of the Act to which it might otherwise be entitled.").

Moreover, the fact that Cannon-Brookes is a billionaire owner of an NBA team formed the *sine qua non* of the criticism. That is, Unterwurzacher's central point was the tone-deaf way in which this supremely wealthy and powerful individual scolded his employees for having the temerity to question the impact of a significant adverse change made by Respondent. (Tr. 69, LL. 7-25). Other employees made this exact point, albeit in different ways. One employee jokingly stated, "shut up and go back to your mines peasant" while another was more direct, stating "I guess with enough money everyone becomes tone-deaf". Other employees made jokes similar to that of Unterwurzacher: "he's got a solar farm to run now. no time for the cash cow anymore" to which another employee replied, "and houses to buy". (GC Exh. 5 at 14). Thus, the record is clear that Unterwurzacher's criticism was a group complaint. The conversation and protest among employees bringing those complaints to the fore is itself the concerted activity, "without regard to whether those discussions result in the employees bringing the concerns to the [r]espondent at all–

[3] Respondent conspicuously does not claim that Unterwurzacher was factually incorrect. In any event, whether she was correct is not relevant to the analysis of whether her conduct was protected. *Tamara Foods, Inc.*, 258 NLRB 1307, 1308 (1981) ("Whether the protested working condition was actually as objectionable as the employees believed it to be . . . is irrelevant to whether their concerted activity is protected by the Act.").

singly or as a group." *Cmty. Counseling & Mentoring Servs., Inc.*, 371 NLRB No. 39 at n. 21 (2021).

Respondent argues that the Board should return to the standard set forth in *Alstate Maintenance*, LLC, 367 NLRB No. 68 (2019), that an individual gripe is not concerted merely because it is made in a group setting. (R. Brf. at 5). But even if the Board were to restore *Alstate*, Respondent would fare no better. In *Alstate*, an employee was discharged after he complained to a supervisor – in front of fellow employees – about a lack of tips from a once and future client. *Id*. at 2. Crucially, the Board found there was "no evidence that the tipping habits of soccer players (or anyone else) had been a topic of conversation among the skycaps prior to [the discriminatee's] statement." *Id*. at 4. Here, by contrast, prior to Unterwurzacher's critical post, there was a lengthy group protest related to very same working conditions Unterwurzacher criticized. Thus, this case bears no resemblance to *Alstate*. Respondent cannot carve out one statement from an extensive group discussion criticizing working conditions and call it an individual gripe. Such an approach defies language, logic, and the law. The Board should reject Respondent's arguments and affirm the ALJ's finding that Unterwurzacher's Outrage Notifications post was concerted activity.

ii. Respondent's Animus Toward Unterwurzacher's Protected Concerted Activity Was Established by Objective Evidence of Respondent's Own Statements (Exceptions 3, 4, 5, 9, 25, 26, 27, 28, 29, 30)

The ALJ found correctly that Respondent acted with animus toward Unterwurzacher's protected concerted activity. (ALJD at 25). This animus is expressly shown in contemporaneous communications from Respondent's Head of Employee Relations, Susan Kelbaugh in explaining why Unterwurzacher had been discharged.[4] In that email, Kelbaugh explained to Unterwurzacher

[4] Further direct evidence of animus toward protected concerted activity can be found in Farquhar's response to Unterwurzacher's 2019 Hello posts and Cannon-Brookes' outburst against employees questioning management's downplaying of the effects of the re-leveling in 2023.

that she was discharged because she "violated our community guidelines and *consistently* acted against our company values". (GC Exh. 7 at 1) (emphasis added). Kelbaugh went on to assert that from 2019 until her discharge, Respondent's founders, managers, and HR professionals had attempted to coach Unterwurzacher on her communication style, but that Unterwurzacher didn't display "effort to improve or a desire to consider the impact of [her] actions" and thus exhibited a "pattern . . . of behavior warrant[ing] termination." (Id.) Unterwurzacher similarly testified that she was given substantially similar reasons for her discharge in the meeting in which she was fired. (Tr. 74, LL. 14-21).

Unterwurzacher confirmed that, during the period described by Kelbaugh, she had only two instances of this supposed "coaching": in 2019 with Farquhar and in May 2023 with Employee Relations representative Kay Sanfilippo.[5] (Tr. 77-78). Therefore, Kelbaugh could only have been referring to Unterwurzacher's 2019 and May 2023 acts of protected concerted activity when describing the basis for her discharge.[6] This connection is further confirmed by Respondent's internal Employee Relations tickets. (Jt. Exhs. 1-3). Each ticket contains a field labeled "Issue Links" with a corresponding box for related issues. (Id.). The ticket for Unterwurzacher's discharge (Jt. Exh. 3) relates back to the tickets created as a result of the 2019 and May 2023 incidents. Furthermore, the 2019 incident is expressly categorized as a discipline: "Informal Warning/Verbal Counseling – Conduct". (Jt. Exh. 1). Notably, whereas the two discipline tickets include detailed descriptions of the conduct at issue, the discharge ticket includes no explanation whatsoever, other than simply saying the founders approved of her discharge. (Compare Jt. Exhs.

[5] Unterwurzacher's testimony on this point was unrebutted.

[6] Because Respondent admitted that Unterwurzacher's past protected activity formed at least a partial basis for her discharge, a *Wright Line* analysis is likely unnecessary. *Phoenix Transit System*, 337 NLRB 510 (2002). For the sake of completeness, however, this brief will complete a full *Wright Line* analysis.

1-2 with Jt. Exh. 3). This departure from past practice is also probative evidence of animus. *Intertape Polymer Corp.*, 372 NLRB No. 133 (2023).

Regarding the May 2023 "coaching," Respondent claimed in the Employee Relations ticket that Unterwurzacher was not being disciplined because "[a]ny form of disciplinary action [would] violate the NLRA." (Jt. Exh. 2 at 3). Despite Respondent's assertion that Unterwurzacher was not being disciplined related to this incident, Respondent apparently still found it necessary to "coach" Unterwurzacher on her communication style and direct her away from making group complaints and then relied on that "coaching" when discharging her.[7] (Id. at 4; GC Exh. 7).

Respondent's animus toward Unterwurzacher's protected activity is also bolstered by *how* Sanfilippo "coached" her. Respondent's internal recap of the conversation – confirmed by Unterwurzacher to be accurate (Tr. 60-61) – describes Sanfilippo's attempts to channel Unterwurzacher's communications away from group settings. For example, Sanfilippo stated, "The ask was that if she has concerns about a particular situation or process, there are multiple options and ways to reach out: discuss with her direct manager, skip level manager, HRBP, or raise a ticket via G'day." (Jt. Exh. 2 at 4). The Board has long held that rules or directives that employees bring complaints directly to management are unlawful. *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1254 (2007) (Citing, *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990); *Easter Seals Connecticut, Inc.*, 345 NLRB 836, 838 (2005)). See also, *Renew Home Health*, 371 NLRB No. 165 slip op. at 1 fn. 2 (2022). While there is no such complaint allegation here, the underlying conduct remains the same and is evidence of animus toward protected concerted

[7] The "coaching" Unterwurzacher received in May 2023 is also arguably unlawful, even if Respondent insists it was not a "discipline" in any official sense, because Respondent relied on it and held it against Unterwurzacher when discharging her. (GC Exh. 7 at 1; Jt. Exh. 3). It certainly strains credulity to believe (and there is no evidence to establish) that Respondent is in the habit of creating and maintaining Employee Relations tickets for conversations that are not disciplinary in nature.

activity. See *Felix Indus., Inc.*, 331 NLRB 144, 145 n. 10 (2000). (citing *London Memorial Hospital*, 238 NLRB 704, 709 fn. 12 (1978) and *Medicine Bow Coal Co.*, 217 NLRB 931 fn. 2 (1975)) ("Indeed, it is well settled that, in considering allegations of discrimination for engaging in protected activity, the Board may consider, and rely on, conduct that would have been found unlawful had it been so alleged.").

Respondent argues on exceptions that the ALJ's animus findings are unsupported, despite the lengthy record evidence cited by the ALJ and discussed above. First, Respondent argues that the ALJ's finding that statements made by Farquhar, Cannon-Brookes, and Sanfilippo were direct evidence of animus were "legal mischaracterizations". Respondent cites no cases to support this alleged mistake of law. Instead, Respondent claims that because the statements were made prior to the discharge or by individuals who were not the decisionmaker, they are "at most circumstantial evidence" of animus.[8] (R. Brf. at 13-4). However, as noted above, Respondent's Head of Employee Relations expressly connected the discharge to the coaching by Farquhar and Sanfilippo. Therefore, statements of animus within such coaching may be used as direct evidence of Respondent's motive for the discharge.

With respect to the 2019 exchange with Farquhar, Respondent argues that a four-year-old "non-disciplinary" response is not probative of a retaliatory motive. In another case, such a statement may well be true. But in *this case*, Respondent expressly tied the decision to discharge Unterwurzacher to the 2019 incident and Farquhar's coaching. Therefore, it is relevant to show a retaliatory motive. Moreover, Respondent's position on the disciplinary nature of the 2019 coaching has apparently shifted between its brief to the ALJ and its exceptions. In its post-hearing brief, Respondent acknowledges that in response to the 2019 exchange with Farquhar,

[8] Of course, circumstantial evidence of animus is nonetheless evidence of animus and may be used to find a violation. *Intertape Polymer Corp.*, 372 NLRB No. 133 (2023).

Unterwurzacher received an "informal verbal counseling for her conduct." (R Post-hearing Brf. at 3). This aligns with the express categorization of the incident on Respondent's Employee Relations ticket. (Jt. Exh. 1). However, on exceptions, Respondent now claims that the 2019 coaching was non-disciplinary in nature. This post-hoc argument comports with neither the objective evidence nor Respondent's treatment of the incident in its post-hearing brief. (R Post-hearing Brf. at 2) (describing Unterwurzacher's protected concerted activities as "a documented history of conduct issues" and noting the impact on her FY2019 rating).

Respondent next claims that Sanfilippo's comments regarding Unterwurzacher's May 2023 Hello post – which Respondent expressly acknowledged was protected activity (Jt. Exh. 2) – were merely "coaching on the manner of communication" and "post-coaching performance monitoring". (R. Post-Hearing Brf. at 15). But if, as Respondent admits, Unterwurzacher's May 2023 stack ranking post was protected (it was), then Respondent had no cause to "coach" her on a better way to communicate. This includes Sanfilippo's coercive attempts to steer Unterwurzacher away from making complaints in group settings. Said differently, Unterwurzacher did nothing wrong and any suggestion that she needed to change her behavior was unwarranted, likely unlawful, and evidence of animus toward protected activity.

Next, Respondent argues that Cannon-Brookes' statement that if employees wanted to "nark" they could go elsewhere was an "uncharged theory" used by the ALJ to "inflate the weight given to . . . animus under *Wright Line*." (R. Post-hearing Brf. at 17). Citing *Wright Line*, 251 NLRB 1083 (1980). Thus, Respondent complains it was deprived of due process because such statement was not alleged as unlawful and it had no notice to develop a record to rebut "a coercive-threat theory". (Id.). This argument, however, fails to acknowledge that (1) the ALJ did not find that Respondent violated the Act by Cannon-Brookes' statement and (2) no remedy was ordered

with respect to that statement. Rather, the ALJ simply found, consistent with decades of Board precedent, that it was likely an unlawful statement and was evidence of animus, even if uncharged. See *Felix Indus., Inc.*, 331 NLRB 144, 145 n. 10 (2000). (citing *London Memorial Hospital*, 238 NLRB 704, 709 fn. 12 (1978) and *Medicine Bow Coal Co.*, 217 NLRB 931 fn. 2 (1975)).

Finally, Respondent asks the Board to ignore Kelbaugh's direct statements tying the decision to discharge Unterwurzacher to her past history of protected concerted activity because it was simply "referencing" her history and "contextualiz[ing]" her termination. (R. Brf. at 17).[9] This argument ignores, however, that Kelbaugh expressly accused Unterwurzacher of engaging in a "pattern" of behavior that "warranted termination." (GC Exh. 7 at 1). Without that alleged pattern, the foundation of Kelbaugh's explanation of the termination falls apart. Instead, the more logical reading of Kelbaugh's email, consistent with every other piece of objective documentary evidence admitted at trial, is that Respondent viewed Unterwurzacher's consistent acts of protected concerted activity as a problem and fired her as a result. This would further explain why other employees who made similar or worse remarks in the Outrage Notifications channel were not punished at all.

iii. Respondent Put Forth No Evidence to Meet Its Rebuttal Burden (Exceptions 6, 30)

As set forth above, the ALJ found correctly that Unterwurzacher engaged in protected concerted activity and Respondent's animus toward that activity was a motivating factor in her discharge. Having established a *prima facie* case, the burden shifts to Respondent to prove by a

[9] Respondent complains that the ALJ's reliance on Kelbaugh and Sanfilippo's comments was improper because they were not subject to cross-examination. However, Sanfilippo's statements were incorporated into a regularly kept business record that was admitted at trial as a joint exhibit. Thus, Respondent cannot complain that it was somehow unaware the statements would be relevant to the case. Furthermore, Unterwurzacher testified to the accuracy of the record and Respondent had every opportunity to cross-examine her. Respondent's complaints with respect to Kelbaugh are, frankly, astounding given that the General Counsel subpoenaed Kelbaugh, an admitted statutory supervisor, to testify yet she failed to appear.

preponderance of the evidence that it would have taken the same adverse employment action even absent the protected activity. (*Willamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra). Importantly, the "issue is [] not simply whether the employer 'could have' disciplined or fired the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.*, 346 NLRB 766 (2006).

In this case, Respondent failed to put forth any evidence whatsoever to meet its rebuttal burden. It called no witnesses and introduced no evidence to even attempt to make the required showing. Additionally, as noted by the ALJ, other employees "made far more cutting remarks about Cannon-Brookes' wealth before Unterwurzacher added her comments, and there is no evidence that any of those other employees were disciplined or terminated." (ALJD at 26). Respondent attempts to distinguish the other employee criticisms as mere "brief reactions" while casting Unterwurzacher's single, 22-word comment as "a sustained satirical impersonation of a cofounder." (R. Brf. at 11). Respondent goes on to bemoan Unterwurzacher's post as "impersonat[ing] a specific named executive in the first person" and "construct[ing] a satirical persona attributing malicious intent to that executive personally." (Id.). Never mind that Unterwurzacher did not name Cannon-Brookes nor did she accuse him of any particular intent – malicious or otherwise. Respondent also admits, in the sentence immediately prior, that another employee also engaged in a humorous, first-person impersonation meant to criticize Cannon-Brookes by stating, "shut up and go back to yours mines peasant." (Id.; GC Exh. 5 at 25). Respondent's attempt to have the Board believe that the "mines" comment, in the context of employees' AMA commentary, was "a generalized, anonymous-target quip directed at no one in particular" (R. Brf. at 11) while Unterwurzacher's comment was somehow fundamentally different in character strains credulity well past its breaking point.

Perhaps recognizing that the comparator evidence (or lack thereof) in this case cuts strongly against it, Respondent instead turns to what it dubs "the remaining record evidence" (R. Brf. at 18) – none of which has any legal significance. For example, Respondent argues that because it categorized Unterwurzacher's discharge under the heading "Policy and Behaviors – Behaviors / Values – Treat Others Respectfully" rather than a "retaliation for speaking up category" this somehow immunizes the decision from scrutiny. This proposition is absurd on its face. Of course, one suspects that Respondent does not actually maintain a category of discipline specifically labelled with its unlawful nature. This is why the Board has long recognized that circumstantial evidence can prove a violation in the absence of a smoking gun. See *Intertape Polymer*, supra. To give such categorization any evidentiary value, let alone the powerful evidentiary value Respondent argues it should hold, would allow any employer to simply claim as prohibited something as fundamental as discussing wages with co-workers based on the employer's "values" and be clear of any wrongdoing.

Similarly, Respondent's argument that its conduct was lawful because Respondent's lawyers and founders approved the decision is of no consequence. Respondent cites no case law in support of this argument and the Board should not take Respondent's invitation to create such law. To do so would allow an employer to insulate itself from liability simply by saying their lawyers thought their conduct was ok. Even assuming the best of intentions, lawyers can make mistakes and founders can make irrational decisions, particularly if their emotions or egos get the better of them. Or perhaps Respondent simply felt that Unterwurzacher's Outrage Notifications post gave them the cover to fire her it didn't have in March 2023. Ultimately, Respondent failed to call either of the founders or the legal counsel involved in the decision to testify about their supposed "considered judgment" when deciding to discharge Unterwurzacher. Instead, objective

evidence in the record conclusively establishes Respondent was motivated by Unterwurzacher's alleged "pattern" of going against company values, violating Respondent's Community Guidelines, and failing to improve despite previous coaching. As a result, the Board should reject Respondent's Exception and affirm the ALJ's findings and conclusions.

B. Unterwurzacher's Discharge was Unlawful Under the General Counsel's Proposed Loss of Protection Standard

i. The Board Should Overrule Lion Elastomers *Because the Framework of* General Motors *Protects Industrial Order and Employees' Section 7 Rights, and Furthers the Intent of Congress in Enacting Protective Workplace Legislation*

The Board should overrule *Lion Elastomers LLC*, 372 NLRB No. 83 (2023)[10] and readopt its decision in *General Motors LLC*, 369 NLRB No. 127 (2020), holding that the *Wright Line* burden-shifting framework applies to all cases alleging unlawful discipline or discharge for protected activity. *General Motors* properly safeguarded employees' Section 7 rights without infringing on employers' right to maintain order, discipline, and respect in their workplaces or thwarting congressional intent in enacting multiple protective workplace laws, including those addressing discrimination and safety. By adopting a consistent and predictable framework, *General Motors* ensured that employees could exercise their protected rights under Section 7 while employers retained the ability to enforce reasonable, neutral workplace rules. This approach struck the proper balance between protecting concerted activity and maintaining industrial order, affirming that misconduct occurring during protected activity is analytically separable from the activity itself. As a result, employers were not forced to tolerate abusive, discriminatory, or unsafe behavior simply because it occurred in the context of Section 7 activity, and employees were not cloaked in an invisible shield protecting them from the consequences of such misconduct.

[10] The Board's decision is currently pending before the Board on remand from the Fifth Circuit. *Lion Elastomers, LLC, v. National Labor Relations Board*, 108 F.4th 252 (5th Cir. 2024).

Furthermore, *General Motors* aligned the Board's standards with the broader legislative intent behind various workplace laws, including those designed to prevent discrimination and promote safety. This harmonization prevented conflicts between the Act and other federal employment statutes, such as Title VII, and ensured that employers could fulfill their legal obligations to provide a safe and equitable work environment without risking liability for unlawful discipline or discharge of employees engaged in protected activity.

Before *General Motors*, the Board applied three setting-specific standards to determine whether an employee's misconduct that occurred in the course of activity that was often only tenuously connected to Section 7 removed the employee from the Act's protection. First, for confrontations with management occurring at the workplace, the Board applied the four-factor test established in *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979), weighing (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked by the employer's unfair labor practice. Second, for communications between coworkers, including via the internet and social media, the Board applied a nebulous "totality-of-the-circumstances" test. See *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1824 n.3 (2016); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017). Third, for picket-line misconduct, the Board applied the even more amorphous test set forth in *Clear Pine Mouldings*, inquiring whether the misconduct, under all the circumstances, reasonably tended to coerce or intimidate employees in the exercise of rights protected under the Act. 268 NLRB 1044, 1046 (1984), *enfd. mem.* 765 F.2d 148 (9th Cir. 1985).

Application of these setting-specific standards in so-called "loss-of-protection" cases resulted in findings that employers unlawfully disciplined or discharged employees for engaging in conduct that would have justified the employment action but for the invocation of Section 7

rights. For example, applying these loss-of-protection standards, the Board found the following conduct did not lose statutory protection:

- Writing "whore board" on an overtime sign-up sheet, *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131, slip op. at 2 (2018), *enf. denied*, 945 F.3d 546 (D.C. Cir. 2019);

- Calling an employer's owner a "fucking motherfucker," "fucking crook," and "asshole," and warning the owner that if the employer fired the employee, it would "regret it," *Plaza Auto Center*, 360 NLRB 972, 973 (2014);

- Referring to a supervisor as an "egotistical fucker," *Alcoa, Inc.*, 352 NLRB 1222, 1225–26 (2008);

- Calling an employer's vice president a "stupid fucking moron," *Tampa Tribune*, 351 NLRB 1324, 1324–25 (2007), *enf. denied*, *Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009);

- Calling a supervisor a "bastard red-neck son-of-a-bitch," *Winston-Salem Journal*, 341 NLRB 124, 125 (2004), *enf. denied, Media General Operations, Inc. v. NLRB*, 394 F.3d 207 (4th Cir. 2005);

- Calling a supervisor a "fucking kid" and telling him he did not have to listen to him, *Felix Industries*, 331 NLRB 144, 144 (2000), *enf. denied*, 251 F.3d 1051 (D.C. Cir. 2001);

- Calling a supervisor a "fucking asshole," *Burle Industries*, 300 NLRB 498, 500 (1990), *enforced*, 932 F.2d 958 (3d Cir. 1991);

- Stating of a manager, "that motherfucker is going down, the gloves are fucking off now," *Caterpillar Logistics, Inc*., 362 NLRB 395, 403 (2015), *enforced*, 835 F.3d 536 (6th Cir. 2016);

- Threatening an employer that "it was going to get ugly" and that a supervisor "better bring [his] boxing gloves," *Kiewit Power*, 355 NLRB 708, 708-09 (2010), *enforced*, 652 F.3d 22 (D.C. Cir. 2011);

- Threatening "if you're taking my truck, I'm kicking your ass right now," *Leasco, Inc.*, 289 NLRB 549, 549 n.1 (1988);

- Posting on Facebook that a manager "is such a NASTY MOTHER FUCKER," *Pier Sixty*, 362 NLRB at 506;

- Shouting racist taunts at black replacement workers while picketing, *Cooper Tire & Rubber Co.*, 363 NLRB 1952, 1954–55 (2016), *enforced*, 866 F.3d 885 (8th Cir. 2017);

- Grabbing and lifting crotch in an obscene gesture directed at a replacement worker crossing the picket line, *Illinois Consolidated Telephone Co.*, 360 NLRB 1284, 1294 (2014), *enf. in rel. part*, 837 F.3d 1 (D.C. Cir. 2016);

- Hitting a foreman's car with picket signs, *Medite of New Mexico, Inc*., 314 NLRB 1145, 1146–47 (1994), *enforced*, 72 F.3d 780 (10th Cir. 1995).

These results were unpredictable, led to misunderstandings as to the contours of employees' protections and employers' rights and obligations, and frequently put the Board's decisions in tension with competing workplace violence and anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq*.). Consequently, the Board forged a new path in *General Motors*, holding that the *Wright Line* burden shifting framework applied in all cases in which the issue is whether an employer unlawfully disciplines or discharges an employee who engaged in protected concerted activity. 369 NLRB No. 127, slip op. at 1–2.

Under *General Motors*, when a complaint alleged that an employer unlawfully disciplined or discharged an employee for engaging in activity protected by the Act, *Wright Line* applied regardless of the setting. *Id.*, slip op. at 1–2, 9, n.22. Accordingly, the General Counsel had to show that (1) the alleged discriminatee engaged in Section 7 activity, (2) the employer was aware of the activity, and (3) the employer's animus against the Section 7 activity was a motivating factor in the employer's decision to discharge or discipline the employee. *Id.* at 10. If the General Counsel made this showing, the employer then had the burden of proving that it would have taken the same action absent the protected activity. *Id.* Just three years later, however, the Board reversed itself, overruling *General Motors* and returning to the setting-specific tests described above. *Lion Elastomers*, 372 NLRB No. 83, slip op. at 1.[11]

[11] The Board's decision followed remand from the Fifth Circuit. 372 NLRB No. 83, slip op. at 1. On review, the Fifth Circuit vacated the Board's determination and remanded the case to the Board a second time, finding that the Board exceeded the scope of the court's original remand in overruling *General Motors* and denied respondent employer due process in doing so without affording it an opportunity to be heard on the issue. *Lion Elastomers*, 108 F.4th at 259–60.

The Board should return to *General Motors* and apply the consistent, predictable test set forth in *Wright Line* in each case alleging unlawful discharge or discipline. As the *General Motors* Board recognized, the setting-specific standards produced inconsistent and unpredictable results. 369 NLRB No. 127, slip op. at 4–6 (collecting cases). By contrast, consistent application of *Wright Line* "promises more reliable, less arbitrary, and more equitable treatment of abusive conduct" than the Board's experience under the setting-specific standards. *Id.* at 10.

Misconduct, including abusive conduct of the sort featured in many setting-specific Board decisions, is analytically separable from Section 7 activity. See, e.g., *United States Postal Service*, 364 NLRB 701, 702 (2016) (employee called supervisor "an ass," unleashed a stream of profanity, forcefully stood up, stepped toward the supervisor, shook her finger within striking distance, and screamed that she could do or say anything she wanted); *Cooper Tire & Rubber Co.*, 363 NLRB at 1954–55 (picketing employee shouted racist taunts at black replacement workers). The *General Motors* Board recognized this by rejecting special standards for employee misconduct that occurred on the shop floor, the internet, or the picket line. 369 NLRB No. 127, slip op. at 8, n.19. Expecting employees to adhere to reasonable, neutrally applied rules of conduct when engaging in protected activity does not interfere with, restrain, or coerce them in the exercise of their rights under the Act. It does, however, ensure that employees who engage in misconduct in the course of Section 7 activity receive no greater protection than other employees who engage in misconduct. *See id.*, slip op. at 10. It follows that employees may not use their protected activity to shield themselves from the consequences of analytically separable misconduct that interferes with an employer's legitimate prerogatives to maintain order and respect in its workplace. By the same token, employers will not be subject to liability for enforcing legitimate and neutral rules

prohibiting misconduct committed in the course of Section 7 activity, unless they are unable to overcome evidence demonstrating that the protected activity motivated the discipline or discharge.

The consistent application of *Wright Line* across workplace settings thus prevents the Act from conflicting with federal antidiscrimination laws. Then-Member Kaplan identified this conflict in his dissent in *Lion Elastomers*, where he observed that courts have criticized the loss-of-protection standards and the EEOC had argued for the Board to abandon those standards. 372 NLRB No. 83, slip op. at 24–25. The EEOC had argued in its amicus brief that the loss-of-protection standards opened employers up to liability if they failed to take corrective action for harassing conduct. *Id.*, slip op. at 25. Employers should not need to choose between two avenues of potential liability when attempting to address workplace conflicts. By readopting *General Motors* and applying the *Wright Line* test consistently across its cases, the Board will bring its jurisprudence into greater harmony with the panoply of federal workplace laws, including those aimed at avoiding the harm caused by unlawful discrimination.

The Board often must revisit its precedent to meet its "responsibility to adapt the Act to the changing patterns of industrial life." *See NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266 (1975). Workplaces have changed considerably since the Board first developed its setting-specific jurisprudence, and experience has demonstrated that loss-of-protection standards under *Atlantic Steel*, *Pier Sixty*, and *Clear Pine Mouldings* led to unjust and inconsistent results as well as friction with other important employer and public policy concerns. The Board's historical acceptance that workers may permissibly exercise their Section 7 rights by resort to profanity, racist or sexist language, or violent or abusive misconduct should be relegated to the dustbin of twentieth-century "realities of industrial life." *See Consumer Power Co.*, 282 NLRB 130, 132 (1986). Regardless of the wisdom of this approach during its development, the reality now is that employers have an

acute interest in safeguarding their workplaces from threats of violence and in promoting just, equitable work environments free of invidious discrimination.[12]

The Board should no longer accept the fiction that employees are incapable of exercising their Section 7 rights without occasional resort to a "moment of animal exuberance," racist, sexist, or other epithets, or other misconduct. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). The supposed "leeway for impulsive behavior" afforded under the misguided setting-specific standards does not provide more robust protection to Section 7 activity; rather, it provides a shield for unprotected misconduct that threatens employers' ability to maintain discipline, exposes them to liability, and risks subjecting employees to harm. For example, in *Constellium Rolled Products*, 366 NLRB No. 131, slip op. at 2, the Board concluded that an alleged discriminatee did not lose protection of the Act by writing "whore board" on an overtime signup sheet on a bulletin board. The reviewing court denied enforcement, finding that the Board had not considered the employer's arguments that it had a duty to comply with federal and state equal employment laws. *Constellium Rolled Products*, 945 F.3d at 551–52. Similarly, in *Cooper Tire & Rubber Co.*, 363 NLRB at 1954–55, the Board ordered reinstatement of a locked-out employee who had been discharged after he directed racially stereotyped taunts at a van carrying African American replacement workers while on the picket line, misconduct that contravened the employer's anti-harassment policy and subjected the employer to potential liability for failing to prevent a hostile work environment under Title VII. By contrast, under the *Wright Line* standard,

[12] For example, the Occupational Safety and Health Administration's website recommends that employers establish a zero-tolerance policy toward workplace violence, *Workplace Violence – Overview*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, https://www.osha.gov/workplace-violence (accessed Aug. 20, 2026), and the U.S. Equal Employment Opportunity Commission provides guidance to employers on how to prevent harassment, including the use of corrective action, *Promising Practices for Preventing Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (accessed Aug. 20, 2026).

protected activity remains protected, and misconduct occurring in the course of such activity receives no special treatment. Thus, the approach in *General Motors* is more consistent with congressional intent across a wide array of protective legislation and less detrimental to industrial order. See *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942) (Board must refrain "from effectuat[ing] the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

As a society, we have come too far to return to a time when racial slurs, sexual harassment, and the use of derogatory terminology is protected, or encouraged, in ANY circumstance. Providing protection to those who engage in these types of behaviors only emboldens them to act in inappropriate ways, and to continue to push the limits of what is protected by engaging in even more outrageous conduct. It does not matter where, when, or in what setting racist, bigoted, discriminatory, hostile, or harassing actions occur – misconduct is misconduct, and should be treated as such to maintain physically and psychologically safe workplaces. Accordingly, the Board should overrule *Lion Elastomers* and readopt *General Motors*, providing a consistent and predictable framework for deciding whether an employer has unlawfully disciplined or discharged an employee because of the employee's protected activity.

ii. Unterwurzacher's Conduct Did Not Lose the Protection of the Act

Applying the General Counsel's proposed standard to this case – and as explained in more detail above – a *Wright Line* analysis shows that Respondent violated the Act as alleged. Specifically, the record makes clear that Unterwurzacher engaged in multiple instances of protected concerted activity, Respondent acted with express animus toward that activity, and Respondent failed to show that it would have taken the same action irrespective of that activity. Respondent spends precisely one paragraph arguing that Unterwurzacher's discharge was lawful

under a *General Motors* theory. In support of that argument, Respondent relies on the conclusory assertion that it would have "taken the same action for the same personal attack even absent any protected activity . . . ." (R. Brf. at 9). However, as discussed above, Respondent failed to adduce any evidence whatsoever to support this conclusion. Indeed, the evidence conclusively shows that other employees engaged in much the same behavior as Unterwurzacher and suffered no consequences at all. (ALJD at 11-12, 24).

C. The Board Should Overturn *Stericycle* in Favor of a Balanced and Common-Sense Approach

While the mere maintenance of the rules in this case is unlawful under the current controlling precedent set in *Stericycle*, 372 NLRB No. 113 (2023), that standard is fundamentally flawed. Instead of striking the congressionally mandated balance between safeguarding the rights of employees and rights of employers, the Board in *Stericycle* presumed unlawful interference whenever employer policies potentially interacted with even the most excessively broad interpretations of Section 7. Reinstating the balancing framework from *Boeing Co.*, 365 NLRB 1494 (2017), together with its practical assessment of whether a rule impacts employee rights under Section 7, would restrict only those rules that demonstrably coerce employees while allowing employers to maintain order, comply with legal obligations, and promote productive workplaces.

i. The Act Requires a Balance Between the Rights of Employees Under Section 7 and the Rights and Duties of Employers

The Board is tasked with faithfully interpreting the Act by ensuring its enforcement remains within the parameters established by Congress. Specifically, the rights guaranteed by Section 7, while vital to the achievement of the national labor policy established by Congress, are not absolute. As the Supreme Court held in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–98 (1945), the law requires "an adjustment between the undisputed right of self-organization

assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." Where necessary, the Board has a "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967). See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"). Cf. *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (emphasizing the Board's responsibility to balance the effect on Section 7 rights and the employer's asserted business justification). However, the Board abandoned its duty to balance or adjust these rights and interests when it overturned *Boeing* in favor of the current *Stericycle* standard.

ii. The Board's Decision in Stericycle Failed to Strike the Required Balance and Compounded that Failure by Adopting an Excessively Broad Interpretation of Section 7

In *Stericycle*, the Board held that when analyzing work rules, the General Counsel must prove that an employer's rule has a reasonable tendency to chill employees from exercising their Section 7 rights. 372 NLRB No. 113, slip op. at 2, 9–10. If an employee, who is understood to be economically dependent on the employer and who contemplates Section 7 activity, could reasonably interpret the rule to be coercive, the General Counsel has carried their burden and the rule is presumptively unlawful even if there is a reasonable non-coercive interpretation. *Id.* Although the employer's intent in creating the rule is immaterial, it may rebut the presumption of illegality by proving the rule advances legitimate and substantial business interests that the employer is unable to advance with a more narrowly tailored rule. *Id.*, slip op. at 2, 10.

Instead of striking a balance between employee rights and employer rights as required by the Court, the Board in *Stericycle* opted to find the former presumptively outweighs the latter except in very narrow situations. Regardless of the magnitude of the business interest, legal duty, or even the need to protect employees undergirding a rule, any potential interference with Section 7 rights will render that rule presumptively unlawful. This is not a standard that fairly balances competing legitimate interests; it is a standard that values the most attenuated Section 7 interest over the strongest of business or societal concerns. Congress never intended the Act to prevent employers from upholding safe and harassment-free workplaces or penalize companies for doing so. See *Republic Aviation*, 324 U.S. at 797 ("The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time."). By stretching the scope of Section 7 beyond its intended boundaries—and common sense—the *Stericycle* framework undermines employers' ability to establish essential policies that foster productivity, protect employees' safety, and maintain a respectful work environment.

Indeed, even the mere possibility of being able to rebut the presumption of illegality under *Stericycle* is largely illusory. As Member Kaplan pointed out in his dissent in *West Shore Home, LLC*, 372 NLRB No. 143, slip op. at 2 (2023), "no matter how narrowly tailored the rule, there could always be a rule that is ever so slightly more narrowly tailored."[13] Such a demand for linguistic perfection also fails to recognize the practicalities of designing the myriad rules, policies, and handbooks needed to run a business. The experience of the Board has been that it is largely impossible to craft reasonable rules and policies addressing a range of issues without having some

[13] Even in *Lutheran Heritage Village-Livonia*, the Board observed that work rules are necessarily general in nature and thus employers should not be required "to anticipate and catalogue in their work rules every instance in which [prohibited conduct] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB 646, 648 (2004). Regrettably, the Board in later cases under the *Lutheran Heritage* standard lost its bearing and began requiring something close to linguistic perfection. *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 1 (2019) .

ambiguity and overlap with one or more types of possible NLRA-protected conduct. *Boeing*, 365 NLRB at 1502, 1513 n.92.

Stericycle's failure to genuinely balance employer interests and the exercise of Section 7 rights undermines employers' statutory and legal duties under federal and state laws to maintain safe environments, investigate allegations of harassment, uphold respectful workplace standards, and safeguard confidential and proprietary information. *See Stericycle*, 372 NLRB No. 113, slip op. at 32 (Member Kaplan, dissenting). The *Stericycle* framework thereby creates a dilemma by forcing employers to either comply with various legal and regulatory requirements or risk having every workplace policy challenged as potentially violative of the Act, leaving employers unable to enforce essential workplace rules without facing legal uncertainty and litigation. The *Stericycle* framework has also made it increasingly difficult for employers to draft workplace policies with certainty, as nearly any rule may now be subject to challenge. This climate of regulatory uncertainty makes employers hesitant to uphold essential workplace standards for fear of having to litigate whether those standards could withstand scrutiny under the broadest possible interpretation of Section 7. Such uncertainty discourages investment while encouraging litigation and falls particularly hard on small businesses that may lack the resources to secure experienced labor counsel. *See* Anna Musquera & Scott Brennen, *Regulatory Uncertainty Is What Actually Holds Back Innovation*, Brookings (Apr. 20, 2026), https://www.brookings.edu/articles/regulatory-uncertainty-is-what-actually-holds-back-innovation ("[O]ne of the clearest and most consistent findings is that regulatory uncertainty discourages investment and innovation, especially among smaller firms.").

Compounding *Stericycle*'s failure to balance employee and employer rights, the decision also adopts an excessively broad interpretation of potential interference with Section 7 rights. As

Member Kaplan noted in his dissent, *Stericycle*'s version of the "reasonable employee" is an individual who is "predisposed to read into their employer's work-rules references to Section 7 activity where none exists, and who would not engage in protected concerted activity without first minutely examining each such rule set forth in their employee handbook." 372 NLRB No. 113, slip op. at 17. Moreover, *Stericycle's* version of the reasonable employee reads workplace rules in a vacuum. Thus, regardless of the context or evident purpose of a rule, or even basic common sense, the *Stericycle* standard presumes a rule unlawful anytime "an individual could possibly suspect that any isolated word or phrase in a rule that does not prohibit Section 7 activity might be interpreted to do so." *Id.*

D. The Board Should Overturn *Stericycle* in Favor of a New Standard Based on *Boeing*

Accordingly, the Board should overturn *Stericycle* and return to the objectively reasonable-employee and balancing elements of the *Boeing* test for determining when the mere maintenance of a facially neutral rule is unlawful.[14] As a threshold matter, the General Counsel must first prove that a facially neutral rule would in context be interpreted by an objectively reasonable employee to potentially interfere with the exercise of a Section 7 right. *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019). This standard is an objective one and looks solely at the wording of the rule or policy at issue. *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 6 n.14 (2019). Rules must be read from the perspective of "an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *LA Specialty*, 368 NLRB No. 93, slip op. at 2 (citation modified). Only if the General

[14] This new standard should also apply to the interpretation of arbitration agreements, see *Briad Wenco, LLC d/b/a Wendy's Restaurant,* 368 NLRB No. 72 (2019), and to rules and oral directives relating to keeping investigations confidential. See *Apogee Retail*, 368 NLRB No. 26 (2020).

Counsel meets this burden should the Board determine whether the nature and extent of the rule's potential reasonable effect on the exercise of NLRA rights outweighs the legitimate justifications associated with the rule. See *Boeing*, 365 NLRB at 1496. In conducting this evaluation, the Board should balance the employer's legitimate business justifications, along with societal interests or regulatory requirements underpinning the rule, against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with employee rights under the Act. See *id.*

i. Rules Must Be Read in Context From the Perspective of an Objectively Reasonable Employee

Importantly, a challenged rule should not be found unlawful merely because it could hypothetically be interpreted to potentially limit Section 7 activity or because the employer failed to eliminate all ambiguities from the rule. See *LA Specialty*, 368 NLRB No. 93, slip op. at 2 (citing *Boeing*, 365 NLRB at 1502). A requirement for perfection in rules drafting creates unnecessary conflict between the rights of employees and those of employers just by the shear breadth of rules that would be implicated. Linguistic precision is neither legally necessary nor realistic for every rule. *Id.* Simply because a rule or policy *could* reasonably be read to interfere with Section 7 rights does not mean an objectively reasonable employee *would* so interpret it. *Newmark Grubb Knight Frank*, 369 NLRB No. 121, slip op. at 2 (2020). How an objective, reasonable employee would interpret a rule or policy is largely dictated by the context of the rule. To analyze the context of a rule the Board "must refrain from reading particular phrases in isolation." *LA Specialty*, 368 NLRB No. 93, slip op. at 5 (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Instead, the Board must look to the context of a rule or policy in order to understand how an objectively reasonable employee would read it. This context can come from the explicit or implicit purpose of

a rule as it appears to an employee, from surrounding or similar sections, from examples given in the rule, from the rest of the rule at issue, from the industry or work setting, or from savings clauses.

One of the simplest ways a rule can make clear it does not reach Section 7 conduct is when the legitimate purpose of the rule is reasonably understandable upon reading, either because it is clearly stated or because the purpose can be readily inferred. For instance, in *Interstate Management Co. LLC,* 369 NLRB No. 84, slip op. at 4 (2020), the Board applying *Boeing* found that a rule listing employee names and contact information as types of confidential information would be understood as applying to the protection of the employer's private records, since both the preamble and concluding paragraph of the rule made clear its purpose was to safeguard the employer's information and information systems. An objectively reasonable employee would thus not read the rule as applying to their own use of names or contact information for Section 7 purposes. *Id.* In *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 3 (2021), the Board also applying *Boeing* held that because a policy against using the employer's name on social media clearly explained its purpose as attempting to control who spoke for the company, objectively reasonable employees would read the rule as applying to that purpose only, and not applying to employee use of the employer's name as part of Section 7 activity.

Broad statements can also be clarified by specific language or examples given elsewhere in the rule. For example, in *Motor City Pawn Brokers Inc.,* 369 NLRB No. 132, slip op. at 5 (2020), the Board applying *Boeing* held that an objectively reasonable employee would not read a rule's reference to "proprietary information . . . of employees" without taking into account the specific examples of confidential information listed in the document, none of which implicated Section 7. Likewise, in *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 2, the Board held that a broad rule against "inappropriate communications" was objectively reasonable because it fell in

an introductory paragraph that was followed by multiple lawful guidelines, and employees would not read the introduction in isolation. Also in *Medic Ambulance*, slip op. at 2–3, the Board held that a rule against disclosing "confidential or proprietary information regarding the company or your coworkers" would not be read by an objectively reasonable employee as applying to wages or terms and conditions of employment because the rule also gave examples of the types of information to which it referred, such as trade secrets and copyrights, none of which implicated wages or Section 7 matters.

Additionally, objectively reasonable employees would read a rule as a whole, not parse out a single clause or section and read it out of context with the broader rule, or purpose. *LA Specialty*, 368 NLRB No. 93, slip op. at 5. If an interpretation of a sentence would render other sentences in that rule superfluous or meaningless, that interpretation is not reasonable. See *id.* For example, in *Medic Ambulance*, 370 NLRB No. 65, slip op. at 4, a rule that only certain named human resources workers could give out information regarding "current or former employee compensation" was immediately preceded by a sentence regarding how to handle "[a]ll telephone calls regarding a current or former employee's position." The Board held that an objectively reasonable employee would put the two sentences together and understand that the policy refers to when someone calls the company to ask about particular employees, and not to the discussion of wages more generally.

Relevant context would also include the employer's industry or work setting because objectively reasonable employees would be familiar with heightened security, confidentiality, safety, or other concerns prevalent in a particular industry. See *Boeing*, 365 NLRB at 1508. For example, in *Argos USA LLC*, 369 NLRB No. 26, slip op. at 4 (2020), the Board applying *Boeing* found that concrete truck drivers, applying the "everydayness of their job" to understanding the purpose of a cell-phone ban, would reasonably recognize the dangers associated with talking or

texting while driving a 70,000-pound truck, and would not read the rule as a ban on discussing, taking photos, or recording their terms and conditions of employment while away from the facility. Notably, this rule would also generally align with state regulations on the use of a cell phone while operating a vehicle, and comply with federal DOT regulations.[15]

Finally, savings clauses included in rules or policies are extremely important in determining, and clarifying, whether a given rule interferes with Section 7 rights. Where a facially neutral rule clearly applies to protected conduct, a savings clause that is sufficiently prominent and specific can still save the rule. The savings clause need not explain "the broad panoply of rights" that employees enjoy under the Act to be effective, as the point of a savings clause is not to remove all ambiguity from a rule, but rather to simply clarify that regardless of what the rule says, it does not apply to the affected Section 7 activity. See *Maine Coast Memorial Hospital*, 369 NLRB No. 51, slip op. at 3 n.8 (2020) (quoting *First Transit, Inc.*, 360 NLRB 619 (2014)).

Where a facially neutral rule clearly forbids protected conduct, the savings clause must be sufficiently specific to be effective. This is where clear, plain language is important. Vague savings clauses, or those full of legalese, that would require employees to "meticulously determine the state of the law" themselves are likely insufficient to prevent the rule's interference with the exercise of NLRA rights. *Everglades College, Inc.*, 368 NLRB No. 123, slip op. at 3 (2019) (finding exception to arbitration agreement "where specifically prohibited by law" insufficient to save otherwise clear ban on filing claims with Board); *accord Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 3–4 (2019); see also *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or apply legal

[15] See Limiting the Use of Electronic Devices, 49 C.F.R. §§ 392.80–.82 (2026).

analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.").

Savings clauses also must be "sufficiently prominent" to save a rule that otherwise clearly applies to protected conduct. *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019). The prominence of a savings clause is judged by several factors, and does not necessarily require bolding, underlining, or other exceptional measures. For example, the prominence of a savings clause is increased if it is incorporated or referenced in the rule it saves,[16] immediately follows the rule it saves,[17] is in a relatively short document,[18] appears in its own paragraph,[19] or appears at the end of the document, right before the signature line.[20]

And while a less prominent or less specific savings clause may not be sufficient, alone, it should be considered along with other contextual information when determining how an objectively reasonable employee would read the rule. See *Shamrock Foods Co.*, 369 NLRB No. 140, slip op. at 1, 6–7 (2020) (holding that while savings clause was insufficiently prominent by itself to find a rule lawful, it was still a relevant consideration in interpreting the rule).

In sum, the Board should revert to the reasonable-employee standard articulated in *Boeing* and *LA Specialty* and apply a common-sense, contextual analysis that takes into consideration the purpose of a rule as it would be understood by an employee in that industry or work setting reading it, looks at surrounding or similar sections, includes examples given in the rule, does not read the rule in isolation, and takes into account any savings clauses. The ultimate question is not whether

[16] See *id.* (clause referenced in same paragraph).
[17] See *Anderson Enterprises, Inc.*, *d/b/a Royal Motor Sales*, 369 NLRB No. 70, slip op. at 3 (2020).
[18] See *San Rafael Healthcare & Wellness, LLC,* 369 NLRB No. 105, slip op. at 3 (2020) (document only three pages); *Four Seasons Healthcare & Wellness Center, LP, A California Limited Partnership*, 370 NLRB No. 8, slip op. at 3 (2020) (two-page and three-page documents).
[19] See *id.*
[20] See i*d*.

a trained labor lawyer reads the rule as limiting or prohibiting Section 7 activity, it is whether the reasonable employee reads it in that way.

ii. The Board Must Strike a Careful Balance to Safeguard Both Employer and Employee Rights and Interests

Where a rule, as read by an objectively reasonable employee, interferes with Section 7 rights, the Board should strike a careful balance between that right and the rights and duties of the employer. Unlike the standard articulated in *Stericycle*, a balance that properly weighs the rights and needs of employers will necessarily entail the possibility that in a particular case, a challenged rule may be lawful to maintain even though it limits the exercise of Section 7 rights to some extent because the legitimate employer interests it advances outweigh that limitation. *Stericycle*, 372 NLRB No. 113, slip op. at 17 (Member Kaplan, dissenting). The Board frequently balances legitimate employer needs against Section 7 rights in other situations. See *Our Way, Inc.*, 268 NLRB 394, 394–95 (1983) (balancing the rights of employees, employers, and unions to find ban on soliciting during working time lawful); *GTE Lenkurt, Inc.*, 204 NLRB 921, 921–22 (1973) (holding lawful no-access rule after balancing employer and employee rights). Similarly, when analyzing a rule, the Board must balance the employer's legitimate business justification for the rule against the rule's potential chilling effect on the exercise of Section 7 rights at issue.

Indeed, as discussed above, the Supreme Court has recognized on multiple occasions that employers have a legitimate right to discipline employees and control their businesses. See *Republic Aviation*, 324 U.S. at 797–98; *Great Dane Trailers*, 388 U.S. at 33–34; *Erie Resistor*, 373 U.S. at 229. Societal interests should also play a role, as they did in *Flagstaff Medical Center*, where the Board applying *Lutheran Heritage* upheld a no-photography rule at a hospital in part because the rule implicated "weighty" patient confidentiality interests. See 357 NLRB 611, 659, 663 (2011), *petition for review granted in part and denied in part*, 715 F.3d 928 (D.C. Cir. 2013).

Those societal interests are also served by rules or policies that seek to comply with an employer's legal or regulatory duties. It is well established that the Board may not "wholly ignore other and equally important Congressional objectives," as the "entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). This should be especially true when the legal or regulatory scheme the rule seeks to enforce is for the benefit of the employees themselves. See *Apogee*, 368 NLRB No. 26, slip op. at 6 (applying *Boeing*, balancing Section 7 with EEOC policies against harassment).

iii. However, the Board Should Dispense with Boeing's *Categories*

Although the Board should readopt the balancing and reasonable-employee standards articulated in *Boeing* and its progeny, the attempt to categorize rules should be abandoned. While *Boeing*'s classification of rules into three or four categories[21] was a laudable effort to bring predictability and clarity to an area of law rife with the disorder and inconsistency prevalent under the *Lutheran Heritage* standard, the *Boeing* categories ultimately caused their own confusion among the labor-management bar. Moreover, while some rules lend themselves to broad categorization—like rules banning discussion of wages—other rules do not. For instance, the Board has variously categorized rules making salary information confidential as Category 1 or Category 3, depending on the specific context of the rule at issue. Contrast *Medic Ambulance*, 370 NLRB No. 65, slip op. at 4 (finding rule banning sharing compensation information lawful), and *Shamrock Foods Co.,* 369 NLRB No. 140, slip op. at 5 (holding lawful rule making compensation

[21] While the Board initially adopted three categories—(1) rules that are always lawful, (2) rules warranting individual scrutiny, and (3) rules that are always unlawful—in *LA Specialty* the Board further divided Category 1 into Category 1(a) rules that are always lawful because they have no impact on Section 7 rights, and Category 1(b) rules that are always lawful despite having an impact on Section 7 because compelling employer interests will always outweigh the implicated Section 7 rights. *Boeing*, 365 NLRB at 1496–97; *LA Specialty*, 368 NLRB No. 93, slip op. at 2 n.2; *cf. Boeing*, 365 NLRB at 1508 n.77 (Member Kaplan, in concurrence, stating he would have preferred a four-part framework).

schedules confidential), with *Lowe's Home Center*, *LLC*, 368 NLRB No. 133, slip op. at 1 n.1 (2019) (finding unlawful rule listing "salary information"), *enforced*, 850 F. App'x 886 (5th Cir. 2021). As these cases illustrate, because the *Boeing* standard rightly puts such emphasis on the specific context of a given rule in determining whether it interferes with Section 7 rights, any attempt to categorize many types of rules will either require ignoring the specific context of that rule or result in extremely narrow categories that include a rule's specific context and are thus not generally useful. Thus, the Board should dispense with categories and analyze rules on their own merits.

E. Under the Proposed New Standard, Only Respondent's Confidentiality Rule is Unlawful

Applying the proposed modified *Boeing* standard to the rules here, we urge the Board to find lawful the three rules directing employees to "Frame opinion, not demands," prohibiting "*ad hominem* attacks," and prohibiting communications with a negative impact. As further explained below, objectively reasonable employees would not read these three rules as applying to the exercise of Section 7 rights, and, in any event, Respondent's rights and legal obligations served by these rules would outweigh their impact on Section 7 rights.[22] But the fourth rule, involving confidentiality, is unlawful because objectively reasonable employees would understand it to restrict communications regarding wages, and the adverse impact on this core Section 7 right outweighs Respondent's interests in maintaining the rule.

i. The Rule Directing Employees to "Frame opinions, not demands" is Lawful

As noted above, Respondent maintains a rule directing employees to "Frame opinions, not demands: It's okay to disagree. It's not okay to make demands of a team or teammate based on

[22] To the extent these rules were unlawfully applied to protected concerted activity, that does not render the rules unlawful themselves. See *AT&T Mobility, LLC*, 370 NLRB No. 121 (2021).

your opinion. Acknowledge what's your opinion vs. mandating a change or action." (Jt. Exh. 5 at 2.) Under the General Counsel's proposed *Boeing*-based standard, this provision is facially lawful.

Under the first step of the proposed standard, the rule must be analyzed to determine whether an objectively reasonable employee would read the rule as applying to Section 7 activity. As the Board observed in *Boeing* itself, workplace civility rules reflect "common-sense standards of conduct" that advance substantial employee and employer interests and would not reasonably be interpreted to prohibit or interfere with the exercise of NLRA rights. 365 NLRB at 1497 n.15. See also *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 459, 470-71 (2014) (applying *Lutheran Heritage* to find rule prohibiting "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests" to be facially lawful). Although Section 7 activity sometimes involves the making of demands, objectively reasonable employees would understand this rule, in context, as seeking to foster harmonious interactions and relationships rather than restricting Section 7 activity. Notably, the rule is part of a list of directives emphasizing the importance of mutual respect in the workplace, including: "[i]t's up to every Atlassian to hold a high bar on how we communicate with each other"; "[w]e have a role to play in ensuring Atlassian is an environment where we can all do our best work, and where every Atlassian feels safe and respected"; and "we are all one team. We deserve one another's respect. Kindness costs nothing. Apply it liberally!" Accordingly, a reasonable employee would not think this rule applies to Section 7 activity.

But even if the rule were found to have some impact on Section 7 activity, it would be outweighed by Respondent's substantial interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity or other important goals. Employers must be able to maintain safe and civil workplaces, and Respondent's interest in fostering civility is

particularly strong because its workplace depends on close teamwork—a common quality in the software industry. By contrast, the impact on Section 7 activity would be comparatively slight. In this regard, employees are fully capable of exercising their Section 7 rights while recognizing that a supervisor or coworker may not agree with their viewpoint.

ii. The Rule Against "ad hominem attacks" is Likewise Lawful

For similar reasons, Respondent's rule prohibiting "*ad hominem* attacks" is facially lawful under the proposed standard. In its entirety, the rule prohibits: "Name-calling, inappropriate jokes, passive aggression, threats or hostility, trolling, bullying, baiting, spreading vitriol (bitterly harsh or caustic language/criticism), defamatory or *ad hominem* attacks (those which target the character, motive, or some other attribute of the person making an argument rather than attacking the substance of the argument itself)." (Jt. Exh. 5 at 2.) Reasonable employees would read the rule, as a whole, with the commonsense understanding that its purpose is to prohibit toxic behavior; they would not parse out the phrase "*ad hominem* attacks," conjure up a scenario in which Section 7 activity may incorporate an *ad hominem* attack, and thereby read into the rule "references to Section 7 activity where none exists." *Stericycle*, 372 NLRB No. 113, slip op. at 17 (Member Kaplan, dissenting). *See also LA Specialty*, 368 NLRB No. 93, slip op. at 5.

Nevertheless, even assuming the rule is found to affect the exercise of Section 7 rights, the rule's impact is comparatively slight. Employees are certainly capable of exercising their Section 7 rights without resorting to *ad hominem* attacks, and the Employer's strong interest in maintaining a safe, harmonious, and civil workplace and prohibiting abusive language in its workplace outweighs the rule's limited infringement on the exercise of those rights.

iii. The Rule Against Communications with a Negative Impact is Lawful

Respondent's rule prohibiting "[c]ommunications or comments that could negatively impact Atlassian partners, shareholders or customers" (Jt. Exh. 5 at 2) is also lawful under the proposed standard. A rule's context largely dictates how an objectively reasonable employee would read a rule. The rule at issue is placed in a list of eight rules, including the facially lawful "*ad hominem* attacks" provision addressed above, and immediately follows prohibitions on "derogatory blanket statements about groups or categories of people"; "[w]ritten or verbal words, images, or symbols with a literal or associated meaning that is discriminatory toward a group of people, or associated with hate groups or speech"; and "[w]ritten or verbal words, images, or symbols that relate to racism, violence, or other harmful dialogue." As such, an objectively reasonable employee would understand that the rule addresses communications implicating Respondent's legal obligation to maintain a safe workplace free of unlawful harassment and which would otherwise harm Respondent's business reputation. See *Medic Ambulance Service*, 370 NLRB No. 65, slip op. at 2 (rule against "inappropriate comments" lawful, in context, because it was followed by multiple lawful guidelines).

Moreover, if the rule were found to affect the exercise of Section 7 rights, the balance favors Respondent. Respondent has a vital interest in maintaining a safe, civil, and harassment-free workplace, and employees are well capable of exercising their Section 7 rights without resorting to these types of hateful, discriminatory, and negative communications.

iv. The Confidentiality Rule is Unlawful

Respondent's rule prohibiting the disclosure of "confidential, sensitive, private, or personal information" (Jt. Exh. 5 at 2) would be unlawful under the proposed *Boeing*-based standard. Although Respondent's Code of Business Conduct & Ethics defines confidential information to

include: "all non-public information that might be of use to competitors or harmful to Atlassian or its customers if disclosed," (Jt. Exh. 6 at 25), this definition is immediately followed by examples of confidential information, including an example regarding employee compensation:

At the least, Atlassian Confidential Information includes information such as Atlassian's proprietary source code, nonpublic technical information about Atlassian systems and products, nonpublic information about Atlassian's product roadmap or partnerships, nonpublic financial information, and *nonpublic information relating to employees and compensation*." (Emphasis added.)

Objectively reasonable employees would understand that "nonpublic information relating to employees and compensation" covers employee wage discussions. Although the definition itself largely focuses on the risk to Respondent's business from competitors, employee compensation is unrelated to this risk. Moreover, employee compensation is of a different nature than the other examples, all of which reference legitimately proprietary information. As such, these contextual elements would not alter an employee's reasonable reading of the rule as covering wage discussions. Indeed, under similar facts, the Board applied *Boeing* to find restrictions on the disclosure of employee compensation unlawful. See *Lowes Home Centers*, *LLC*, 368 NLRB No. 133, slip op. at 1 n.1, 3, 5 (finding unlawful a rule describing "salary information" as confidential, where it was listed as an example alongside "customer, budget, financial, credit, marketing, pricing, supply cost, personnel, [and] medical records" information, and the rule defined confidential information as "non-public information that might be of use to competitors of the company, or harmful to [the company], its suppliers or customers, if disclosed"). Notably, here, the presence of "nonpublic financial information" in the list of examples would make "nonpublic information relating to employees and compensation" superfluous if the latter merely meant

employees' direct-deposit banking information or employer formulae for calculating employee pay. Contrast *Shamrock Foods Co.*, 369 NLRB No. 140, slip op. at 5 (rule listing "compensation schedules" as confidential information would be understood, in context, as information other than employee wages); *Argos USA LLC*, 369 NLRB No. 26, slip op. at 2-3 (2020) (rule listing as confidential "*Argos'* . . . earnings" and "*Argos'* . . . employee information," when read as a whole alongside numerous examples of clearly proprietary employer information, would be understood as referencing employer revenues, profits, and staffing information rather than employees' wages or contact information).

Employers have a legitimate interest in restricting employees' unauthorized access to, and dissemination of, information stored in their employer's confidential records, including salary information contained in such records. However, the Respondent's rule fails to convey to a reasonable employee that "information relating to employees and compensation" is limited to such information stored in Respondent's confidential records or only applies to the subset of employees who have special access to such records. See *Lowe's Home Centers, LLC*, 368 NLRB No. 133, slip op. at 1 n.1 (rule's limitation of covered proprietary information to information "entrusted" to employees was insufficient to convey to a reasonable employee that restriction on disclosing "salary information" only applied to those employees with special access to employer's confidential records).

On balance, the rule's adverse effect on the exercise of Section 7 rights outweighs Respondent's business interest in maintaining the rule. The rule has a serious adverse impact on the central NLRA right of employees to concertedly discuss wages. Respondent has no business interests that outweigh that right. Accordingly, this rule is unlawful under the proposed standard.

In sum, when determining whether the mere maintenance of a facially neutral rule is unlawful, the Board should overturn *Stericycle* and return to the common-sense standards articulated in *Boeing* and its progeny. However, in keeping with the contextually specific analysis of the *Boeing* standard, the Board should abandon the attempt to create broad categories of rules as always lawful or unlawful. Applying that new standard here only Respondent's confidentiality rule is unlawful.

F. The Board Should Overrule *McLaren Macomb*

In 2020, the Board formulated a new approach to severance agreements in *Baylor*, 369 NLRB No. 43, as applied and clarified in *IGT*, 370 NLRB No. 50 (2020). Under that precedent, proffering a severance agreement to an employee would not violate Section 8(a)(1)—even where it limited Section 7 activity on its face—if the agreement: (1) was entered into voluntarily; (2) only applied to post-employment activities and had no impact on employment terms or accrued benefits; and (3) was offered under non-coercive circumstances, that is, no employees were unlawfully discharged for protected conduct, the employer had not discriminated within the meaning of Section 8(a)(3), and no other circumstances existed that would tend to infringe on the Section 7 rights of the discharged employees or their co-workers.[23] *Baylor*, 369 NLRB No. 43, slip op. at 1-2; *IGT*, 370 NLRB No. 50, slip op. at 2. Applying this standard, the Board found the proffer of the following provisions to be lawful: a non-assistance clause (*Baylor*), a confidentiality-of-employment-information clause (*Baylor*), and non-disparagement clauses (*Baylor* and *IGT*).

In so doing, *Baylor* overruled several cases to the extent they held that certain provisions are categorically unlawful to proffer, concluding instead that the proffer of such provisions can be

[23] *IGT* held that an unlawful refusal to bargain over a subcontracting decision and threats of loss of overtime did not establish discriminatory or coercive circumstances so as to render the non-disparagement clause unlawful. 370 NLRB No. 50, slip op. at 2 n.7.

unlawful only when accompanied by unlawful discharges or other coercive conduct. In this regard, *Baylor* overruled *Clark Distribution Systems, Inc.,* 336 NLRB 747 (2001), to the extent it held that offering a severance agreement with a non-assistance clause *invariably* violates the Act. *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6. Thus, *Baylor* limited *Clark*'s applicability to cases where a non-assistance clause is offered to employees who had been unlawfully discharged. *Id.* In the Board's view, the mere proffer of such a provision only "*reasonably* tend[s] to interfere with the free exercise of employee rights under the Act" if an employer has shown that it harbors animus toward Section 7 activity and is willing to terminate employees on that basis. *Id.* For the same reasons, the Board also overruled *Metro Networks*, 336 NLRB 63 (2001), which involved unlawful non-assistance and confidentiality-of-employment-information clauses, and *Shamrock Foods, Co*., 366 NLRB No. 117 (2018), which involved unlawful non-disclosure-of-confidential-business-information and non-disparagement clauses. *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6. Thus, *Baylor* likewise limited *Metro Networks*' and *Shamrock*'s holdings to situations where employees had been discharged in violation of the Act or where there were other coercive circumstances.

Baylor adopted the above standard in lieu of former General Counsel Peter Robb's proposal to apply longstanding precedent involving settlement agreements. *Id.*, slip op. at 2 n.7. *Baylor* distinguished that precedent on the bases that the severance agreements there were not related to any labor dispute and the challenged provisions did not affect employees' terms and conditions of employment. *Id.*

In *McLaren Macomb*, 372 NLRB No. 58, slip op. at 1 (2023), the Board explicitly overruled *Baylor* and *IGT* and held that "unlawful provisions in a severance agreement proffered to employees have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under the Act" even absent other, related unfair labor practices. Provisions would

be unlawful if any relinquishment of Section 7 rights was not narrowly tailored. *Id.*, slip op. at 4. In effect, however, the Board considered any "chilling tendency" to be a "relinquishment" of rights. *Id.*, slip op. at 8.

Accordingly, the Board found that the employer unlawfully proffered a severance agreement offering payments to 11 permanently furloughed employees in exchange for, among other things, a release of claims arising out of their employment or termination of that employment as well as the following provisions:

> Confidentiality Agreement. The [e]mployee acknowledges that the terms of this [a]greement are confidential and agrees not to disclose them to any third person, other than [their] spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> Non-Disclosure [Non-Disparagement]. At all times hereafter, the [e]mployee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the [e]mployee has or had knowledge of, or involvement with, by reason of the [e]mployee's employment. At all times hereafter, the [e]mployee agrees not to make statements to [e]mployer's employees or to the general public which could disparage or harm the image of [e]mployer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

Id., slip op. at 1-2.

The Board began its analysis by explaining that before *Baylor*, the Board "focused on the language of the severance agreement to determine whether proffering the agreement had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of Section 7 rights," citing the prior decisions in *Metro Networks*, 336 NLRB 63, *Clark,* 336 NLRB 747, and *Shamrock*, 366 NLRB No. 117. *McLaren Macomb,* 372 NLRB No. 58, slip op. at 3. The *McLaren Macomb* Board noted that those decisions found the proffer of a facially unlawful severance agreement to be unlawful without relying on the presence of additional unlawful employer conduct. *Id*. *Baylor*

and *IGT* abandoned that approach and "shifted focus instead to the circumstances under which the agreement was presented to employees." *Id*., slip op. at 3-4.

The *McLaren Macomb* Board reasoned that *Baylor* and *IGT* were "flawed in multiple respects," particularly because (1) the absence of other unfair labor practices does not eliminate the chilling effect of a facially unlawful severance agreement, (2) the *Baylor* and *IGT* Boards erred when considering employer animus because Section 8(a)(1) involves an objective test, and (3) those decisions provided no policy explanation for their change in law. *Id*., slip op. at 4-5.

In addition, the Board emphasized the "broad scope and the wide protection to employees by Section 7." *Id*., slip op. at 6. It underscored that such rights extend to *former* employees and that these rights may be exercised via channels outside the immediate employee-employer relationship. *Id*. (emphasis added). It is "through the lens of this broad grant of rights and the Board's duty to protect them" that severance agreements should be scrutinized. *Id*., slip op. at 6-7. Under this standard, "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights." *Id*., slip op. at 7. The Board further explained that "[i]nherent in any proffered severance agreement requiring workers not to engage in protected concerted activity is the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement." *Id*., slip op. at 7, 10 n.51 ("coercion . . . inherent in the agreement itself"). In the same vein, although the majority agreed that a work rules-type analysis was inapt, it rejected the dissent's proposition that severance agreements are "inherently less coercive" than overbroad work rules. *Id*., slip op. at 7 & n.36, 10 n.51. It reasoned that a "broad voluntary waiver of statutory rights undermines the public purposes of the Act, which depend on the freedom of all employees to

engage in Sec. 7 activity, to support each other in doing so, and to assist the Board in vindicating employee rights under the Act." *Id*., slip op. at 10 n.51.

Applying its new standard, the Board concluded that the non-disparagement and confidentiality-of-contract-terms provisions at issue were unlawful and that the employer violated Section 8(a)(1) by proffering the severance agreement to its furloughed employees. *Id*., slip op. at 7-8. The Board concluded that the non-disparagement provision contained a "far-reaching proscription"—not even limited to past employment issues—that effectively prohibited the signatory from making any "statements to [the] [e]mployer's employees or to the general public which could disparage or harm the image of [the] [e]mployer." This "comprehensive ban" would encompass "[p]ublic statements by employees about the workplace" that are "central" to the Act and was not cabined to disparaging statements that would lose the protection of the Act under *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard Broad. Co*.), 346 U.S. 464 (1953). 372 NLRB No. 58, slip op. at 8.[24] In addition, the Board viewed the ban as an "extreme circumscription" of statutory rights in that it would effectively prohibit cooperation with both the Board's investigation and litigation of unfair labor practices as well as efforts by furloughed employees to raise or assist complaints about the employer with their co-workers, the union, the media, or federal agencies. *Id*., slip op. at 8 & n.41.

Similarly, the Board found the confidentiality-of-contract-terms provision broadly forfeited statutory rights because it prohibited disclosing the severance's terms "to *any* third person." *Id*., slip op. at 8. The Board interpreted this language to preclude the signatory from assisting the Board's investigation into the lawfulness of the agreement and discussing the terms

[24] The Board further noted that the ban was sweeping in that it applied to statements made to the employer's "parents and affiliated entities and their officers, directors, employees, agents and representatives" and contained no temporal limitation. 372 NLRB No. 58, slip op. at 8.

of the agreement with the union, former employees in the same predicament deciding whether to accept the deal, and even future co-workers. *Id*., slip op. at 8-9. In other words, it treated the clause as having the "same deterrent effect as the explicit non-assistance provision found unlawful in *Clark*." *Id*., slip op. at 8 n.45. In finding this clause to be an overbroad waiver of rights, *McLaren Macomb* overruled two cases—*Shamrock*, 366 NLRB No. 117, discussed above, as well as *S. Freedman & Sons*, 364 NLRB 1203 (2016), *enforced mem. per curiam*, 713 F. App'x 152 (4th Cir. 2017)—to the extent they found "broadly worded" confidentiality-of-contract-terms provisions to be lawful, reasoning that those provisions would impair employees' Section 7 rights in precisely the same ways as the one in *McLaren Macomb*. 372 NLRB No. 58, slip op. at 9 & n.48.

The *McLaren Macomb* majority disagreed with then-Member Kaplan's partial dissent, which argued, among other things, that the Board should adhere to *Baylor* and *IGT* and that the majority erroneously applied a work rules analysis.[25] *Id*., slip op. at 10, 12-15. The majority also rejected Kaplan's assertion that *Baylor* and *IGT* concerned "facially neutral" provisions because the Board in those cases never analyzed the language of provisions at issue. *Id*., slip op. at 9-10, 13 n.4, 14-15.

The Board should overrule *McLaren Macomb*[26] and analyze severance agreements in a way that protects employees' Section 7 rights while honoring the Board's longstanding policy favoring private resolution of workplace disputes. To accommodate these goals, the Board should

[25] Then-Member Kaplan only partially dissented in *McLaren Macomb* because the severance agreement was the product of direct dealing, which provided sufficient coercive circumstances to render the proffer unlawful under *Baylor* and *IGT*. 372 NLRB No. 58, slip op. at 12, 14.

[26] Chairman Murphy and Member Mayer have indicated that they would be open to overruling *McLaren Macomb* once they have a three-member majority. *Prime Communications, LP*, 374 NLRB No. 88, slip op. at 1 n.1 (2026).

only find severance agreements, or their proffer, to be unlawful if they contain an *explicit* waiver of Section 7 rights that is not narrowly tailored. Respecting parties' private agreements, including the severance agreements at issue here, unless they actually contain an explicit overly broad forfeiture of statutory rights furthers the Board's bedrock policy favoring private resolution of potential workplace disputes through settlements, enables parties to agree to commonplace clauses, and promotes agreements that benefit employees while protecting employers' legitimate business interests. Cf. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (although not "absolute," freedom of contract is one of the "fundamental policies" under the Act).

Applying the General Counsel's proposed standard, the Board should conclude that the Respondent violated Section 8(a)(1) by proffering the severance agreement because the non-disparagement provision is facially unlawful inasmuch as it contains an unlawful non-assistance clause. However, the Board should find the confidentiality-of-contract-terms provision to be facially lawful and therefore lawfully proffered. Although the General Counsel prefers this approach to returning to *Baylor* and *IGT*, if the Board is not persuaded by her proposal, it should return to those precedents.

i. Severance Agreements Serve the Public Interest by Fostering Private Resolution of Disputes

As a critical starting point, the Board should evaluate severance agreements through the lens of its longstanding policy "favor[ing] 'private, amicable resolution of labor disputes, whenever possible.'" *S. Freedman*, 364 NLRB at 1204 (quoting *Hotel Holiday Inn De Isla Verde*, 278 NLRB 1027, 1028 (1986)), *overruled by McLaren Macomb*, 372 NLRB No. 58; see *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944) ("the Board has from the very beginning encouraged compromises and settlements"). Severance agreements commonly contain a broad release of claims against the employer as a quid pro quo for the severance payment because such agreements

are a means of avoiding potential litigation. See *Baylor*, 369 NLRB No. 43, slip op. at 3 (severance agreement included release of claims); *IGT*, 370 NLRB No. 50, slip op. at 1 (same); *Regal Cinemas*, 334 NLRB 304, 305 (2001) (same), *enforced*, 317 F.3d 300 (D.C. Cir. 2003); *Hughes Christensen Co.*, 317 NLRB 633, 633-34 (1995) (same), *enf. denied on other grounds*, 101 F.3d 28 (5th Cir. 1996); *Phillips Pipe Line Co.*, 302 NLRB 732, 732 (1991) (same); LHH, *Why Do Companies Offer Severance Packages?*, Feb. 13, 2025, https://www.lhh.com/en-us/insights/why-companies-offer-severance-pay (survey of human resources leaders shows that "reducing litigation risk remains an important factor in severance policies" and "[c]ompanies typically tie severance benefits to the signing of release agreements, helping protect the organization from potential legal challenges while ensuring departing employees receive meaningful support"). Thus, in the case of both potential and pending claims, the Board's policy favoring private agreements helps parties achieve labor peace, the fundamental goal of the NLRA. Cf. *Independent Stave Co.*, 287 NLRB 740, 743 (1987) (settlements allow parties to side-step "the very risks that [the private parties] have decided to avoid," allowing them to "reach an early restoration of industrial peace, which . . . is a fundamental aim of the Act"). Moreover, because they are designed for similar aims, the Board is often called upon to adjudicate the lawfulness of the same central provisions in settlement and severance agreement cases—such as a release of claims, confidentiality, and non-disparagement clauses—provisions that are included as standard practice in many settlement and severance agreements.[27] Accordingly, it is unsurprising that the Board has applied its severance

[27] See, e.g., *Drafting a Settlement and General Release Agreement: Single Plaintiff Employment Dispute Checklist*, Practical Law Checklist 9-522-0993 (available on Westlaw) (listing common employment settlement agreement terms as including release of claims, confidentiality, and non-disparagement); *Breach of a Non-Disparagement Clause*, 13 Bus. & Com. Litig. Fed. Cts. § 144:42 (5th ed.) ("employment severance agreements . . . and contracts to settle pending litigation often include non-disparagement clauses").

agreement caselaw when analyzing settlement agreements, and vice versa. See, e.g., *S. Freedman*, 364 NLRB at 1204 (in settlement context, relying on principles from severance cases, *Clark*, 336 NLRB 747, and *Metro Networks*, 336 NLRB 63; *Shamrock*, 366 NLRB No. 117, slip op. at 3 n.12 (applying *S. Freedman* in severance context).

Moreover, as a practical matter, the Board's role in this area should be circumscribed. The Board should not view itself as the arbiter of every private agreement in the workplace that *could* be read to encompass Section 7 rights under the broadest possible interpretation. See *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) ("[a]s an administrative agency the Board should not . . . seek to rule on every dispute that may fall within the letter of the Act"), *enforced sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). By inserting itself into private negotiations between parties, including the severance agreements at issue here, and finding common provisions to be universally unlawful, the Board does a disservice to the public. Scrutinizing severance clauses to such an extreme degree hurts employer interests, especially their ability to amicably resolve potential litigation, and employee interests by preventing them from entering into agreements they otherwise would have absent an overreading by a completely uninvolved party. Such agreements, which are negotiated as an employee exits a company, have common (often standard) industry provisions meant to avoid potential disputes unrelated to the NLRA. For example, employers understandably desire some post-employment protections from their former employees given that they no longer owe a duty of loyalty and may harbor ill will toward the company depending on the circumstances of their departure. See *Hawaii Tribune Herald*, 356 NLRB 661, 661-63 (2011) (*Jefferson Standard* concerns a "duty [of loyalty] possessed by current employees"), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976) ("wholly natural for an employee to react with some vehemence to an unlawful

discharge"), *enforced*, 548 F.2d 391 (1st Cir. 1977); *see also Why Do Companies Offer Severance Packages?*, *supra* p. 12 ("In an era where company reputations can be made or broken on social media and employer review sites, how organizations treat departing employees significantly impacts their ability to attract future talent.").

The Board's hyper-scrutiny of severance agreements can also hurt employee interests, especially given that employees do not "view every employer document . . . through the prism of Sec[tion] 7." *IGT*, 370 NLRB No. 50, slip op. at 2 n.8. Departing employees often rely on severance payments to make ends meet during a potential gap in employment. See *Why Do Companies Offer Severance Packages?*, *supra* p. 12. An employer's demonstrated willingness to offer severance agreements further provides current and prospective employees with peace of mind in uncertain economic times that they too would have a cushion if they experience job loss. *Id.* The Board's hyper-regulation of severance agreements thus becomes an obstacle for parties trying to get the benefit of a deal that is not generally designed (and is not understood) to constitute a waiver of Section 7 rights.

ii. The Board Should Overrule McLaren Macomb and Only Find Severance Agreements, or their Proffer, to be Unlawful if they Contain an Explicit Waiver of Section 7 Rights that is Not Narrowly Tailored

a. Explicit Employee Waivers of the Right to Assist Other Employees with their Claims Before the Board or File their Own Future Claims Are Not Narrowly Tailored

In light of these policies and practical concerns, the Board should overrule *McLaren Macomb* and only find severance agreements, or their proffer, to be unlawful if they contain an explicit waiver of Section 7 rights that is not narrowly tailored. Under this approach, many common severance provisions would be lawful. For example, a departing employee's waiver of their own present NLRA rights would be narrowly tailored, and thus lawful. In contrast, a

severance agreement that explicitly waives the departing employee's Section 7 rights to assist other employees before the Board or file their own future claims would be overbroad and thus unlawful.

Indeed, the Board has long found its ability to effectively enforce the Act is infringed upon by overbroad employee waivers of the right to assist *other* employees with *their* claims. This Section 7 right—the right to cooperate with the investigation and prosecution of unfair labor practices—continues to be important at the post-employment stage. The Supreme Court has made clear that "'all persons with information about [unfair labor] practices [must] be completely free from coercion against reporting to the Board'" and that such freedom is necessary to protect the Board's "channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967)). Former employees often have valuable information to share with Board agents and are especially important resources when current employees are too afraid of possible retaliation to cooperate with the Board. See, e.g., *Flexsteel Industries,* 316 NLRB 745, 745, 749 (1995) (judge credited former employee witness because he had "no reason to lie" and noted that current employees must testify "adversely to their pecuniary interest") (cited repeatedly for these propositions), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) ("the danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage"). Thus, the Board has found unlawful severance agreements barring employees from lending assistance to others' claims, reasoning that such waivers did not arise from the facts giving rise to the settlements. For example, in *Metro Networks,* 336 NLRB at 64, 67 & n.20, the Board found, with former Chairman Hurtgen agreeing, that a non-assistance

provision was unlawful because the promise not to "assist or otherwise participate, except as may be required by law, in any claim . . . [or] investigation . . . of any kind which relates to any matter that involves [the employer]" would have prohibited the employee from voluntarily assisting other employees with matters under the Act. Likewise, in *Clark,* 336 NLRB at 748, an inaptly named "confidentiality" provision in a severance agreement was found unlawful because it contained a ban on employees "voluntarily appear[ing] as a witness, voluntarily provid[ing] documents or information, or otherwise assist[ing] in the prosecution of any claims . . . against the company," thereby barring them from assisting a Board investigation of a claim filed by another individual.[28]

Similarly, the Board has found that waivers were unlawfully overbroad if they waived the right to engage in *future* Section 7 activity. For example, in *Ishikawa Gasket America*, the employer violated Section 8(a)(1) based on language in a separation agreement prohibiting the employee from engaging in, among other things, "any conduct which is contrary to the [c]ompany's interests in remaining union-free" for one year post-employment. 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). The Board explained that "future rights of employees as well as the rights of the public may not be traded away in this manner." *Id.* at 176 (quoting *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973)). The Board also considered a release of claims lawful where it pertained to existing or pending claims and did not reach future incidents. See, e.g., *Phillips Pipe Line,* 302 NLRB at 732-33 (release lawfully waived right to file Board charge where it was "clear from the language of the release itself that it applies only to claims . . . resulting from circumstances predating the execution of the release"); *Coca-Cola Bottling Co.*, 243 NLRB 501, 502 (1979) (lawful settlement of employee suspension where release

[28] As discussed in the Background section, *Baylor* overruled and limited *Clark* and *Metro Networks* to the extent they held that non-assistance clauses are categorically unlawful, even absent unfair labor practices that reflect hostility to employee rights. 369 NLRB No. 43, slip op. at 2 n.6.

interpreted not to apply to future claims); *Mandel*, 202 NLRB at 119 (employer unlawfully conditioned reinstatement on forbearance from future charges and concerted activities).

Indeed, the Board narrowly construed a release of claims unless it was clear from the language and surrounding context that the release waived the filing of future claims over future incidents. Thus, in *First National Supermarkets*, the Board construed a release "narrowly" such that it was limited to past employment claims notwithstanding that it was "broadly worded." 302 NLRB 727, 727 (1991). By its terms, the release waived "claims of any kind which are now pending or which could be filed in the future relating to or arising out of my total employment and my termination with [the employer]." *Id.* The Board observed that "the phrase 'total employment' may appear ambiguous in isolation" but that "its meaning becomes evident when examined in the context of the release itself, as well as the circumstances surrounding [the employee's] discharge," namely that it was proffered after a "lengthy dispute" over his discharge and vacation pay. *Id.* Given this context, the majority rejected the dissent's view that "total employment" could be interpreted to mean claims arising during future reemployment. *Id.* at 727-28. The majority observed that the dissent's interpretation "ignores the context in which releases are generally negotiated with a terminated employee," namely, that an employer is "seeking final repose for all claims which have arisen out of any and all aspects . . . of the employment being concluded." *Id.* Thus, it "would not be reasonable to conclude that the parties, by signing the present release, intended to compromise the rights and obligations that would grow out of any future employment relationship." *Id.* at 728. In justifying its narrow reading of the release, the Board relied on the fact that the Board had undertaken a similar approach in *Coca-Cola*, where it "implicitly interpreted a

release providing 'that no actions of any kind will ensue' narrowly based on the entire document and the surrounding circumstances." *Id.* at 727 (quoting *Coca-Cola*, 243 NLRB at 501-02).[29]

Under the General Counsel's proposed standard, clauses that prohibit an employee from cooperating with the Board in others' ULP cases—as in *Baylor*,[30] *Clark*,[31] and *Metro Networks*[32] or filing claims over future incidents—as in *Mandel*, 202 NLRB at 119 would be unlawful inasmuch as they constitute explicit waivers of Section 7 rights that are not narrowly tailored.[33]

b. *McLaren Macomb* and Two Earlier Cases Should be Overturned Because they Treat Broadly-worded or Ambiguous Proscriptions as Explicit Waivers

The *McLaren Macomb* standard sweepingly emphasizes the "broad scope and the wide protection to employees by Section 7" and that it is "through the lens of this broad grant of rights and the Board's duty to protect them" that severance agreements should be scrutinized. 372 NLRB No. 58, slip op. at 6-7. That "lens," however, effectively turns any severance clause into a waiver of statutory rights whenever it *could possibly* be read to encompass Section 7 activities. This is

[29] This is consistent with the approach the Board employs when assessing whether the statutory right to bargain has been waived. See, e.g., *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983); *KOIN-TV*, 369 NLRB No. 61, slip op. at 2 n.5, 7-8 (2020) (applying clear and unmistakable waiver principles in assessing whether post-contract change was unlawful where relevant provisions did not survive expiration of the agreement), *enforced sub nom. NLRB v. Nexstar Broad., Inc.*, 4 F.4th 801 (9th Cir. 2021).

[30] The non-assistance provision in *Baylor* (included under the misleading heading "No Participation in Claims") stated that the signatory "agrees that, unless compelled to do so by law, [he or she] will not pursue, assist or participate in any [c]laim brought by any third party against [employer]." 369 NLRB No. 43, slip op. at 1.

[31] The non-assistance provision in *Clark* (tucked inside in a paragraph entitled "Confidentiality") stated: "You further agree that You will not . . . voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims . . . against the company." 336 NLRB at 748, 761.

[32] The non-assistance provision in *Metro Networks* provided: "you agree not to sue or file a charge . . . in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves [the employer] . . . and that occurred on or before your execution of this [a]greement." 336 NLRB at 64, 69.

[33] Should the Board adopt the proposed test, it should nevertheless reaffirm in an appropriate case that an otherwise facially lawful severance provision cannot be applied in an unlawful manner—for instance, by using it as a basis to sue a signatory former employee for providing Board testimony.

anathema to the Board's longstanding policy favoring private settlement agreements, is contrary to the approach applied in *First National Supermarkets*, 302 NLRB at 727-28—a case that *McLaren Macomb* purportedly followed—and creates unnecessary obstacles to parties trying to get the benefit of a deal that was not designed or understood to constitute a waiver of Section 7 rights.

Specifically, in overturning *Baylor* and *IGT*, *McLaren Macomb* claimed a return to "long-standing precedent," but it actually compounded an analytical error that emerged in earlier cases applying the narrowly-tailored-waiver standard. *Id.*, slip op. at 9. *McLaren Macomb* stated, without limitation, that "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights." 372 NLRB No. 58, slip op. at 7. Applying that test, it found any provision that had a "chilling tendency on the exercise of Section 7 rights" to be overbroad and unlawful. *Id*. slip op. at 8. Yet, before *Metro Networks*[34] and *Shamrock*,[35] those decisions never painted in such broad strokes. Rather, as set forth above, they held that an employer could lawfully condition a settlement or severance on an employee's waiver of Section 7 rights where the waiver was narrowly tailored to the facts giving rise to the agreement and the employee received a benefit for the waiver. See, e.g., *Coca-Cola*, 243 NLRB at 502. And this earlier precedent expressly cautioned against interpreting "broadly-

[34] *Metro Networks* found a confidentiality-of-employment-information to be unlawfully proffered, seemingly independent of the fact that the employees had been unlawfully discharged. The nondisclosure clause in that case, 336 NLRB at 64, provided in relevant part that employees will not publicize or communicate to any entity "information concerning your employment" with the employer. Although the provision also contained a confidentiality-of-contract-terms provision, that was not the basis for the Board's finding that the paragraph was unlawful. *Id.* at 67 & n.18 (interpreting paragraph to prohibit employee from "communicating with anyone about his employment").

[35] *Shamrock* also found a common non-disclosure-of-confidential-business-information clause to be unlawfully proffered, as well as a commonplace non-disparagement clause, apparently independent of the other unfair labor practices in the case. The non-disclosure clause provided that the employee may not disclose any confidential or proprietary information, which it defined as including "personnel or corporate information." The non-disparagement provision stated that the employee may not make "disparaging" remarks that could be "detrimental" to the company. *Shamrock*, 366 NLRB No. 117, slip op. at 28-29.

worded" or "ambiguous" phrases "in isolation" and ignoring the context in which they were offered. *First National Supermarkets*, 302 NLRB at 727-28 (observing that in *Coca-Cola*, 243 NLRB at 501-02, the Board "implicitly interpreted a release providing 'that no actions of any kind will ensue' narrowly based on the entire document and the surrounding circumstances").

In its misapplication of longstanding precedent, the Board in *McLaren Macomb* effectively employed a work rule-type analysis to severance provisions. Although the Board denied using this framework in response to then-Member Kaplan's partial dissent, its work rule approach is apparent from its exacting scrutiny of each provision at issue in the case, assessing whether it could possibly be interpreted to restrict Section 7. *Id*., slip op. at 10.

Once this longstanding precedent is properly understood, it is clear that *McLaren Macomb* erred in concluding that a non-disparagement provision was unlawful despite it being a commonplace severance agreement provision that contained no explicit reference to Section 7 rights. The Board read its terms broadly—filtering them through the "lens of [the Act's] broad grant of rights"—and finding they could be interpreted to encompass Section 7. *Id.*, slip op. at 6. Thus, the Board reasoned that the prohibition on making statements to employees or the public that "could disparage or harm the image of [the] [e]mployer" was unlawful because it could encompass a statement that the employer had violated the Act, "conduct regarding any labor issue [or] dispute," or cooperation with a Board investigation "at any time in the future" because it lacked a temporal limitation. *Id*., slip op. at 8. Tellingly, the Board reasoned that the provision was overbroad in that it failed to reference the Board's standard in *Jefferson Standard*, 377 U.S. at 477—essentially creating a requirement that employers write the NLRA law into severance provisions that were not intended to reach Section 7 activities. 372 NLRB No. 58, slip op. at 8. In short, *McLaren Macomb*'s finding that a general non-disparagement clause was unlawful —one

that did not reference clearly protected activities such as cooperating with an administrative agency or supporting employees in a labor dispute—is ripe for overruling.

McLaren Macomb also deviated from prior precedent in finding a confidentiality-of-contract-terms provision unlawful and should be overruled on this basis as well. ***Such a provision had never been held unlawful***. Tellingly, *McLaren Macomb* overturned prior precedent (*S. Freedman*, 364 NLRB 1203, and *Shamrock*, 366 NLRB No. 117) to reach this result, undermining its assertion that its decision represented a "return to the approach followed by Board precedent before *Baylor.* " *Id*., slip op. at 7, 9 n.48. Notably, *S. Freedman* construed a confidentiality-of-contract-terms clause to be a "narrowly tailored," "limited waiver" of the right to discuss discipline with coworkers in the context of an employee who was being reinstated and waiving his right to pursue the matter further through a grievance.[36] 364 NLRB at 1203-04. The Board found that clause lawful, specifically invoking the policy favoring the private resolution of labor disputes. *Id.* Following *S. Freedman*, the Board in *Shamrock* found lawful a confidentiality-of-contract-terms provision in a separation agreement since it did not waive the employee's right to discuss his discharge. 366 NLRB No. 117, slip op. at 3 n.12, 29. Indeed, the Board recently observed that confidential settlement agreements may "facilitate the resolution of workplace conflicts and thus 'further the Board's policy of encouraging the peaceful, nonlitigious resolution of disputes.'" *Dish Network, LLC*, 370 NLRB No. 97, slip op. at 4 (2021) (quoting *Independent Stave*, 287 NLRB at 741). Accordingly, the Board should overrule *McLaren Macomb* and restore *S. Freedman* and *Shamrock* on this point.

[36] *S. Freedman* did not construe this broadly worded confidentiality-of-contract-terms clause to preclude the employee from providing information to the Board, distinguishing *Metro Networks* on this basis. 364 NLRB at 1204 & n.4.

Finally, by prioritizing departing employees' Section 7 rights above all else, the *McLaren Macomb* Board ignored the basic tenet of appropriately accommodating Section 7 rights and private interests based on the nature and relative strength of the Section 7 right at issue. Pursuant to longstanding Supreme Court precedent, Section 7 rights are "not unlimited." *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 797-98 (1945). Rather, they fall along a spectrum that requires balancing of the nature and strength of the respective Section 7 rights against legitimate employer interests. *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). In the context of settling claims—including settlements concurrent with the end of employment—the narrowly-tailored-waiver test reflects an appropriate balance between employees' statutory rights and employers' legitimate interests, including "seeking final repose for all claims which have arisen out of any and all aspects . . . of the employment being concluded." *First National Supermarkets*, 302 NLRB at 727-28.

Contrary to this case law, *McLaren Macomb* gave no weight to legitimate employer interests in entering into severance agreements, while finding the mere possibility of Section 7 infringement to be of sole, dispositive importance. As explained above, employer interests in maintaining industrial peace, resolving potential claims, protecting its reputation, and safeguarding its confidential and proprietary information are relatively strong. To be sure, departing and former employees are statutory employees with Section 7 rights. See, e.g., *Briggs Manufacturing*, 75 NLRB 569, 570-71 (1947) (holding that "employee" as defined in Section 2(3) "covers . . . former employees of a particular employer"); *Eastex v. NLRB*, 437 U.S. 556, 564 (1978) (Section 2(3) "definition [of 'employee'] was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own"). However, their right to engage in protected concerted activities post-employment is comparatively low on the *Hudgens* spectrum because, generally speaking, they are no longer personally invested in

improving the terms and conditions of employment at their former employer since any improved terms would not affect them. That said, as explained above, one Section 7 right is especially important at the post-employment stage—the right to cooperate with the investigation and prosecution of unfair labor practices.

In effectively outlawing many commonplace severance clauses by failing to adequately balance employee and employer interests, *McLaren Macomb* gives undue weight to the right to engage in concerted activities post-employment while virtually ignoring legitimate employer interests. In contrast, the narrowly-tailored-waiver standard proposed by the General Counsel reflects a better balance. That standard will safeguard access to the Board, ensure that employees are not coerced into trading away future rights, and respect employers' legitimate interest in reaching private settlements that protect their businesses, including facing disparagement and defamation from prior employees as well as protecting business-related confidential information, while benefiting both parties.

For all these reasons, the Board should overturn *McLaren Macomb*—as well as *Metro Networks* and *Shamrock* to the extent they found broadly-worded but commonplace non-disparagement and confidentiality clauses to be unlawful independent of the other unfair labor practices in those cases—and readopt *S. Freedman* and *Shamrock* to the extent they held that confidentiality-of-contract-terms provisions were lawful.

iii. The General Counsel's Proposed Standard is Preferable to Baylor *and* IGT

The General Counsel respectfully submits that the proposed approach outlined herein is preferable to the standard set forth in *Baylor* and *IGT*. While both would significantly narrow the circumstances in which the Board interjects itself into severance agreements, the General Counsel's standard has some distinct advantages. It is more consistent with longstanding

precedent, namely, *Mandel*, 202 NLRB at 119, 122, which found that conditioning reinstatement on waiving the right to file future charges with the Board was unlawful notwithstanding that *all the other unfair labor practice allegations were dismissed*. Applying *Baylor*'s approach, that condition would have been lawful to proffer because there was "no reason to believe that the [employer] harbor[ed] animus against Sec. 7 activity." *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6.[37] In addition, the General Counsel's approach is more protective of the right to cooperate with the Board, which is a strong statutory right in this context, as explained above. The General Counsel's proposed approach also recognizes that the proffer of a facially unlawful agreement—when combined with a valuable benefit such as a severance payment at a time when the departing employee could use a financial cushion—tends to encourage employees to accept the terms and nominally forfeit unwaivable rights. In any event, as a practical matter, there is little benefit in permitting employers to propose overbroad waivers to employees if those same waivers would be unlawful if signed and maintained. This is especially so if the overbroad waiver discourages employees from cooperating with the Board because it erects a barrier for the Board to ever learn of the violation.

Admittedly, *Baylor* rejected former General Counsel Peter Robb's argument that settlement agreement precedent should be applicable in the severance agreement context. 369 NLRB No. 43, slip op. at 2 n.7. However, the General Counsel respectfully submits that the Board should revisit this conclusion. As to the argument in *Baylor* that severance agreements are not related to a labor dispute, as explained above, a primary purpose of severance agreements is to

[37] While it appears that the discriminatee in *Mandel* may have accepted the unlawful condition because he did, in fact, withdraw his charges, it is not entirely clear if he agreed to refrain from filing any future charges and the Board's decision certainly does not rely on his acceptance for finding it coercive within the meaning of Section 8(a)(1). 202 NLRB at 118-19 (supervisor promised that discriminatee would stop petitions, not discriminatee).

resolve potential labor-related claims, some of which may be on the precipice of litigation. Thus, many severance agreements do resolve potential labor disputes. Moreover, settlement and severance agreements contain many of the same standard terms and both have labor peace as their goal. Accordingly, settlement and severance agreement principles and precedents align well. The *Baylor* Board's observation that severance agreement provisions do not impact terms and conditions of employment is equally unpersuasive. *Id.* A severance agreement clause explicitly waiving Section 7 rights in an overbroad manner is no less chilling on a former employee's willingness to participate in Board proceedings or assist the Board in its investigations than it would be in a settlement agreement context. In either case, an employee's exercise of Section 7 rights comes at the potential cost of forfeiting the severance payment or being forced to defend against a costly employer lawsuit—significant disincentives notwithstanding that they do not affect employment terms.

iv. If the Board Does Not Adopt the General Counsel's Proposed Standard, It Should Overturn McLaren Macomb and Return to Baylor *and* IGT

Although the General Counsel recommends that the Board adopt the proposed standard set forth herein, should the Board disagree, it should return to *Baylor* and *IGT* instead of continuing to apply *McLaren Macomb*. Despite their shortcomings, *Baylor* and *IGT* are more closely aligned with the Board's policy favoring private agreements, they constrain the Board's role in policing such agreements, and they allow employers to proffer severance agreements without undue concern about running afoul of the Act, thereby benefitting employees. Indeed, while *McLaren Macomb* reads severance provisions too broadly, the main strength of *Baylor* and *IGT* is that they respect the Board's policy favoring private resolution of disputes, allowing employees and employers to offer and negotiate severance agreements without concern that a provision that does not reference Section 7 rights could result in an unfair labor practice. Because this represents a

better balance of interests, returning to *Baylor* and *IGT* would be an improvement over current law should the Board decide not to adopt the General Counsel's position.

v. Applying the General Counsel's Proposed Standard, the Board Should Find that the Severance Agreement Was Lawfully Proffered

The ALJ concluded that based on the non-disparagement provision's similarities to the one in *McLaren Macomb*, she was constrained to find a violation here. (ALJD at 27-28). Specifically, the ALJ pointed to the "extremely broad" definition of "disparage" contained within the provision. (ALJD at 27). The ALJ thus concluded such language could be read to "block[] the signer's right to engage in the core protected activity of disclosing, inter alia, any labor dispute to the public." (Id.).

Applying the General Counsel's proposed standard, however, this language would not amount to a waiver because it does not specifically mention statements about a labor dispute or statements to a government agency. Taking into account the severance context and the fact that employees do not always interpret language through the prism of Section 7, employees would understand that this language is meant to prevent statements in the public domain that hurt the Respondent's reputation, not statements in support of a labor dispute—at least absent evidence that the parties were contemplating those issues when the provision was drafted. Cf. *First National Supermarkets*, 302 NLRB at 727-28 (considering "context in which releases are generally negotiated with a terminated employee . . . [i]t is highly doubtful that the parties [were] thinking about the prospects of any future [employment]" and absent "evidence pertaining to reemployment customs," "it simply would not be reasonable to conclude that the parties . . . intended to compromise" rights surrounding a future employment relationship").

Similarly, the Board should find the confidentiality-of-contract-terms provision is lawful because it does not contain an explicit waiver of Section 7 rights. The Board should analyze this

provision consistent with its well-reasoned decision in *S. Freedman*, which found lawful a settlement agreement clause promising that "the terms of this agreement will remain confidential" and that "any disclosure" could result in discipline. 364 NLRB at 1203-04. Relying on the policy favoring amicable resolution of labor disputes, the Board found that the waiver was narrowly tailored to the facts giving rise to the settlement inasmuch as it was "limited to resolving this one incident," "not any future discipline" and "[n]othing in the agreement limited [the employee's] right to discuss discipline, file grievances, or pursue litigation concerning unrelated matters." *Id*. at 1204. It further contrasted the case from *Metro Networks* on the basis that the confidentiality agreement in *S. Freedman* only restricted the employee's ability to discuss the settlement terms with others, not his ability to assist other employees in unfair labor practices cases before the Board. *Id*. at 1204 n.4. In this regard, the majority implicitly declined to construe the broad language prohibiting "any disclosure" to waive the right to provide information or the agreement to the Board. Because the confidentiality language in the severance agreement proffered to Unterwurzacher does not explicitly restrict Section 7 activity, the Board should find it lawful.

G. The ALJ's Remedies Should be Modified Consistent with the Violations Argued Herein (Exceptions 18-24, 34, 35)

Respondent excepts to the remedies ordered by the ALJ, which are standard remedies based on the violations found. Respondent's remedial arguments primarily rely on its claim that the ALJ simply got the violations wrong, and the ordered remedies were therefore inappropriate. To the extent the General Counsel now agrees, as discussed above, that some portion of the ALJ's findings were in error, the Board should order standard remedies consistent with those violations

as set forth in *Thryv, Inc.*, 372 NLRB No. 22 (2022), *vacated in part*, 102 F.4th 727 (5th Cir. 2024).[38]

III. CONCLUSION & REQUEST FOR RELIEF

Based on the foregoing, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act by discharging Denise Unterwurzacher in retaliation for her protected concerted activity and by maintaining an unlawful confidentiality rule. However, consistent with the arguments set forth above, the ALJ erred in finding unlawful the remaining rules and the severance agreement proffered to Unterwurzacher. The General Counsel therefore asks that the Board deny Respondent's Exceptions, except to the extent they are consistent with the arguments above, and any relief deemed appropriate. The General Counsel does not believe oral arguments are necessary or appropriate to decide the instant case.[39]

DATED at Fort Worth, Texas this 11th day of September, 2026.

Respectfully submitted,

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[38] The General Counsel disagrees with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), *vacated in part*, 102 F.4th 727 (5th Cir. 2024), and will be urging the Board to reconsider the policy in a future, appropriate case.

[39] Respondent's references to *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), are misplaced. Board remedial determinations are reviewed by the courts under an abuse-of-discretion standard. As the Supreme Court has repeatedly explained, the Board has the authority to exercise its "primary responsibility and broad discretion to devise remedies" for violations of the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (collecting cases).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge has been e-filed and served this 11th day of September 2026, via electronic mail, upon the following:

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