UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THRYV, INC.

Employer

and

INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL 1269

Petitioner

Case 20-CA-250250
Case 20-CA-251105

BRIEF OF *AMICI CURIAE* ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., COALITION FOR A DEMOCRATIC WORKPLACE, HR POLICY ASSOCIATION, NATIONAL FEDERAL OF INDEPENDENT BUSINESS, AND THE NATIONAL RETAIL FEDERATION

A. John Harper III
Emily Dombrowski
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, Texas 77010
T: 713.951.9400
F: 713.951.9212
ajharper@littler.com
edombrowski@littler.com

Arthur T. Carter
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, Texas 75201-2931
T: 214.880.8100
F: 214.880.0181
atcarter@littler.com

Maury Baskin
LITTLER MENDELSON, P.C.
815 Connecticut Avenue, NW
Suite 400
Washington, DC 20006-4046
T: 202.842.3400
F: 202.842.0011
mbaskin@littler.com

Michael J. Lotito
LITTLER MENDELSON, P.C.
333 Bush Street, 34th Floor
San Francisco, California
T: 415.433.1940
F: 415.399.8490
mlotito@littler.com

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Act Does Not Allow the Board to Award Consequential Damages. 5

A. The Board Must Adhere to the Language of the Act; It Is Powerless to Amend the Act by Imposing Consequential Damages. 6

B. The Treatment of Consequential Damages Under Title VII's Analogous Remedies Provision Demonstrates That the Board Lacks Authority to Award Consequential Damages. 9

C. It Is the Role of Congress, Not the Board, to Amend the Act and Provide for Compensatory Damages. 11

II. The Board's Inclusion of Search-for-Work and Interim Employment Expenses Among Its Make-Whole Remedies Does Not Open the Door to Other Compensatory Damage Remedies. 12

III. There Are Strong Policy Reasons Not to Include Consequential Damages Among the Board's Make-Whole Remedies. 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Albermarle Paper Co. v. Moody,
422 U.S. 405 (1975).....6, 13

Arthur Anderson & Co. v. Perry Equip. Corp.,
945 S.W.2d 812 (Tex. 1997).....15

Atta v. Sun Company, Inc.,
596 F. Supp. 103 (E.D. Pa. 1984).....7

Baker Electric, Inc.,
351 NLRB 515 (2007).....15

BE&K Const. Co. v. Will & Grundy Cntys. Bldg. Trades Council,
156 F.3d 756 (7th Cir. 1998).....8

Boddy v. Dean,
821 F.2d 346 (6th Cir. 1987).....7

Bradley v. G. & H.W. Corson Ins.,
501 F. Supp. 75 (E.D. Pa. 1980).....10

Carrillo v. Douglas Aircraft Co.,
18 FEP Cas. 830, 830 (C.D. Cal. Oct. 12, 1978).....7

Carrol v. General Accident Inc. Co.,
891 F.2d 1174 (5th Cir. 1990).....7

Chamber of Commerce v. NLRB,
721 F.3d 152 (4th Cir. 2013).....11

Collazo v. Nicholson,
535 F.3d 41 (1st Cir. 2008).....10

Cortes v. R.I. Enters., Inc.,
95 F. Supp.2d 255 (M.D. Pa. 2000).....7

Crossett Lumber Co.,
8 NLRB 440 (1938), enfd., 102 F.2d 1003 (8th Cir. 1938).....4, 12, 14

Curtis v. Loether,
415 U.S. 189 (1974).....7

Emhart Indus. v. NLRB,
907 F.2d 372 (2d Cir. 1990).....16

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976).....6

Great-West Life & Annuity Co. v. Knudson,
534 U.S. 204 (2002).....6, 13

Gross v. FBL Financial Servs.,
557 U.S. 167 (2009).....8

Harrington v. Vidalia-Butler Board of Education,
585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979).....10

Hoffman Plastic Compounds, Inc. v. NLRB,
535 U.S. 137 (2002).....5

Howard v. Lockheed-Georgia Co.,
372 F. Supp. 854 (N.D. Ga. 1974).....10

King Soopers, Inc.,
364 NLRB 1153 (2016) ..... *passim*

Lorillard v. Pons,
434 U.S. 575 (1978).....7

Lutz v. Glendale Union H.S. No. 205,
403 F.3d 1061 (9th Cir. 2005) 6

NLRB v. J. Weingarten, Inc.,
420 U.S. 251 (1975).....11

Pearson v. W. Elec. Co.,
542 F.2d 1150 (10th Cir. 1976) 6, 10

Phelps Dodge Corp. v. NLRB,
313 U.S. 177 (1941).....6

Pollard v. E.I DuPont De Nemours & Co.,
532 U.S. 843 (2001).....9, 13, 14

Protos v. Volkswagen, Inc.,
797 F.2d 129 (3d Cir. 1986).....6

Richerson v. Jones,
551 F.2d 918 (3d Cir 1977).....6, 7, 10

Soc'y of Profl. Eng'g Emps. v. Boeing Co.,
921 F. Supp.2d 1122 (D. Kan. 2013) 6

Spencer v. Wal-Mart Stores, Inc.
469 F.3d 311 (D.C. Cir. 2006) 6

The Vorhees Care & Rehab. Ctr.,
371 NLRB No. 22, slip op. (Aug. 25, 2021) 14

Thryv, Inc.,
371 NLRB No. 37, slip op. (Nov. 10, 2021) 12

Tietz v. Iron Workers,
12 FEP Cas. 381, 381 (W.D. Mo. May 15, 1975) 7

U.S. v. Burke,
504 U.S. 229 (1992) 8, 9

UAW v. Russell,
356 U.S. 634 (1958) 8

United Const. Workers v. Laburnum Const. Corp.,
347 U.S. 656 (1954) 8

Van Hoomissen v. Xerox Corp.,
368 F. Supp. 829 (N.D. Cal. 1973) 9, 10

Villescas v. Abraham,
311 F.3d 1253 (10th Cir. 2002) 8

Walker v. Ford Motor Co.,
684 F.2d 1355 (11th Cir. 1982) 7, 9, 10, 13

Whiting v. Jackson State Univ.,
616 F.2d 116 (5th Cir. 1980) 13

Statutes

19 U.S.C. § 1981 7

29 U.S.C. § 160(c) ..... *passim*

29 U.S.C. § 187 ..... 4, 7, 8, 10

42 U.S.C. § 1981a 11, 14, 17

42 U.S.C. § 2000e-5(g) ..... *passim*

Protecting the Right to Organize Act, H.R. 842, Sec. 106 ..... 11, 12

Seventh Amendment of the U.S. Consitution.....7

Other Authorities

Black's Law Dictionary (7th ed. 1999).....5

Delay, Slowness in Decision-making, and the Case Backlog at the National Labor Relations Board, H.R. Rep. No. 1141, 98th Cong., 2d Sess. 16 (1984).....16

INTERESTS OF *AMICI CURIAE*

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters represent all specialties within the U.S. construction industry, comprised primarily of firms that perform work in the industrial and commercial sectors. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and fair and open competition.

Associated General Contractors of America, Inc. ("AGC") works to ensure the continued success of the commercial construction industry by advocating for federal, state and local measures that support the industry; providing opportunities for firms to learn about ways to become more accomplished; and connecting firms with the resources and individuals they need to be successful businesses and corporate citizens. Over 27,000 firms, including more than 7,000 of America's leading general contractors, nearly 9,000 specialty contracting firms and almost 11,000 service providers and suppliers belong to the association through its nationwide network of chapters.

The Coalition for a Democratic Workplace ("CDW") represents employers and associations and their workforces that together represent businesses of all sizes. Consisting of over 600 member organizations, CDW was formed to give its members a voice on labor reform. CDW has advocated for its members on a number of labor issues including non-employee access, an employee's right to have access to organizing information from multiple sources, and unit determinations. CDW's members, the majority of which are covered by the National Labor Relations Act ("NLRA") or represent organizations covered by the NLRA, have a strong interest in the way the NLRA is interpreted and applied by the National Labor Relations Board ("the

Board"). Because CDW and its members represent a large group that would be affected by the Board's action, they have a strong interest in the Board's interpretation of the remedial statute and whether it provides for consequential damages as part of the Board's make-whole remedy for employees after an employer has committed an unfair labor practice.

HR Policy Association ("HRPA") is a public policy advocacy organization that represents the chief human resource officers of more than 400 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

Independent Electrical Contractors ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,600 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition, and economic opportunity for all.

National Federation of Independent Business ("NFIB") is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting

small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases that will impact small businesses.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 52 million working Americans. Contributing $3.9 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government.

The foregoing associations, who represent both unionized and non-union employers across the country, will be referred to collectively below as the "**Business *Amici***." As further explained below, the questions presented by the Board in the Notice are of great importance to the Business *Amici*, as the Board's determination will have immediate long-lasting effects on their members' labor relations, workplace morale and productivity.

SUMMARY OF ARGUMENT

The Board does not have the statutory authority to award consequential damages, and therefore it should not do so.

Section 10(c) does not mention consequential damages. Nothing in Section 10(c) of the National Labor Relations Act ("NLRA" or "Act") authorizes or even mentions consequential or any other types of legal "damages."

The Board's lack of authority is confirmed by how courts treated Section 706(g) of Title VII. The fact that the Board lacks the authority to award consequential damages is illustrated by how such damages were originally treated under Section 706(g) of Title VII. 42 U.S.C. § 2000e-

5(g). Section 706(g) was modeled on Section 10(c) and provided the same remedies, but courts universally held that Section 706(g) did not allow for legal damages such as compensatory, consequential, or punitive damages.

Further, if Congress wanted to allow the Board to award legal damages it could have amended Section 10(c) in 1947 when it added Section 303 of the Labor Management Relations Act ("LMRA") allowing for damage suits against Unions. Its failure to do so is powerful evidence that Section 10(c) does not allow for the provision of such damages.

Crossett Lumber and King Soopers do not open the door to more general consequential damages. The Board's decisions in *Crossett Lumber* and *King Soopers* do not change this result. These cases addressed search-for-work and interim work expenses, both of which are directly attributable the amount of back pay and interim earnings (as an offset to back pay) an employee receives. Consequential damages are several steps removed from back pay; indeed, by definition they are indirect damages resulting from allegedly unlawful conduct.

There are strong policy reasons not to award consequential damages. The introduction of consequential damages, and the resultant need to prove the causation and reasonable foreseeability of such damages, will increase and prolong litigation in a situation where the Board is already the recipient of significant criticism for such delays. Moreover, efforts to recover such damages in the course of trying to settle claims will result in a failure of settlement when respondents have no opportunity to test the propriety of such damages through contested proceedings, especially given the other headwinds to settlement being imposed by the General Counsel.

For all of these reasons, the Board should not allow for the awarding of consequential damages by administrative fiat. Rather, it should await action by Congress on this issue.

ARGUMENT

In its Notice and Invitation to File Briefs (the "Notice"), the Board is seeking positions on a very specific issue: In cases where employees are being reinstated and made whole due to employer unfair labor practices, whether the Board should also award consequential damages, and, if so, what the standards of proof should be. Consequential damages are those damages "that do not flow directly and immediately from an injurious act, but that result indirectly from that act." *Black's Law Dictionary*, 54 (7th ed. 1999) (emphasis added). For the following reasons, the Board should not add consequential damages to the remedies established by Section 10(c).

I. The Act Does Not Allow the Board to Award Consequential Damages.

The Board's remedial discretion is broad but is not without limits. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-43 (2002). Section 10(c) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160(c), specifies the Board's remedial authority and does not mention consequential damages, any other form of legal damages, or even use the word "damages". Rather, Section 10(c) states in relevant part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board…shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him….

(emphasis added). Courts are clear that all of the remedies available to the Board under Section 10(c) are equitable, not legal, in nature. The Board's effort to add consequential damages to the remedies available under Section 10(c) is simply an effort to exercise authority that has not been granted to it by Congress.

A. The Board Must Adhere to the Language of the Act; It Is Powerless to Amend the Act by Imposing Consequential Damages.

The Board must adhere to the language of Section 10(c), which states that the Board may: (i) issue a cease and desist order; (ii) take such affirmative action as will effectuate the policies of the Act; and (iii) that such affirmative actions may include reinstatement with or without back pay. Section 10(c) says nothing about consequential damages; it does not even use the word "damages." In fact, all of the remedies allowed by Section 10(c), including the Board's ability to take affirmative action to effectuate the purposes of the Act, and reinstatement and back pay (including awards associated with pension and benefits), are equitable remedies because they are restorative in nature.[1] *See, e.g., Franks v. Bowman Transp. Co*., 424 U.S. 747, 763 (1976) (noting that statutory language authorizing "such affirmative action as may be appropriate" to make claimants whole is equitable in nature); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975) (awards of back pay are equitable in nature); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).[2]

Consequential damages, like all compensatory damages, are legal remedies. *See, e.g., Protos v. Volkswagen, Inc.*, 797 F.2d 129, 138 (3d Cir. 1986) (describing compensatory damages

---

[1] *See also Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204, 213 (2002) (stating that a significant difference between legal and equitable remedies is that equitable remedies arise when the money identified as belonging to the plaintiff can be traced to the funds or property in the defendant's possession, but legal remedies arise when the property sought to be recovered is no longer in the defendant's control) (cited by *Soc'y of Profl. Eng'g Emps. v. Boeing Co*., 921 F. Supp.2d 1122 (D. Kan. 2013)).

[2] *See also Lutz v. Glendale Union H.S. No. 205*, 403 F.3d 1061, 1067-68 (9th Cir. 2005); *Spencer v. Wal-Mart Stores, Inc*. 469 F.3d 311, 315-16 (D.C. Cir. 2006) (citing cases from various courts and stating that reinstatement and back pay are equitable remedies awarded by the court); *Richerson v. Jones*, 551 F.2d 918, 926 & n.13 (3d Cir 1977) (noting that awards in the nature of restitution, including for back pay and pension benefits, are equitable in nature); *Pearson v. W. Elec. Co*., 542 F.2d 1150, 1151-52 (10th Cir. 1976) (noting that 42 U.S.C § 2000e-5(g), which provides for reinstatement, back pay and other such affirmative action as may be appropriate, provided for equitable, not legal, remedies).

as legal relief); *Walker v. Ford Motor Co*., 684 F.2d 1355, 1363-64 & n.16 (11th Cir. 1982).[3] The fact that Congress chose to include only equitable remedies and not legal remedies like consequential damages in Section 10(c) demonstrates that the Board has no power to order consequential damages or any other legal remedies. *Cf. Atta v. Sun Co., Inc.*, 596 F. Supp 103, 105-06 (E.D. Pa. 1984) (striking claim for compensatory damages where not authorized by statute). This is especially true because consequential damages and other legal remedies are the province of juries under the Seventh Amendment of the U.S. Constitution. *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) (holding that jury trials are available under the ADEA because its remedy provision provided for both legal and equitable remedies, and in cases in which legal relief is available, the Seventh Amendment provides a right to a jury trial) (citing *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974)).[4] Of course, since Congress vested the Board with enforcement of the Act; jury trials are not available.

Section 10(c) of the Act stands in stark contrast to Section 303 of the Labor Management Relations Act ("LMRA"), which allows any person aggrieved by a violation of Section 8(b)(4) to

---

[3] *See also Carrol v. General Accident Inc. Co.,* 891 F.2d 1174, 1177 (5th Cir. 1990) (vacating awards for compensatory and punitive damages because Title VII permitted recovery of only equitable relief); *Boddy v. Dean*, 821 F.2d 346, 352 (6th Cir. 1987) (affirming trial court's strike of compensatory and punitive damages where only equitable remedies were available by statute); *Richerson*, 551 F.2d at 928 (striking plaintiff's claim for punitive damages because the statute didn't provide for such damages and noting that "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed."); *Atta v. Sun Company, Inc*., 596 F. Supp. 103, 105-06 (E.D. Pa. 1984) (striking claim for compensatory damages since they are legal remedies and statute only authorized equitable remedies); *Tietz v. Iron Workers*, 12 FEP Cas. 381, 381 (W.D. Mo. May 15, 1975).

[4] *Accord Cortes v. R.I. Enters., Inc*., 95 F. Supp.2d 255, 262 (M.D. Pa. 2000) (ordering jury trial where plaintiff was seeking compensatory damages); *Carrillo v. Douglas Aircraft Co*., 18 FEP Cas. 830, 830 (C.D. Cal. Oct. 12, 1978) (citing cases and stating that where compensatory and punitive damages are sought in a 19 U.S.C. § 1981 case, legal claims are presented and a jury trial is mandated).

"recover the damages sustained by him." 29 U.S.C. § 187(b). Further, claims under Section 303 are tried to juries because they involve questions about legal damages. *See BE&K Const. Co. v. Will & Grundy Cntys. Bldg. Trades Council*, 156 F.3d 756, 760 (7th Cir. 1998) (noting that LMRA Section 303 damages claim tried to jury). Congress amended the NLRA at the same time it enacted Section 303, and even amended Section 10 of the NLRA at that time, but it did not add the word "damages" to Section 10(c). *See, e.g., Villescas v. Abraham*, 311 F.3d 1253, 1260 (10th Cir. 2002) (rejecting claim for compensatory damages under ADEA because Congress did not amend the ADEA to provide for such damages when it amended Title VII to do so).

Simply put, Congress knows how to authorize an award of consequential damages, but it has not done so in Section 10(c), even though it enacted a damages provision in the LMRA at the same time it amended Section 10 in 1947. Where Congress has authorized "legal relief" or "damages" in one statute, but not in another, that is powerful evidence that such relief is not available where it is not expressly authorized. *See Gross v. FBL Financial Servs*., 557 U.S. 167, 174 (2009) (when Congress amends one statutory provision but not another, it is presumed to have acted intentionally). Indeed, the Supreme Court has clearly stated, "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *UAW v. Russell*, 356 U.S. 634, 643 (1958) (citing *United Const. Workers v. Laburnum Const. Corp*., 347 U.S. 656, 666-67 (1954)).[5]

[5] The *King Soopers* majority dismissed this statement in *UAW v. Russell* by asserting that the search-for-work and interim work expense damages have been awarded for years, and that the Board has authority to award some compensatory relief in connection with back pay. But as explained in the main text, and as the Board recognized, search-for-work and interim work expenses are directly related to a calculation of back pay. The Supreme Court's statement in *UAW v. Russell* also is fully applicable in this case because the Board is contemplating importing a full range of tort remedies into Section 10(c) without Congressional authorization to do so. *See U.S. v. Burke*, 504 U.S. 229, 239 (1992) (construing the remedies available under Title VII Section 706(g) to excluded "tort-like" compensatory damages).

B. The Treatment of Consequential Damages Under Title VII's Analogous Remedies Provision Demonstrates That the Board Lacks Authority to Award Consequential Damages.

Rather than amending Section 10(c) to allow for consequential damages, Congress based the remedial provision of a later statute, Section 706(g) of Title VII of the Civil Right Act of 1964, on Section 10(c). 29 U.S.C. § 2000e-5(g). Further demonstrating that Section 10(c) does not allow for consequential damages, courts almost universally held that Section 706(g) did not allow for compensatory damages until Congress amended Title VII's remedies in 1991.

Specifically, the Supreme Court has stated that Section 706(g) was based on Section 10(c), and courts historically interpreted the provisions in the same way. *Pollard v. E.I DuPont De Nemours & Co.*, 532 U.S. 843, 849 (2001); *U.S. v. Burke*, 504 U.S. 229, 240 n.10 (1992). Like Section 10(c), Section 706(g) broadly granted courts the ability to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay." 29 U.S.C. §2000e-5(g).

Critically, however, courts interpreting Section 706(g) reached the exact opposite conclusion that the Board is seeking to reach here—they uniformly concluded that Section 706(g) did not authorize consequential damages. *See, e.g., Burke*; 504 U.S. at 239 (stating that nothing in Title VII's remedial scheme prior to the 1991 amendments purported to recompense victims of discrimination for consequential damages) (citing *Walker v. Ford Motor Co*., 684 F.2d 1355, 1363 (11th Cir. 1982), which, in turn cited numerous cases); *Van Hoomissen v. Xerox Corp.,* 368 F. Supp. 829, 835-38 (N.D. Cal. 1973). *Walker* and similar cases reasoned that the language of Section 706(g) provided solely for equitable relief, not legal relief, and that Congress provided for legal and punitive damages in other statutes around the same time it passed Title VII. *Walker*, 684

F.2d at 1363.[6]

The *Walker* Court further cited several decisions for the proposition that consequential damages were not available under Section 706(g) because Section 10(c) did not authorize such damages.[7] *See Walker*, 684 F.2d at 1363; *see also Harrington v. Vidalia-Butler Board of Education*, 585 F.2d 192, 194-96 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Richerson v. Jones*, 551 F.2d 918, 926-28 (3d Cir. 1977); *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1151-52 (10th Cir. 1976); *Howard v. Lockheed-Georgia Co.*, 372 F. Supp. 854, 855-56 (N.D. Ga. 1974) (stating that nowhere does Section 10(c) provide for the recovery of compensatory damages; hence Title VII's remedy provision does not either); *Van Hoomissen*, 368 F. Supp. at 837.[8]

In sum, Section 10(c) of the Act does not expressly authorize compensatory damages or any other legal damages—it does not even use the word "damages," even though Congress clearly knows how to provide for compensatory damages if it wants to, and did provide for the imposition of "damages" in Section 303 of the LMRA at the same time it amended Section 10 the NLRA. 29 U.S.C. § 187; *see Walker*, 684 F.2d at 1364 (noting that "perhaps the most persuasive rationale" as to why compensatory damages not available under Title VII is that Congress enacted a

---

[6] *Accord Bradley v. G. & H.W. Corson Ins.*, 501 F. Supp. 75, 76-77 (E.D. Pa. 1980) (collecting cases and stating that every circuit and almost every district that has addressed the issue concluded that the enforcement provision of Title VII did not authorize compensatory damages).

[7] The *Walker* Court stated that while many courts had been imprecise in describing the damages at issue, the damages it was considering were properly termed "consequential damages" because they involved claims for emotional distress and for damages resulting from the consequences of an adverse employment action. 684 F.2d at 1364 n.16.

[8] Courts have reached similar conclusions under other statutes where Congress has provided for certain types of damages but not for others. *See, e.g., Collazo v. Nicholson*, 535 F.3d 41, 44-45 (1st Cir. 2008) (citing cases and stating that courts uniformly have held that the ADEA does not allow the imposition of compensatory damages where the statute allows awards for only those pecuniary benefits connected to the job relation. (internal quotation marks and citations omitted)).

contemporaneous statute expressly providing for both actual and punitive damages). Courts interpreting Title VII's original remedy provisions, which the Supreme Court has recognized was based on Section 10(c), universally held that the analogous language does not authorize compensatory damages. And in reaching this conclusion, several courts concluded that Section 10(c) itself does not allow the awarding of compensatory damages. Accordingly, the Board is without authority to award compensatory damages by administrative fiat.

C. It Is the Role of Congress, Not the Board, to Amend the Act and Provide for Compensatory Damages.

The role of the Board is to interpret and adapt the NLRA to changing patterns of industrial life. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Board does not have the power to issue rules or make decision that are beyond what is authorized by the Act, however. *See Chamber of Commerce v. NLRB*, 721 F.3d 152, 162-63 (4th Cir. 2013) (Board exceeded its authority in promulgating notice posting rule not authorized by the NLRA; stating that the NLRB is not only bound by the purposes of the Act, but also by the means selected by Congress to carry out those purposes). Because Section 10(c) does not authorize the Board to award consequential damages, any effort to do so would exceed its authority.

Rather, just as occurred with the interpretation Section 706(g) and subsequent addition of compensatory damages to Tile VII's remedial scheme, so too should the Board conclude that Section 10(c) does not give it the authority to impose consequential or any other legal damages. Thus, the Board should wait for Congress to act, just as Congress added consequential damages to the relief available under Title VII in 1991. *See* 42 U.S.C. § 1981a. Here, Congress has a bill pending that would amend the Act to give the Board the express power to award consequential damages, namely the Protecting the Right to Organize Act ("PRO Act"). H.R. 842, Sec. 106 (amending Section 10(c) to provide for consequential and liquidated damages). CDW opposes the

PRO Act, and the will of the people, as expressed through Congressional action or lack thereof, may or may not allow it to become law. But that is how the process should work—consequential damages must be added to Section 10(c) by Congress, not by administrative fiat.

II. The Board's Inclusion of Search-for-Work and Interim Employment Expenses Among Its Make-Whole Remedies Does Not Open the Door to Other Compensatory Damage Remedies.

In its Notice and Invitation to File Briefs, the Board identified two of its historic remedies that, in its view, qualify as consequential damages: reasonable search-for-work and interim employment expenses. *Thryv, Inc.*, 371 NLRB No. 37, slip op. at 1 (Nov. 10, 2021) (citing *Crossett Lumber Co*., 8 NLRB 440, 497-98 (1938), enfd., 102 F.2d 1003 (8th Cir. 1938), and *King Soopers, Inc*., 364 NLRB 1153, 1160-1161 (2016), enfd. in rel. part, 859 F.3d 23 (D.C. Cir. 2017)). It noted that the *King Soopers* Board expanded the application of these two remedies by requiring that they be calculated separately from net backpay, even where such expenses exceed interim earnings. *Id*. These cases do not open the door to an award of broader consequential damages, however, because they are directly and inextricably intertwined with an award of back pay.

As the Board has repeatedly noted, the *Crossett* Board set forth no explanation for why search-for-work and interim-employment expenses should be off-set against interim earnings. But it is clear that the remedy related to what amount should be subtracted from gross back pay as part of interim earnings. *Crossett*, 8 NLRB at 497-98. There also is no indication in the decision that anyone challenged the Board's remedial authority to issue such an order.

In *King Soopers*, 364 NLRB No. 93, slip op. at 4-8, the Board majority's analysis of why search-for-work and interim employment expenses should be recoverable related directly to the impact of such expenses on an employee's duty to mitigate damages and, consequently, recovery of back pay. The Board noted that deducting search-for-work and interim employment expenses from interim earnings could discourage employees from searching for interim work, hence creating

the risk that they will not receive back pay due to a failure to mitigate. *Id*., slip op. at 5. The Board also noted that these expenses should be treated similarly to medical and retirement benefits, which themselves are elements of compensation, and recovery for which also was historically available under Section 10(c)'s analogue, Title VII Section 706(g), because such awards are in the nature of restoring lost benefits associated with work and thus are equitable in nature.[9] *Id*., slip op. at 6; *Walker*, 684 F.2d at 1364-65 (citing *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 n.2 (5th Cir. 1980)). Most critically, however, the Board itself described search-for-work and interim employment expenses as "nonwage components of backpay [sic]." *Id*., slip op. at 6; *see also id*., slip op. at 6-7 (quoting *NLRB v. Seven-Up Bottling Co*., 344 U.S. 344, 346-47 (1953) for the proposition that the Board's orders with respect to "restoration by way of back pay" are entitled to deference)).

The *King Soopers* Board's analysis of whether such damages were consequential damages prohibited by the Act does not render all consequential damages allowable under Section 10(c) because that analysis does not take account of (a) the legal distinction between equitable remedies, which the Board is empowered to award, and legal remedies, which it is not; or (b) the history of courts' rejection of compensatory damages under Section 706(g) before Title VII was amended. In fact, none of the remedies the Board identified as being "properly imposed that are not explicitly provided in the Act," such as notice posting or mailing, bargaining orders, or access right are legal damages at all; they are non-monetary equitable relief of the sort identified by the Supreme Court in *Albermarle*.

Indeed, the Supreme Court addressed a similar issue in *Pollard* where it considered

[9] That orders restoring health and retirement benefits are equitable in nature is also consistent with *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. at 213, since the money associated with them can be traced to the funds of the employer rather than being in the possession of a third party.

whether front pay was "compensatory damages" subject to the damages caps under 42 U.S.C. § 1981a, or whether it was equitable relief traditionally awarded under Section 706(g) and hence excluded from the damages cap. The Court held that front pay was an equitable remedy excluded from the damages cap because it was a supplement to back pay arising out of whether and when a victim of discrimination is reinstated. 532 U.S. at 849-50.

That is exactly the case with respect to search-for-work and interim employment expenses. Both of them directly relate to whether, when and the circumstances under which the employee secures work in order to comply with his obligation to mitigate back pay. Thus, just as front pay, they are fairly within the contemplation of Section 10(c). *Cf. Pollard*, 532 U.S. at 849-50.

What's not fairly within the contemplation of Section 10(c) are legal damages at all, or at least damages that have no direct connection to back pay. And by definition, consequential damages have no direct connection to back pay because they result only indirectly from a wrongful act. For example, the victims of a wrongful act might seek consequential damages for someone having to sell a house, damages to a credit rating, late fees on a credit card, or the like. *See, e.g., The Vorhees Care & Rehab. Ctr.*, 371 NLRB No. 22, slip op. at 4, n.14 (Aug. 25, 2021). None of these sorts of damages relate to the amount of money employers pay to employees, or to the benefits an employer provides in exchange for work, or whether employees will be made whole for the loss of such wages and benefits as the result of an improper discharge; rather, they are one or more steps removed from such issues. For example, an employee could have kept his or her job and still lost a house or a car, or suffered credit card late fees. Similarly, an employee could lose his job and suffer none of these consequences. As a result, these sorts of damages fall far outside equitable questions about how much back pay and what sorts of benefits an employee should receive under a Section 10(c) make-whole remedy. Accordingly, *Crossett* and *King*

Soopers do not provide any basis on which to expand Section 10(c) to include a broader range of compensatory damages. And if they somehow do, they were wrongly decided.

III. There Are Strong Policy Reasons Not to Include Consequential Damages Among the Board's Make-Whole Remedies.

There are also strong policy reasons not to include consequential damages among the Board's make-whole remedies. While back pay calculations are often fraught with their own issues and delays, at least they are related to how much back pay an employee should receive, and subject to reasonably concrete proof about how much the employee made at his prior employer, the amount of his interim earnings, and how much he spent on seeking new employment. *See, e.g., Baker Electric, Inc*., 351 NLRB 515, 537-38 (2007) (remanding claim for proper calculation of mileage associated with search for work expenses).

Not so with broader consequential damages, however. Rather, the decision about whether to award consequential damages or not adds an entirely new set of litigable issues to unfair labor practice proceedings. To establish entitlement to consequential damages, there must be proof that the damages were foreseeable, were directly traceable to the wrongful conduct and resulted from the wrongful conduct. *See, e.g., Arthur Anderson & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 816 (Tex. 1997) (Consequential damages must be foreseeable and must be directly traceable to the wrongful act and result from it). These elements of proof go far beyond questions about how much the employee made at his former employer, how much he earned after he was discharged, and how much it cost him to obtain those interim earnings. Rather, there are often hotly disputed facts about whether certain elements of consequential damages are directly traceable to a respondent's conduct, and whether such damages were reasonably foreseeable. These sorts of questions will inevitably lead to protracted litigation and delayed resolution of Board proceedings, especially as aggrieved parties search for large payouts—something about which the Board has been often

criticized, and with good reason. *See, e.g., Emhart Indus. v. NLRB*, 907 F.2d 372, 378-380 (2d Cir. 1990) (denying enforcement to a Board order due to administrative delay and stating that "once a case is presented to the board 'it enters a new dimension—one where time has little meaning.'") (quoting House Committee on Government Operations, *Delay, Slowness in Decision-making, and the Case Backlog at the National Labor Relations Board*, H.R. Rep. No. 1141, 98th Cong., 2d Sess. 16 (1984)).

When presented with a similar concern in *King Soopers*, the Board majority responded that most of its cases settle and so it was not a real concern.[10] Once again, however, given the indirect nature of consequential damages, settlement of cases in which such damages are sought is far from certain because employers may have little or no ability to assure themselves of the accuracy of the Board's consequential damages calculations. Moreover, this would simply add one more deterrent to settlement under the General Counsel's current approach to settlement, which is demanding apologies for disputed violations, rejecting non-admissions clauses, and insisting on the ability to resurrect long-resolved allegations based on alleged settlement defaults. *See, e.g.,* GC Mem. 21-07 (Sept. 15, 2021).

CONCLUSION

For the foregoing reasons, the Board does not have the statutory authority under Section 10(c) of the National Labor Relations Act to award consequential damages and, therefore, it should decline to do so. Rather, only Congress has the authority to amend the Act to allow for such damages.

In the alternative, should the Board decide to include compensatory damages among its

[10] Moreover, these policy concerns regarding delay and potentially negative impacts on settlement are no more speculative than the *King Soopers* Board's speculation that offsetting search-for-work expenses from interim earnings somehow deterred charging parties from searching for work.

remedies despite its lack of statutory authority to do so, it should only award such damages in the most egregious cases as an extraordinary remedy given the indirect nature of such damages, it should require that they be established by clear and convincing evidence, and consistent with how Congress chose to add compensatory damages to the analogous provisions of Title VII, it should impose damage caps similar to those imposed by 42 U.S.C. § 1981a to avoid converting such damages to impermissible penalties, and to avoid allowing charging parties to receive windfalls based on unusual circumstances.

Respectfully submitted this 10th day of January, 2022.

LITTLER MENDELSON P.C.

By: */s/ A. John Harper III*
A. JOHN HARPER III
ARTHUR T. CARTER
MAURY BASKIN
MICHAEL J. LOTITO
EMILY DOMBROWSKI

Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

Pursuant to the Board's "Notice and Invitation to File Briefs," the undersigned hereby certifies that a copy of the foregoing amicus brief in Cases 20-CA-250250 and 20-CA-251105 was electronically filed via the NLRB e-filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on this 10th day of January, 2022.

Min-Kuk Song
Field Attorney, Region 20
National Labor Relations Board
901 Market Street, Suite 400
San Francisco, California 94103
Min-Kuk.Song@nlrb.gov

Stefen Guthrie
Harry Esquivel
Karen Gowdy
International Brotherhood of Electrical Workers, Local 1269
870 Market Street, Room 479
San Francisco, California 94102
stefen@ibew1269.org
harry@ibew1269.org
kareng@ibew1269.org

Arthur G. Telegen
Jason J. Silver
Seyfarth Shaw LLP
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210
atelegen@seyfarth.com
jsilver@seyfarth.com

/s/ A. John Harper III
A. John Harper III

4876-8849-6902.5 / 068891-1000