Nos. 23-1335/23-1403

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner/Cross Respondent,

v.

McLAREN MACOMB,

Respondent/Cross-Petitioner.

Originating Case No. 07-CA-263041

BRIEF *AMICI CURIAE* OF THE COALITION FOR A DEMOCRATIC WORKPLACE ET AL. IN SUPPORT OF RESPONDENT/CROSS-PETITIONER McLAREN MACOMB

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Amici Curiae Coalition for a Democratic Workplace, Associated Builders and Contractors, Associated General Contractors of America, Council on Labor Law Equality, National Federation of Independent Business Legal Center, and National Retail Federation (collectively, "*Amici*") respectfully submit this brief in support of Respondent Cross-Petitioner McLaren Macomb ("McLaren"). *Amici* urge this Court to grant McLaren's Petition, review the Decision and Order of the National Labor Relations Board ("NLRB" or "the Board"), and set it aside.[1]

INTERESTS OF THE *AMICI CURIAE*

Amicus Coalition for a Democratic Workplace ("CDW") represents hundreds of employer associations, individual employers, and other organizations that together represent millions of businesses of all sizes. CDW's members employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the NLRB that threatens the wellbeing of employers, employees, and the national economy.

Amicus Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 22,000 members.

[1] Pursuant to FRAP 29(a)(2) and 29(a)(4)(E), counsel for *Amici* state that all parties have consented to the filing of this brief; that no party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief; and that no person other than *Amici*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

Founded on the merit shop philosophy, ABC and its 68 Chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

Amicus Associated General Contractors of America ("AGC") is the nation's largest and most diverse trade association in the commercial construction industry, now representing over 27,000 companies in a network of 89 chapters. AGC represents both union- and open-shop contractors engaged in building, heavy, civil, industrial, utility, and other construction. The association provides a full range of services to meet the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest.

Amicus Council on Labor Law Equality ("COLLE") is a national association of large employers with partially unionized workforces founded more than 35 years ago to monitor and comment on developments concerning the interpretation of the Act. COLLE member companies represent every essential industry in the United States, which reflects the broad scope of private-sector workplaces subject to the Act. COLLE members' economic success and ability to create sustainable jobs

depends on a national labor policy characterized by stable, predictable and balanced interpretations of the Act.

Amicus National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB 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. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents the interests of its members in Washington, D.C., and in all 50 state capitals.

Amicus National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad.

Amici regularly advocate for their members on issues of labor law and workplace policy, including by submission of amicus briefs in matters before the NLRB and various courts. *Amici*'s members commonly enter into confidentiality and non-disparagement agreements with employees on mutually beneficial terms, whether in the context of an employee separating from employment, or the

resolution of a workplace dispute. Accordingly, the questions presented in this case are of great importance to *Amici*, because, if upheld, the Board's decision will have immediate and long-lasting effects on their members' labor relations, workplace morale and productivity, and their legal and economic liability.

SUMMARY OF ARGUMENT

In its Decision and Order, the Board, for the first time in the almost 90-year history of the National Labor Relations Act ("NLRA" or "the Act"), declared that the simple act of *offering* a severance agreement which contained facially-neutral confidentiality and non-disparagement clauses was a *per se* violation of Section 8(a)(1) of the Act. It did so in the absence of any evidence that the provisions in question were objectively coercive—let alone any evidence that the eleven employees who were offered these agreements themselves felt in any way coerced by their proffer—and without serious analysis of the actual language of the agreements themselves. The Board also ignored important facts in the record and long-standing Board policy favoring the private resolution of disputes, encouraging settlement between the parties, and holding non-disparagement and confidentiality clauses lawful under the Act.

To reach its conclusion, the Board overruled at least four prior cases, none of which were necessary to overturn—under governing Board law, the outcome of the case would have been the same. Rather, the Board appears to have seized an

opportunity to jettison settled law in its zeal to reach the outcome-based conclusion it desired. In the place of settled law setting forth a clear standard and balancing the rights of employers and employees, it now offers a vague and amorphous standard under which no employer can be certain it is acting within the lawful confines of the Act. In doing so, the Board acted arbitrarily and capriciously, and in contravention of the statute. Its decision should be afforded no deference, and its Decision and Order should be set aside.

ARGUMENT

I. Confidentiality and Non-Disparagement Agreements Serve Important and Salutary Purposes, Which the Board Improperly Ignored

Amici's members routinely enter into voluntary separation and severance agreements which involve an exchange of mutually agreed-upon consideration. These often include provisions requiring both parties to keep the terms of the separation confidential to the extent that the law allows. Mutual non-disparagement provisions—in which both parties agree to not malign or impugn the other—are also not uncommon.

These provisions are narrowly tailored to serve legitimate business purposes, and are critical to safeguarding an employer's proprietary and confidential trade secret information and ensuring its successful continuity of operations when an employee departs. Indeed, research indicates that "59% of ex-employees admit to stealing confidential company information" when they leave a job. *See* "More Than

Half of Ex-Employees Admit to Stealing Company Data According to New Study," Ponemon Institute & Symantec Corporation (Feb. 23, 2009).[2] The cost of this misappropriation of intellectual property has been estimated to range from one to three percent of U.S. Domestic Product, potentially costing U.S. employers up to $480 billion per year. *See* "Economic Impact of Trade Secret Theft: A framework for companies to safeguard trade secrets and mitigate potential threats," CREATe.org and PwC (Feb. 2014).[3]

Mindful of their obligations under the law, *Amici's* members routinely include provisions clarifying that certain claims may not be waived (for example, future claims, or claims the waiver of which may be statutorily limited or prohibited), and making clear that, while financial recovery may be limited, the agreement does not limit their right to access and assist federal, state, and local administrative agencies.

In its Decision and Order, the Board ignored completely both the valid reasons why an employer would seek to include such provisions in a separation agreement

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[2] Available at: https://investor.nortonlifelock.com/About/Investors/press-releases/press-release-details/2009/More-Than-Half-Of-Ex-Employees-Admit-To-Stealing-Company-Data-According-To-New-Study/default.aspx; *see also* Symantec Corporation, "What's Yours Is Mine: How Employees are Putting Your Intellectual Property at Risk," (Feb. 6, 2013) ("Half of the survey respondents say they have taken information, and 40 percent say they will use it in their new jobs."), available at: https://www.ciosummits.com/media/solution_spotlight/OnlineAssett_Symantec_WhatsYoursIsMine.pdf.

[3] Available at: https://www.innovation-asset.com/hubfs/blog-files/CREATe.org-PwC-Trade-Secret-Theft-FINALFeb-2014_01.pdf.

and the fact that in every instance, an employee accepting them is doing so on an entirely voluntary basis. In so doing, it improperly elevated employee rights under Section 7 of the Act over the legitimate employer interests supporting the rule, and failed to engage in the balancing test required under then-existing law governing the analysis of facially neutral work rules. *See The Boeing Company*, 365 NLRB No. 154, slip op. at 3 (2017) ("[W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. We emphasize that the Board will conduct this evaluation, consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act . . . which consistent with Section 8(a)(1).") (internal citation omitted)).[4] Under that governing standard, both the confidentiality and non-disparagement policy would have been found lawful. *See Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 2-3 (2021) (finding confidentiality rule lawful); *Motor City Pawn Brokers, Inc.*, 369 NLRB No. 132, slip op. at 5-7 (2020) (finding non-disparagement rule lawful).

[4] While the Board has since overturned its ruling in *The Boeing Company*, *see Stericycle, Inc.*, 372 NLRB No. 113 (2023), at the time of the instant decision there is no dispute that the *Boeing* balancing test was governing law.

II. The Board's Creation of a New Standard Not Litigated Before the Administrative Law Judge, and Its Reversal of Precedent Which Would Have Resulted in Precisely the Same Outcome, Was Unnecessary, Arbitrary and Capricious

In two independent ways the Board committed reversible error. First, it did so by creating new law based on a theory of the case not presented at trial or to the Administrative Law Judge. Second, it acted arbitrarily and capriciously when it proceeded to overturn existing case law and create unprecedented new law unnecessarily, insofar as it is undisputed the case would have resulted in exactly the same result under existing law. Both of these errors justify this Court vacating the Board's decision.

A. The Board's Decision Impermissibly Rests on an Issue Not Adjudicated Before the Administrative Law Judge

No party debates that, until this case, the Board has never held that the mere proffer of a severance agreement containing a facially neutral confidentiality or non-disparagement provision is a *per se* violation of Section 8(a)(1) of the Act. Nor was the question of whether it does put before the Administrative Law Judge (ALJ) who tried the matter. Rather, the case was litigated on the theory that *McLaren* threatened employees with the loss of benefits contained in the severance agreement. Proceeding from that theory, and applying well-settled law, the ALJ held squarely that the subject non-disparagement and confidentiality clauses were lawful under the Act. *See McLaren Macomb*, 372 NLRB No. 58 slip op. at 19 (2023). It was not until

after the ALJ's decision that the General Counsel changed her theory to argue that the subject agreements were "merely coercive," *id.* at 15 (Member Kaplan dissenting), and urged the Board to overrule existing case law. The Board, accepting the General Counsel's invitation, proceeded to do so.

The Board's decision to create new law on an issue not presented to the ALJ at hearing in and of itself justifies this Court's vacatur. Indeed, the Board's actions in this case are strikingly similar to its attempt to fashion new law based on theories not presented at trial in *International Organization of Masters, Mates, & Pilots*, 61 F.4th 169 (D.C. Cir. 2023), which the Court of Appeals for the D.C. Circuit unanimously and unequivocally rejected.

In that case, a two-member majority of the Board created unprecedented new law based not on the arguments of the parties presented at trial, but rather on a theory of the case "that had never been raised before the ALJ." *Id.* at 179. The Court of Appeals rejected the Board's attempt to do so with dispatch:

> It is a basic tenet of administrative law that each party to a formal adjudication must have a full and fair opportunity to litigate the issues to be decided by the agency," *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996), because otherwise, ''the record developed with regard to that issue will usually be inadequate to support a substantive finding in [the proponent's] favor,'' *id*. The law is clear that "notice adequate to provide a fair opportunity to defend on [an] issue"' must "occur[ ] before the record is closed, and that the Board generally should not consider significant issues that the parties failed to raise.

Id. *See also Collective Concrete, Inc. v. NLRB*, 786 F. App'x 266, 267 (D.C. Cir. 2019) (declining to review issues not presented to ALJ); *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 24 n.1 (D.C. Cir. 2000) (an issue that "the parties did not litigate . . . before the ALJ'' was "not properly before the court"). This alone justifies this Court setting aside the Board's Order.

B. The Board's Decision to Reverse *Baylor* and *IGT*—Under Which the Outcome of the Case Would Have Been Identical—Was Unnecessary, Arbitrary and Capricious

In its decision, the Board majority repeatedly claimed that *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020), were in conflict with long-standing precedent, and that this conflict justified their reversal. Both of these assertions are incorrect.[5]

Put simply, *Baylor* and *IGT* stand for the proposition that where a departing employee's acceptance of a separation agreement containing allegedly unlawful provisions is entirely voluntary, does not affect any benefit which the employee had accrued or to which was otherwise entitled, and is offered without evidence of

[5] The Board also expressly overturned *S. Freedman & Sons*, 364 NLRB 1203 (2016) *enf'd* 713 Fed App'x 152 (4th Cir. 2017) and *Shamrock Foods*, 366 NLRB No. 117 (2018) "to the extent they are inconsistent" with the unprecedented new standard announced in the instant case. The Board's ability in its Decision to first overturn *Shamrock Foods* but two paragraphs later cite it as an example how the lawfulness of severance agreements should properly be analyzed is, respectfully, extraordinarily arbitrary.

unlawful discrimination or coercion, a non-disparagement or confidentiality provision does not interfere with, restrain, or coerce employees in the exercise of their rights under the Act. Conversely, where such provisions are offered in a context which could be construed as objectively coercive, either through a record of the employer's violation of the Act, or by way of other circumstances which would lead to the reasonable conclusion that the proffer was intended to chill Section 7 rights, they may be found to violate the Act.

The majority's Decision holds that the mere offering of a severance agreement violates the act, and that unlawful or coercive conduct by the employer is unnecessary to find the proffer unlawful. However, in their effort to find a scintilla of support for overturning *Baylor* and *IGT*, the conveniently overlook the fact that in each case they cite in support of this proposition, *there was, in fact unlawful conduct which would lead to the reasonable conclusion that these proffers were coercive.*

In *Shamrock Foods*, for example, the Board held that a separation agreement containing broad confidentiality and non-disparagement provisions which was offered to an employee who had been discharged in violation of Section 8(a)(1) and (3) of the Act was unlawful. *See Shamrock Foods Co.*, 366 NLRB No. 117 (2018), *enf'd* 779 Fed. App'x 752 (DC Cir. 2019) (per curiam); *see also Metro Networks*, 336 NLRB 63, 66-67 (2001) (same). Similarly, in *Clark Distribution Systems*, 336

NLRB 747 (2001), the Board found that language prohibiting employees from participating in Board processes was unlawful where the employer had engaged in other unfair labor practices which had the effect of rendering the tender of the agreement coercive.

To be clear, the fact that in each of these instances unlawful conduct was present does not suggest that an ancillary unfair labor practice is a required precondition to finding a separation agreement unlawful, but rather only that "in evaluating whether a reasonable employee would find that the *proffer* of the settlement agreement would interfere with, restrain, or coerce them in the exercise of their Section 7 rights . . . the presence of prior conduct suggesting a proclivity to violate the Act would affect the way in which employees *would* interpret the severance agreement." 372 NLRB No. 58 slip op. at 14 (Member Kaplan dissenting) (emphasis in original).

The majority likewise erred in coming to the conclusion that *IGT* and Baylor must be overturned because they conceivably "grant[] employers *carte blanche* to offer employees severance agreement[s] that include unlawful provisions," *id.* slip op. at 10. This supposition is similarly without basis in fact and wholly speculative. *IGT* and *Baylor* addressed the lawfulness of facially neutral separation agreements, and neither case has ever been used to find facially unlawful severance agreements

permissible under the Act. The Board's attempt to argue that they somehow might is, charitably, a straw man.

Given all of these facts—and the indisputable conclusion the outcome of the case would have been exactly the same under existing precedent—there was simply no rational basis on which to overturn *Baylor* and *IGT*. The Board's doing so in the absence of such reason was arbitrary and capricious.

III. The Board's "Tendency to Chill" Standard Is Overbroad, and Its Failure to Address Key Facts Leaves Employers with No Guidance as to Whether Any Contractual Provision Is Lawful Under the Act

The Board's Decision and Order adopted an overbroad standard, under which any language that has a "tendency to chill" the exercise of Section 7 rights is unlawful. It did so foremost without analyzing express language in the subject agreements permitting communication with and assistance to the Board. Adding insult to injury, subsequent guidance issued by the General Counsel purporting to clarify how the Board will enforce its decision going forward provides no concrete or useful guidance to employers seeking to ensure that the confidentiality or non-disparagement agreements they enter into are lawful under the Act. If allowed to stand, this Decision will, as a practical matter, dramatically limit the ability of employers to enter into agreements with their employees on mutually beneficial terms.

A. The Board's "Reasonable" or "Chilling" Tendency Analysis Is Overbroad and Misstates the Law

As noted above, the Board in this case takes the position—previously espoused by then-Member, now Chair McFerran—that the mere offer of a separation agreement with mutual consideration has "inherent coercive potential" and is therefore unlawful. Respectfully, this view relies on an overbroad conception of Section 7 rights—one emphatically rejected by the Supreme Court. *See Epic Systems v. Lewis*, 138 S. Ct. 1612, 1617 (2018) (declining to read Section 7 so broadly as to encompass class action waivers in arbitration agreements, explaining, "Section 7 focuses on the right to organize unions and bargain collectively."). Put more simply—and despite the fact that the majority may wish it to be so—as the Board has long recognized, "'the reasonable employee does not view every employer policy through the prism of the NLRA.'" *L.A. Specialty Produce Co*., 368 NLRB No. 93, slip op. at 2 (2019) (citing *The Boeing Company*, 365 NLRB No. 154 slip op at 3 n.14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017))).

Indeed, as Member Kaplan—who would have found that the employer in this case violated Section 8(a)(1) under prior precedent—put succinctly:

> Under [the majority's] standard, an employer's proffer of any severance agreement containing any term that could *possibly* be interpreted as interfering with Sec. 7 rights would be *per se* unlawful, without regard for whether a reasonable employee would interpret the term at issue as coercive in the context of either the severance agreement as a whole or

> their former employer's history in response to activity protected by the Act.

372 NLRB No. 58 at 20 n.7 (Member Kaplan dissenting). Put most simply, the Board in this instance concluded, with scant analysis and no evidentiary support, that "the high potential that coercive terms in separation agreements may chill the exercise of Section 7 rights—whether accepted or merely proffered—unless narrowly tailored." 372 NLRB No. 58, slip op. at 7 (the Board then declined to define under what circumstances such terms will be found by the Board to be "narrowly tailored" *see id.* n.38[6]). This attempt to stretch the NLRA to its outermost limits, in the absence of evidence to justify so broad a reading, should be rejected.

B. The Board's Decision Ignored the Express Language of the Subject Agreement, and Provides No Meaningful Guidance to Employers as to How to Structure Agreements That Are Lawful Under the Act

While purporting to apply a "careful analysis of the terms" of the subject confidentiality and non-disparagement clause, the Board did no such thing. Indeed, in its decision the majority in fact glossed over entirely the express language of the

[6] Nor did the Board make any meaningful effort to distinguish prior case law in which the Board upheld severance agreements with arguably broader releases. *See* 372 NLRB No. 58 slip op at 7 n.38 (noting only that *Hughes Christenson Co.*, 317 NLRB 633 (1995), and *First National Supermarkets, Inc.*, 302 NLRB 727 (1991), "waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement"). If this is the test the Board intends to use as to whether a release of Section 7 rights is "narrowly" tailored, it ought say so explicitly.

Agreement, including, most notably, language in the confidentiality provision which explicitly provides that the Agreement does not restrict disclosure to "an administrative agency of competent jurisdiction." 372 NLRB No. 58 slip op at 2, 8.

The Board's holding in this case, coupled with its disregard of express language providing for access to the Board or any other administrative agency provides no useful guidance for employers going forward as to how to tailor confidentiality and non-disparagement clauses to be within the lawful confines of the Act (at least as construed by the General Counsel). Indeed, the decision leaves employers between the proverbial Scylla and Charybdis—they must choose to either forego the inclusion of such provisions in separation agreements entirely, or include such language at their peril and run the risk that that the Board may construe it as having an ill-defined "chilling tendency" on the exercise of Section 7 rights.

Indeed, a General Counsel's Memorandum issued subsequent to the decision provides nothing in the way of concrete guidance as to whether and how the Board will now assess the lawfulness of such provisions under the Act. *See* General Counsel Mem. GC 23-05, "Guidance in Response to Inquiries about the McLaren Macomb Decision" (Mar. 22, 2023).

Per the General Counsel, a lawful severance agreement is only one that "do[es] not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees." *Id.* at 2. With respect to

confidentiality clauses, only those which are "narrowly tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications *may* be considered lawful," *Id*. at 5 (emphasis added). It is already abundantly clear that the General Counsel will take an extremely limited view of what "narrowly tailored" means in this context: As recently as last week, the Board filed a complaint against a leading e-commerce business, alleging that an agreement entered into with a program manager engaged in the development of the cutting-edge delivery technology violated the Act because it restricted discussion of "proprietary or confidential information." *See* Lauren Rosenblatt, "NLRB accuses Amazon of unlawful confidentiality agreements for drone staff," Seattle Times (Sep. 11, 2023). The General Counsel's proposition in that cases that an agreement between an employee and a technology company which restricts post-employment discussion of its confidential technology "restrains or coerces" any employee's exercise of their Section 7 right to organize is quite simply astounding.[7]

Indeed, throughout her Memorandum, the single, qualified, example of a term within a confidentiality agreement that may or may not be permissible is one

[7] See also "General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision," *Garten Trucking LC & Assoc. of Western Pulp and Paper Workers*, Cases 10-CA-279843 *et al*. (Apr. 28, 223), at 45-46 (provision stating merely that employee is required to not disparage employer is "unlawful restraint" on former employee's Section 7 rights), available at: https://apps.nlrb.gov/link/document.aspx/09031d4583a465ca.

regarding the financial terms of a settlement, which "typically" (but presumably not always) would not interfere with the exercise of Section 7 rights. *See* General Counsel Mem. 5 n.9.

As for non-disparagement clauses, only those which are "limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity *may* be found lawful". *Id.* at 5-6 (emphasis added). The General Counsel's position that in light of *McLaren*, the only permissible non-disparagement term an employer may include in a separation agreement is one that provides only that the employee not engage in defamation under the law is preposterous and unprecedented.

Finally, if allowed to stand, the General Counsel has made clear her view that not only non-disparagement and confidentiality clauses are at odds with the Act, but also that other provisions "might" interfere with Section 7 rights, including non-competition agreements; non-solicitation clauses; no poaching clauses; and/or "broad liability releases and covenants not to sue that may go beyond the employer." *Id.* at 6-7. This attempt to use an ill-reasoned and overbroad decision to even further limit employers' rights under the Act should be rejected.

IV. The Board's Decision Should Be Given No Deference by the Court

The Board's decision should be given no deference by this Court for two independent reasons. First, insofar as the Board's decision did not interpret the National Labor Relations Act, but rather merely the common law of contracts (in which the Board has no particular expertise), it is entitled to no deference. Second, given the that the Board (as is increasingly its wont) arbitrarily and unnecessarily reversed numerous precedents, along the way ignoring the plain facts of the case, it should not be afforded the deference traditionally accorded to an administrative agency when it gives a "reasonable" construction of its statute.

A. The Board Has No Special Expertise In the Common Law of Contracts, and Its Interpretation of the Contractual Provisions at Issue in this Case Should Not Be Afforded Deference

As a general rule, an agency is afforded a certain amount of deference when it is interpreting a statute Congress has authorized it to enforce. *See generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (courts defer to an agency's "reasonable interpretation" of ambiguous terms in a statute administered by that agency). Conversely, where an agency interprets the content and meaning of the common law, its resolution requires "no special administrative expertise that a court does not possess." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968). *See also Epic Systems Corp. v. Lewis*, 584 S. Ct. 1612 (2018) (Board has no expertise and is thus entitled to no deference in its

interpretation of the Federal Arbitration Act); *cf. Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 194 (2023) (allowing collateral review of agencies' decisions where issues presented were "outside [the Commissions'] expertise.").

Where, as here, the Board merely interpreted the nature of a contractual relationship between two parties, this Court should review its decision *de novo*. *See, e.g., Browning Ferris Indus. of Calif.v. NLRB*, 911 F.3d 1195, 1206 (D.C. Cir. 2018) (reviewing decision of the Board interpreting the common law of agency with respect to the definition of employer under the Act and concluding "The content and meaning of the common law is a pure question of law that we review *de novo* without deference to the Board."). In so doing, this Court must come to the inexorable conclusion that the Board's decision was in error. It should be vacated.

B. The Board's Arbitrary and Unnecessary Reversal of Precedent Demonstrates That It Has Not Engaged in Reasoned Decision-Making and Has Acted Arbitrarily and Capriciously

"The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.'" *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (quoting *Motor Vehicle Mfrs Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). The arbitrary-and-capricious standard imposed by the Administrative Procedure Act requires that an action be reasonable and reasonably explained. *See Fed. Commc'ns Comm'n v. Prometheus Radio Project*,

141 S. Ct. 1150, 1158 (2021); *accord Texas v. Biden*, 20 F.4th 928 (2022). Agencies are "free to change their existing policies," but, when doing so, must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citation omitted).

It has become all too common for the Board to reverse precedent with the change of the balance of political power at the agency. Unfortunately, the deference which Courts of Appeals give the Board's interpretations of the Act under *Chevron* has enabled this frequent flip-flopping.[8]

The Board's ideologically driven interpretation and reinterpretation of the NLRA has been the subject of considerable criticism. *See, e.g.*, Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. J. Lab. & Emp. L. 707, 711 (2006) ("[I]deology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues."); Leonard Bierman, *Reflections on the Problem of Labor Board Instability*, 62 Denv. U.L. Rev. 551

[8] Indeed, empirical evidence demonstrates that the Board's success rate is markedly higher in cases where it is afforded *Chevron* deference than when it is not. In cases reviewing NLRB decisions between 1993 and 2020, which cite *Chevron*, the NLRB won 83.9% of the time. *See* Amy Semet*, Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis,* 12 U.C. Irvine L. Rev. 621, 651 n.226, 679 (2022). When the reviewing court did not apply *Chevron* in any form, the NLRB's interpretation survived in only 36.4% of cases. *Id*. In light of these facts, it is hardly surprising that the U.S. Supreme Court has granted *certiorari* to review its reasoning in *Chevron* and is widely believed to be poised to narrow the scope of that decision.

(1985). That practice holds true across presidential administrations of both major parties. *See* Michael J. Lotito, *et al*., Coal. for a Democratic Workplace & Littler's Workplace Pol'y Inst., *Was the Obama NLRB the Most Partisan Board in History?* 1 (Dec. 6, 2016) ("Overall, the Obama Board upended 4,559 total years of established law."); Bierman, *supra*, at 551 (documenting the Board's "fast and furious pace" of overruling precedent during the Reagan administration).

As a legal matter, the "random use of inconsistent precedents . . . surely is not reasoned decisionmaking." *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571, 1574 (D.C. Cir. 1992). Here, the Board's holding "defies established law, and creates a new rule without reasoned justification. It thus fails substantial evidence review and is arbitrary and capricious for want of reasoned decision making." *Int'l Org. of Masters, Mates, and Pilots*, 61 F.4th at 174. As a practical matter, the constant reversal of precedent and policy can make it impossible for employers (or, for that matter, labor organizations) to make lawful business decisions with confidence that what is lawful and permissible under the Act today will still be lawful tomorrow, next week, or in the next presidential administration.[9] More to the point, the any

[9] This is especially true where, as is increasingly the case, the decision of the Board is retroactive, such as in the instant case. *See also, e.g., Cemex Constr. Materials Pacific, LLC*, 372 NLRB No. 130 (2023) (new rules regarding election procedures and bargaining orders will be given retroactive effect); *Stericycle, Inc*., 372 NLRB No. 113 (new rules governing lawfulness of handbooks and policies under NLRA will be applied retroactively).

party to be able to frustrates Congress's objective to instill "stability of labor relations" through the NLRA. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949).

The Board's decision in this case marks yet another example of its eagerness to reverse any precedent with which it disagrees, notwithstanding the merits of the case or the strength of reasoning of the prior decision. Indeed, in the short time that the Board has had a Democratic majority in this administration, it has already reversed itself more than a dozen times, and, at the request of the General Counsel, is poised to do so in literally dozens of other cases. Some of the most significant reversals this Board has made thus far include:

- *Independent Contractor Status Under the NLRA*. The Board majority in *The Atlanta Opera*, 371 NLRB No. 95 (2023), overturned its 2019 decision in *Super Shuttle DFW, Inc.*, which set forth the standard for determining whether a given worker is an employee protected by the Act, or an independent contractor outside its ambit. In so doing, the Board re-adopted its 2014 FedEx standard, which has been rejected—twice—by the D.C. Circuit Court of Appeals. As with the instant case, there was no dispute as to the outcome of the case—the Board unanimously found that the subject workers were employees under the existing *Super Shuttle* standard or the new *The Atlanta Opera*

standard—but the Board majority felt the need to overturn precedent in the absence of any compelling reason to do so.

- *Workplace Civility and Discipline*. In 2020, perhaps animated by criticism that the NLRB's rules on when an employer lawfully can discipline an employee who engages in egregious workplace behavior (for example, making sexist or racist remarks) were inconsistent with the laws governing harassment in the workplace, the Board issued *General Motors LLC*, 369 NLRB No. 127 (2020). *General Motors* resolved the tension between competing laws, holding that an employer could lawfully discipline such an employee, provided it would have done so in the absence of union activity. Less than three years later, the Board reversed itself, overruling *General Motor*s and again placing employers in legal limbo as to how to balance their obligations under competing workplace laws. *See Lion Elastomers LLC II*, 372 NLRB No. 83 (2023).

- *Uniform Standards and Workplace Dress Codes*. In its 2022 *Tesla, Inc.* decision, the Board overruled *Wal-Mart Stores, Inc*., 368 NLRB No. 146 (2019), declaring that that "any limitation on the display of union insignia, no matter how slight" is presumptively unlawful. 371 NLRB No. 131, at *20 (2022) (Members Kaplan and Ring, dissenting). In

reversing precedent only three years old, the Board placed in legal jeopardy innumerable dress code and uniform policies adopted by employers for wholly legitimate reasons.

- *Workplace Rules and Handbook*s. In *Stericycle, Inc*., 372 NLRB No. 113 (2023), the Board majority overruled *The Boeing Co*., 365 NLRB 154 (2017), and adopted a strict new legal standard for evaluating the validity of workplace rules under the Act. In so doing, it upset the reasonable expectations of employers that employee work rules and handbooks adopted under the *Boeing* framework would be presumptively lawful.

These are but a sample of the precedent this Board alone has overturned in less than three years. *Chevron* deference all but ensures that these flip-flops stick, "reduc[ing] the judicial process . . . to a mere feint" and rendering the NLRA's meaning fundamentally unstable. *SEC v. Chenery Corp.*, 332 U.S. 194, 210 (1947) (Jackson, J., dissenting). Indeed, even the NLRB's threshold determinations—whether it has regulatory authority in an area at all—are free from meaningful judicial scrutiny. *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013). Without *Chevron* or "*Chevron*-like" deference, there is reason to believe that the NLRB's success rates in the federal courts of appeals would decrease significantly. That heightened risk would incentivize the Board to engage in a more measured

interpretive exercise than the shameless flip-flopping that exists today. *See Michigan v. EPA*, 576 U.S. 743, 763 (2015) (Thomas, J., concurring) (noting that prior decisions affording agencies deference had "emboldened" EPA's interpretations).

As one former Chair of the Board has observed, "Arbitrary application of a standard where the choice of standard determines the outcome, as is the case here, can only breed cynicism regarding [the Board's] decisions and contempt of the Board itself." *J.G. Kern Enterprises*, 371 NLRB No. 91, at 10 (2022) (Member Ring, dissenting) (noting Board's disregard of precedent contravenes the Administrative Procedure Act). *Amici* respectfully submit that in an instance such as this one, where it is undisputed that the case would have ended up with the same result under prior precedent, the decision of the Board to reverse standing law for absolutely no good reason is even more egregious.

Something must change. Employers need a level of "certainty" so that they can "reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice." Unions, too, need certainty so that they may discern "the limits of [their] prerogatives." *The Boeing Co.*, 365 NLRB No. 154, slip op. at 9 n.40 (quoting *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679, 685 (1981)). The Board, however, provides no predictability. And so long as the Board's decisions are given broad deference, there is little hope that courts will do so either. This Court should enforce limits on that deference and reduce the ability of agencies like the

NLRB to change position so easily. The Board's decision to do so in this case was arbitrary and capricious and should be set aside.

CONCLUSION

In its desire to reach a foreordained conclusion and achieve its desired outcome, the Board ignored fact and misapplied the law. For all of the foregoing reasons, *Amici* urge this Court to grant McLaren's Petition, set aside the Board's Decision and Order, and grant Petitioner such relief it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,386 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally space typeface using Times New Roman 14-point font.

/s/ Maurice Baskin
Maurice Baskin

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2023, a true and correct copy of the foregoing Brief was filed electronically with the U.S. Court of Appeals for the Sixth Circuit, which will send a notice of the filing to all counsel of record.

/s/ Maurice Baskin
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