Nos. 24-9511 & 24-9525

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

3484, INC. & 3486, INC.,

PETITIONERS,

V.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

On Review from the National Labor Relations Board
Nos. 27-CA-278463, 27-CA-278592, 27-CA-279117

PETITIONERS' 3484, INC. & 3486, INC. OPENING BRIEF

Oral Argument is Requested

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GLOSSARY

3484 or **3484 Production**: Petitioner 3484, Inc.

3486 or **3486 Production**: Petitioner 3486, Inc.

ALJ: administrative law judge

Board: National Labor Relations Board

Local 222: International Brotherhood of Teamsters Local 222

Local 399: International Brotherhood of Teamsters Local 399

NLRA: National Labor Relations Act

NLRB: National Labor Relations Board

Section 7 or **§7**: 29 U.S.C. § 157

Section 8 or **§8**: 29 U.S.C. § 158

Section 8(a)(1) or **§8(a)(1)**: 29 U.S.C. § 158(a)(1)

Section 8(a)(3) or **§8(a)(3)**: 29 U.S.C. § 158(a)(1)

ULP: Unfair Labor Practice

STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

Petitioners 3484, Inc. and 3486, Inc. petition for review of the National Labor Relations Board's Decision and Order dated March 7, 2024. *3484, Inc. & 3486, Inc.*, 373 N.L.R.B. No. 28 (N.L.R.B. Mar. 7, 2024); ROA.807–834. The Tenth Circuit has jurisdiction under 29 U.S.C. § 160(f) because Petitioners are aggrieved parties, and the Decision and Order is a final, appealable order. Venue is appropriate because Petitioners are headquartered within the Tenth Circuit.

NLRB cross-petitioned for enforcement of the Decision and Order on April 16, 2024. This Court has jurisdiction over the cross-petition under 29 U.S.C. § 160(e).

ISSUES PRESENTED FOR REVIEW

1. Does substantial evidence support the Board's conclusions that:

(a) the 3484 Production committed unfair labor practices by (i) asking a driver a single question—whether she had heard about union activity—and (ii) asking the driver to keep that brief conversation confidential?

(b) the 3486 Production committed unfair labor practices when (i) its transportation coordinator asked a driver a single question, "Who called the union?"; (ii) its

transportation coordinator told a union representative and a driver, without authorization, that future movies would be moved to Canada because of union activity?; and (iii) when it discharged and refused to reinstate striking drivers?

2. Does 29 U.S.C. § 160(c), which authorizes equitable relief, authorize the Board to order legal damages and, if so, does §160(c) violate the non-delegation doctrine?

3. Does the Board's proceeding—irrespective of any decisions or orders made therein—violate Petitioners' rights under Article III and the Seventh Amendment?

STATEMENT OF THE CASE

A. David Wulf—Producer

David Wulf is a movie producer who has made films in Utah and internationally during his 20-year career. ROA.189. This case involves two movies he produced through Petitioners 3484, Inc. and 3486, Inc., two Utah-based companies that Wulf owns. ROA.193, ROA.201–02, ROA.812, ROA.816. Each corporation was created to produce only a single film, as is the practice of both Wulf and the industry. ROA.216–18, ROA.812–13. Petitioner 3484, Inc. was created to produce a film called

"Christmas at the Madison," ROA.194, and Petitioner 3486, Inc. was created to produce "Love at the Pecan Farm," ROA.201. The corporations are neither alter egos nor single employers. ROA.807 n.1, ROA.825–26. Wulf, through other production companies, has often worked with unionized crews—both before and after these two productions. ROA.362.

B. Union Tactics & Leverage

This case involves the "common" union "tactic" of "leveraging" work stoppages—here, by drivers of movie-production equipment—to force collective bargaining agreements upon Petitioners. *See* ROA.143–44. Jason Staheli, a Los Angeles-based union representative of the International Brotherhood of Teamsters Local 399, admitted (in the ALJ's words) that "most of the organizing drivers' leverage comes from the moving of vehicles so that walking off a job would have a large effect on production." ROA.815. Staheli further acknowledged that "withholding services is a common tactic for organizing." ROA.144.

C. The 3484 Production

Staheli was unable to use this tactic on the 3484 Production because, by the time he got involved, transportation was all but finished. ROA.815. As he explained, withholding services there "wouldn't [have had] a huge effect on the [3484] production." ROA.102. Without leverage,

Staheli decided not to organize the 3484 Production. *Id*. But Staheli's union, Local 399, filed a ULP charge anyway. This claim was based on a single, brief conversation between Jennifer Ricci, line producer on the 3484 Production, and one of the production's drivers, April Hanson, with whom Ricci had a professional relationship. ROA.813, ROA.815. Hanson told Ricci she hadn't heard anything about organizing the 3484 Production, and Ricci soon after texted Hanson and asked that she keep their conversation confidential. ROA.815.

D. The 3486 Production

Staheli planned and used the work-stoppage tactic on the 3486 Production—immediately before and during the first days of filming, a time when Wulf and everyone else were "very busy." ROA.816.[1] On June 10, three days before filming started, Lindsay Dougherty, another Local 399 representative, left a voicemail and emailed Wulf to discuss unionizing the 3486 Production. *Id.*[2] Wulf recalls receiving a voicemail but doesn't remember when it came in. ROA.360. As he testified, "the closer you get to a shooting start date, it's incredibly busy with all the moving parts. So

[1] All relevant events occurred in 2021 unless otherwise noted.
[2] The ALJ (ROA.816) cited GC Ex. 4(b) [ROA.598], but that exhibit does not include an email dated June 10, 2021.

you know, any sort of unsolicited call, you wouldn't have time to take that particular day. Like, right before, it's crazy busy. I mean, it's – there's a lot." ROA.359–60.

Dougherty also emailed Wulf that Friday evening, June 11, approximately 36 hours before filming started. ROA.816. The email asked Wulf for availability to discuss "a possible one-off project labor agreement." *Id.* Wulf and Brett Miller, transportation coordinator for the 3486 Production, "were very busy [that day] getting things ready to start the new production and transporting vehicles and equipment to start production" in southern Utah (St. George, Leeds, and Hurricane, Utah), approximately 300 miles from Salt Lake City where Wulf is based. ROA.816, ROA.818. For his productions, Wulf[3] rents various equipment—*e.g.*, restrooms, two-room trailers, generators, cameras, air-conditioners, and a "stake bed" (an open-back truck used for hauling). ROA.152, ROA.203–06, ROA.238–40, ROA.271, ROA.277; *see, e.g.*, ROA.677 (equipment-lease agreement).

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[3] In addition to forming a corporation for each movie production, Wulf has formed corporations for other purposes. *See, e.g.*, ROA.204–05. For the sake of convenience, the term "Wulf" in these contexts, *e.g.*, renting equipment for productions, refers to his companies.

According to Miller, Wulf told him that Friday that the 3486 drivers were considering some type of union action and asked him "to see if I [Miller] could talk with the union and figure something out." ROA.816 (citing ROA.045), ROA.048; *but see* ROA.057, ROA.059 (Miller's testimony that Wulf did *not* ask him to contact anyone). Miller couldn't remember the exact conversation because "we were both real busy." ROA.048.

Miller texted Local Union 399's Staheli and a transportation "captain" on the 3486 Production, Roy Brewer. ROA.058, ROA.813. Miller asked Brewer if anyone was talking to a union. ROA.816. Miller informed Staheli and Brewer that if the 3486 Production was unionized, Wulf would probably take future productions to Canada. ROA.816–17. Miller admitted under oath that he later told Wulf that he (Miller) had stretched the truth when he talked to Staheli and Brewer; he also testified that he had no authorization from Wulf or anyone else to make threats about moving future productions. ROA.059–61; *see also* ROA.820 (Miller thought Wulf was "probably mad at me"). Wulf testified that he had never discussed anything like this with Miller—or with anyone else. ROA.368–69. The record contains no evidence whatsoever that Wulf *ever* talked or

even *thought about* moving any productions to Canada. Yet the ALJ found that Wulf "directed" Miller to make a threat. ROA.817.

Regardless, based on Miller's statement, Staheli filed a ULP charge against the 3486 Production on the evening of June 11. ROA.581–83, ROA.818. Later that evening—when, again, Wulf was "very busy" preparing for filming to begin in less than 48 hours—Staheli emailed Wulf to complain that "[w]e are getting off on the wrong foot by you refusing to talk to us." ROA.599. Staheli also forwarded the ULP charge and claimed that Miller (based on a single conversation) had already "broken federal law several times on your behalf." ROA.160–61, ROA.599. Finally, Staheli wrote that the union was interested in "getting a deal that allows your driver crew to get health insurance and retirement." ROA.599.

Staheli began considering a strike that same day, June 11. ROA.109–10. The next day, Staheli emailed Brewer, 3486's transportation captain, a standard list of ULPs to share with the other drivers. ROA.600–02. Staheli identified the "things [ULPs] most likely to happen." ROA.600. And he explained that ULPs "work as leverage." *Id*. Finally, Staheli said that he had already filed a ULP charge against 3486

and "the more [ULP charges] we have the better the leverage." *Id*. Staheli asserted his interest in securing benefits for the drivers and also claimed an interest in addressing the alleged June 11 ULP. ROA.162.

Staheli then traveled to Utah to organize the 3486 drivers; he flew to Salt Lake City and then drove a rented van to St. George, preparing to transport striking workers. ROA.110, ROA.818. According to the ALJ, a Union attorney instructed Staheli "to tell the drivers they were striking due to the June 11 ULP charge so it would be a ULP strike." ROA.818.[4]

Meanwhile, the 3486 drivers brought equipment from Salt Lake City to southern Utah on Saturday, June 12, and set up the trucks, trailers, vans, and equipment for the start of the 15-day shoot, beginning June 13. ROA.056, ROA.260, ROA.818–19. On that first morning of filming, Wulf responded to Staheli's June 11 email. Wulf wrote, "No one has refused to speak with you. I have not asked anyone to speak or act on my behalf." ROA.598.

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[4] At the end of a "ULP strike," an employer must ordinarily reinstate striking workers. *See Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 698 (10th Cir. 1996). But an employer need not reinstate an "economic" striker when the employer has a "legitimate and substantial business justification for refusing to reinstate him." *Medite of N.M., Inc. v. NLRB*, 72 F.3d 780, 787 (10th Cir. 1995).

That same morning, Staheli arrived at the shooting location (Leeds, Utah) with two representatives of the International Brotherhood of Teamsters Local 222. ROA.815, ROA.818. The three union representatives stayed on the set for about six hours and talked to the 3486 drivers while the drivers were working. ROA.148, ROA.169, ROA.459–60, ROA.818. When asked about the propriety of organizing on private property while employees are working, Staheli responded cavalierly, "[i]n my experience in California, it has never slowed me down." ROA.148. As the union lawyer instructed, Staheli told the drivers that ULPs had occurred. ROA.111, ROA.459–60. When the day's filming was done, the 3486 Production crew prepared to move from Leeds to a pecan farm in Hurricane, Utah, for the next day's shoot. ROA.116, ROA.819. But before the drivers started moving the set to Hurricane, Staheli initiated a vote to strike, which was approved. ROA.819.

At Staheli's direction, the striking drivers then moved 3486 Production equipment—which, as noted above, either belonged to or was leased by Wulf—and some personal property. ROA.153–54, ROA.352, ROA.820–21. Staheli testified that equipment and personal property was taken to a Best Western hotel, where the drivers were staying. ROA.127,

ROA.153–54. Staheli admitted that he had never received approval from Wulf or anyone else associated with the 3486 Production to move the equipment. ROA.155, ROA.165–66. And multiple people testified that the equipment was damaged in the process. ROA.309, ROA.323–25, ROA346–47, ROA.372–76; *see also* ROA.695 (picture of flat tire). The drivers spent the rest of the day either moving equipment or picketing. ROA.822.

Wulf was thus forced to the hotel to recover equipment and his personal property that should never have been taken. ROA.821. Moving the equipment also impacted the production. For example, air-conditioned trailers had been removed from the pecan-farm location in Hurricane, which got quite hot on Monday (June 14). ROA.239–41. The production was also forced to shoot some scenes in Salt Lake City, rather than Southern Utah, because the "picture car" had been moved. ROA.256. The drivers even used equipment from the 3486 Production—like portable toilets—while they picketed. ROA.242, ROA.822–23.

To keep the production going, 3486 hired new drivers (on day three of filming), and two remained to the end. ROA.824. The 3486 Production also rented new equipment as needed. ROA.228–29, ROA.257–58,

ROA.281–82. The drivers continued to picket during the filming that week, at one point requiring the sheriff to move them off private property. ROA.242–43, ROA.449, ROA.822. A union representative also admitted that the drivers used bullhorns with the intention of disrupting the production. ROA.453–54. The picketing focused entirely on benefits, not ULPs. ROA.304–05.

On June 17, day five of the production and four days after the strike began, a Local 222 officer emailed Wulf with a "notice of cessation" of the ULP and an "unconditional offer to return all striking employees to work," effective that day at 11:59 p.m. ROA.608–10. Staheli picked that date to end the strike for leverage—he knew the shooting schedule and thought the 3486 Production would need drivers. ROA.131, ROA.824. While the 3486 Production did not rehire the striking drivers, Wulf hired many of those drivers for later productions. ROA.824, ROA.224. Filming ended July 2. ROA.260, ROA.824.

E. NLRB In-House Hearing and Decisions

The NLRB General Counsel brought the following charges: (1) that the 3484 Production violated Section 8(a)(1) when Ricci asked driver April Hanson if she knew about any union activity and when she asked Hanson to keep the conversation confidential; (2) that the 3486

Production violated Section 8(a)(1) when Miller unilaterally asked driver Roy Brewer about the existence of any union actions, and when Miller "threatened" to move production to Canada; and (3) that the 3486 Production violated Section 8(a)(1) and (a)(3) when it discharged and refused to reinstate striking drivers.

The charges were consolidated by the Regional Director for NLRB Region 27 for a hearing before an NLRB-employed ALJ, Gerald M. Etchingham. The hearing was conducted May 17–19, 2022, at the offices of National Labor Relations Board Region 27 in Salt Lake City, Utah. The ALJ issued his initial decision on February 27, 2023, ruling in favor of the NLRB General Counsel.

The NLRB, with some amendments, adopted the ALJ's findings and conclusions on March 7, 2024. ROA.807–10 & n.2.[5] The NRLB ordered Petitioners to, among other things, cease and desist from engaging in unlawful activity and reinstate the striking drivers. ROA.808–10. The NLRB further ordered the 3486 Production to "make whole" the striking drivers for "any loss of earnings and other benefits, and for any other

[5] When discussing the Board's order below, references will include citations to the ALJ's decision adopted by the Board.

direct or foreseeable pecuniary harms, suffered as a result of their unlawful discharges…." ROA.809.

Petitioners timely filed their Petition for Review in this Court on March 20, 2024 (No. 24-9511), the NLRB filed a Cross-Application for Enforcement on April 16, 2024 (No. 24-9525), and the Court consolidated the cases. *See* Apr. 17, 2024 Order.

SUMMARY OF ARGUMENT

This case is about a common union tactic of leveraging work stoppages to force collective bargaining agreements upon Petitioners. The Board adopted, with minor amendments, the ALJ's findings that both the 3484 Production and the 3486 Production had engaged in unfair labor practices. The findings are not supported by substantial evidence.

The Board found that the two Petitioners were not alter egos or a joint employer, but it nonetheless considered the purported animus of both to support individual ULP findings against the separate entities. Further, the ULP findings—brief innocuous questions that merely sought information, an unauthorized threat, and a refusal to reinstate striking workers who, after striking, took possession of and damaged 3486's equipment—lack substantial evidence. Among other things, the Board failed to tie any (purported) animus to the alleged adverse actions.

And the Board ignored evidence that the ULP charges were pretext to engage in an economic strike.

Separately, the Board erred in imposing compensatory damages against the 3486 Production, since the NLRA—29 U.S.C. § 160(c)—authorizes only equitable relief. Alternatively, if Section 160(c) does authorize legal damages, then it violates the non-delegation doctrine. And, at least, the award is improper because it was applied to 3486 retroactively.

Finally, the Board's proceeding—in which it acts as prosecutor, judge, jury, and appellate court—violated Petitioners' rights to an independent Article III court and their Seventh Amendment rights to a jury trial.

STANDARD OF REVIEW

Courts review the Board's legal conclusions *de novo* and its findings of fact for substantial evidence. *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1253 (10th Cir. 2005); *Loper Bright Enter. v. Raimondo*, 144 S.Ct. 2244, 2261 (2024). The Board's factual findings are conclusive "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e), (f). But "Congress has imposed on [courts] responsibility for assuring that the Board keeps within reasonable grounds." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951)).

The substantiality of evidence "must take into account whatever in the record fairly detracts from its weight." *Id.* at 488.

ARGUMENT

I. THE BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

"Congress has imposed on [courts] responsibility for assuring that the Board keeps within reasonable grounds." *Universal Camera*, 340 U.S. at 490. Therefore, the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. A reviewing court does not accept the Board's findings unless, "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view," the supporting evidence is substantial. *J.S. Dillon & Sons Stores Co. v. NLRB*, 338 F.2d 395, 399 (10th Cir. 1964) (quoting *Universal Camera*, 340 U.S. at 488). The Board's findings here are not supported by substantial evidence.

A. The Board's determination that 3484 and 3486 violated §8(a)(1) is not supported by substantial evidence

The Board determined that the 3484 Production violated §8(a)(1) when (1) Supervisor Jennifer Ricci asked driver April Hanson a lone question and (2) Ricci immediately followed-up with a text requesting confidentiality. The Board further found that 3486 violated §8(a)(1) when

its transportation coordinator Miller asked driver Roy Brewer a single question. ROA.807, ROA.827–29. The record does not support these conclusions.

"Not all interrogations are illegal." *Cannady v. NLRB*, 466 F.2d 583, 587 (10th Cir. 1972) (concluding that single question about union activity was not unlawful interrogation). The same applies to confidentiality requests. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 826 (N.L.R.B. Aug. 27, 1998). To be unlawful, an employer's action must reasonably tend to interfere with an employee's Section 7 rights. *See id*. (concluding confidentiality instruction with "no more than a speculative effect on employees' Section 7 rights . . . is too attenuated to warrant a finding of an 8(a)(1) violation"). Here, the Board's conclusion that Hanson's and Brewer's Section 7 rights were violated is pure speculation.

Further, this Court should not accept the Board's conclusion that solitary, innocuous conduct by employers amounts to unlawful activity. Indeed, "[i]t would be untenable, as well as an insulting reflection on the American worker's courage and character, to assume that any question put to a worker by his supervisor about unions, whatever its nature and whatever the circumstances, has a tendency to intimidate, and thus to

interfere with concerted activities in violation of section 8(a)(1)". *NLRB v. Champion Labs., Inc.*, 99 F.3d 223, 228 (7th Cir. 1996).

1. Ricci did not unlawfully interrogate Hanson or unlawfully request confidentiality

The record shows that Ricci and Hanson had a single brief conversation, in which Ricci asked Hanson if she "hear[d] of transportation flipping the show[.]" ROA.815. Hanson responded no. *Id.* Immediately after, Ricci texted Hanson and asked her to keep their conversation confidential. *Id.* That's it.

Such actions are unlawful only if, "under all of the circumstances," they "'reasonably tend[] to restrain, coerce, or interfere with rights guaranteed by the Act.'" *Webco Indus., Inc. v. NLRB*, 90 F. App'x 276, 285 (10th Cir. 2003) (quoting *Rossmore House,* 269 N.L.R.B. 1176 (1984)). And "'either the words themselves or the context in which they are used must suggest an element of coercion or interference.'" *Id.*

In finding violations, the Board purportedly considered the factors from *Westwood Health Care Ctr.*, 330 N.L.R.B. 935 (N.L.R.B. Mar. 20, 2000). ROA.827: (1) The background, *i.e.*, is there a history of employer hostility and discrimination? (2) The nature of the information sought, *e.g.*, did the interrogator appear to be seeking information on which to

base taking action against individual employees? (3) The identity of the questioner, *i.e.*, how high was he or she in the company hierarchy? (4) Place and method of interrogation, *e.g.*, was employee called from work to the boss's office? Was there an atmosphere of unnatural formality? (5) Truthfulness of the reply.

But the application of the *Westwood* factors, considering the totality of the circumstances, supports the 3484 Production:

(1) The Board claimed to find "extensive" evidence of animus by 3484 *and* 3486. But the Board found elsewhere that 3484 and 3486 were not alter egos or a joint employer, and that finding is unchallenged. ROA.807 n.2. Thus, tying the (purported) ULPs of the 3486 Production to the 3484 Production contradicts the finding that these entities are not alter egos or a single employer. Further, Ricci's conversation with Hanson took place *before* any of the events related to 3486 occurred. Thus, there simply was no "history of employer hostility and discrimination" by 3484 when Ricci talked to Hanson—to 3484. *Westwood*, 330 N.L.R.B. at 939; *cf. Stern Produce Co., Inc. v. NLRB*, 97 F.4th 1, 12 (D.C. Cir. 2024) (An "employer's simple animus and general hostility toward the union

are insufficient on their own;" there "must be something more to connect the employer's animus to the adverse action.") (simplified).

Further, the record shows that 3486 itself exhibited no animus: Wulf (working with Ricci) worked with unions both before and after the productions at issue here, and Wulf even later hired many of the striking drivers for later productions. ROA.224, ROA.362.

Finally, demonstrating that her Section 7 rights were not influenced in any way, Hanson herself voted to strike on the 3486 Production. ROA.819. The Board's finding is untenable.

(2) There is no evidence—and the Board made no finding—that Ricci sought information to take action against individual employees. Ricci merely asked if Hanson had heard of any union activity.

(3) Ricci had a relatively high position in 3484, and this factor (alone) tends to support the Board's finding.

(4) There is no evidence—and the Board made no finding—of an "atmosphere of unnatural formality." Ricci did not call Hanson to an office or otherwise parade her in front of other employees; she simply made a private telephone call.

(5) Hanson answered truthfully and did not hide information from Ricci due to perceived coercion or any other reason.[6]

The Board further speculated that Hanson would have reasonably felt obligated to disclose information to Ricci and that Hanson would have reasonably felt restrained from exercising organization activities on 3484 or successive productions involving Ricci, knowing that Ricci "was monitoring union activities very closely." ROA.828. As noted above, there is no evidence that Hanson felt obligated or restrained to say or do anything. To the contrary, Hanson was hired to work on the later 3486 Production, on which she voted to strike. Finally, the Board fails to support its contention that a single question amounts to "monitoring union activities very closely." Such a conclusion would prevent employers from asking any union-related questions—which is not the law. *See Tschiggfrie Props., Ltd. v. NLRB*, 896 F.3d 880, 887 (8th Cir. 2018) (Section 8(a)(1) "'does not prohibit all employer questioning of employees regarding unionization.'") (citation omitted).

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[6] The Board also noted that Ricci's question involved union activities and that no evidence showed that Hanson was a union supporter. ROA.828. The Board failed to explain the relevance of these findings.

Notably, the conclusion in *Westwood* itself demonstrates the Board's error here. In *Westwood*, the Board found an unlawful interrogation based on *numerous* questions about an employee's attitudes toward union activity. *See* 330 N.L.R.B. at 940–41. The Board even discounted an "initial stairway conversation," in which the employee was asked "whether she had attended the meeting" about potential unionization and "what went on there." *Id.* At 940. According to the Board, had that brief conversation been the full "interrogation"—as was the case with Ricci and Hanson—it "would not likely [have found]" a §8(a)(1) violation. *Id*. at 941. *Westwood* thus supports Petitioner 3484.

This Court's precedent also supports 3484. In *Cannady*, an employer asked an employee "if there had been any union activity at the plant." 466 F.2d at 586. The Board found this lone question to be a coercive interrogation, but this Court reversed because "[n]ot all interrogations are illegal," and the Board had "failed to meet its burden" to show that the "interrogation" "interfered with the free exercise of [the employee's] rights." *Id.* at 587. Indeed, Tenth Circuit precedent upholds unlawful interrogation findings only when—unlike here—an employer questions an employee multiple times or coerciveness is patently obvious.

See Webco Indus., Inc. v. NLRB, 90 F. App'x at 285 (employee felt need to falsely deny union activity, and employer had recent history of ULPs); *McLane/Western, Inc. v. NLRB*, 723 F.2d 1454, 1457 (10th Cir. 1983) (employer asked different employees for names of union-supporting employees); *Presbyterian/St. Luke's Med. Ctr. v. NLRB*, 723 F.2d 1468, 1475 (10th Cir. 1983) (among "numerous" other instances, employer asked employee about her union-solicitation activities and, after her denial, warned that they "would have to talk about" further incidents); *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1285 (10th Cir. 1980) (among other things, employer told employees they shouldn't come to work if they were sympathetic to a strike); *see also Champion Labs.*, 99 F.3d at 227 (distinguishing coercive interrogations from mere questions).

2. Ricci's Statement Does Not Constitute an Unlawful Confidentiality Instruction Under §8(a)(1)

The Board's contention, that Ricci's confidentiality request was unlawful, was based on substantively identical "findings." ROA.828.[7] As explained above, these "findings" have no support in the record. And a

[7] The ALJ found Ricci's confidentiality request to constitute an "unlawful interrogation." ROA.828. The Board, however, "rel[ied] on a different rationale than the judge" and instead found that the statement constituted an "unlawful confidentiality request." ROA.807.

confidentiality instruction that "has no more than a speculative effect on employees' Section 7 rights . . . is too attenuated to warrant a finding of an 8(a)(1) violation." *Lafayette Park*, 326 N.L.R.B. at 826. Such a "bald assertion cannot stand because the Board failed to engage in reasoned decisionmaking." *Ridgewood Health Care Ctr., Inc. v. NLRB*, 8 F.4th 1263, 1276 (11th Cir. 2021) (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

The ALJ's findings here were also based on an error—as the Board itself acknowledged. *See* ROA.807 n.2. According to the ALJ, Ricci's lone question "creat[ed] an impression among [] employees that their union activities were under surveillance[.]" ROA.828, ROA.832. The Board "deleted" that "inadvertent reference" because "there is no allegation or finding that [3484] created an impression of surveillance." ROA.807 n.2. But the Board failed to consider that the ALJ's error supported his conclusion that Ricci unlawfully requested confidentiality—yet another reason to discount the Board's conclusions.

This Court should set aside the Board's speculative finding that Ricci's request was an unlawful confidentiality instruction.

3. The 3486 Production Did Not Engage in an Unlawful Interrogation Under §8(a)(1)

According to the Board, Miller told Brewer and Local 399's Staheli that Wulf received emails about potential union organizing and that Miller asked Brewer if he knew who called the union. ROA.828. The Board stated that "Miller admits having a conversation with Brewer and/or other drivers" and "asking the drivers" if any were "talking about a union." ROA.828–29 (citing ROA.046, ROA.105). The record says otherwise. He said he talked to Brewer—not other drivers—by phone and asked, "do you know who called the union?" ROA.046. The citation to ROA.105 is from Staheli's deposition—not Miller's—and Staheli testified merely that Brewer told him (Staheli) that Miller asked if someone had talked to the union.

Therefore, the Board again found an unlawful interrogation based on a lone, innocuous question. ROA.828. And the Board based its conclusion on the same factors (*i.e.*, Miller's position, purported animus at both 3484 and 3486, etc.) as above. ROA.829. For the reasons set forth above, these factors do not provide substantial evidence of an unlawful interrogation. Indeed, Brewer, like Hanson, voted to strike on the 3486 Production. ROA.819.

The ALJ also claimed that Brewer "knew that Miller was against the union coming in to organize and flip the 3486-movie production." ROA.816. But contemporaneous evidence shows otherwise. In a June 13 text to union representative Staheli, Miller wrote "obviously of course I would love for everything that I do to be union so I can get insurance and all the rest of the benefits." ROA.184, ROA.606.

Finally, the Board found that Miller asked Brewer about union activity "at Owner Wulf's request." Even if that were true, it's irrelevant—the question is whether a question "reasonably tends to interfere with, restrain or coerce" Brewer in the free exercise of his Section 7 rights. And there is no evidence that Brewer knew Miller was (purportedly) asking on Wulf's behalf. But, regardless, it's not true.

B. The 3486 Production Did Not Make an Unlawful Threat Under §8(a)(1)

The Board concluded that 3486 made an unlawful threat based on an unauthorized statement by Miller. ROA.829–31. According to the record, Miller—on his own and without being asked or directed—told driver Roy Brewer and Local 399's Staheli that unionization would cause future productions to move to Canada. ROA.047, ROA.604. But, as Miller admitted under oath, he later told Wulf that he (Miller) had stretched the

truth when he made the "threat," and that he had no authorization from Wulf or anyone else to make a threat. ROA.059–61; *see also* ROA.820 (Miller thought Wulf was "probably mad at me"). Indeed, the evidence is conflicting on whether Wulf even asked Miller to talk to anyone about potential union activity. Miller initially testified that Wulf asked him to talk to the union, but he later testified that Wulf never asked him to call anyone. ROA.048, ROA.057.

Further, Wulf testified that he had never discussed anything like this with Miller—or with anyone else. ROA.368–69. Indeed, Wulf didn't learn what Miller had done until after filming was complete. ROA.372, ROA.407. And the record contains no evidence that Wulf *ever* talked or even *thought about* moving any productions to Canada. Therefore, the finding (ROA.817) that Wulf "directed" Miller to make a threat has no support whatsoever.

Nor does the record support the finding (ROA.830) that Miller was a "supervisor" or "agent" under the NLRA. A "supervisor" is an individual with "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their

grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). To determine "whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." §152(13).

Here, the record shows that Miller could, at most, arrange drivers' schedules—based on a movie's schedule—and "assign" a driver "captain." ROA.827. But he could not hire or fire drivers or change their pay. ROA.814. Nor could he "discipline" anyone. The ALJ claimed that Miller could issue a "final warning" to a driver. ROA.814. But, as Miller testified, this "authority" meant that Miller could then ask Wulf or Ricci for permission to fire that driver. ROA.040. And while he claims he could send a driver home for the day, he failed to explain how that driver's work would be made up; after all, he needed permission to hire new drivers. ROA.44. Further, Miller could not enter into agreements for equipment. ROA.370. Local 399's Staheli admitted that he sent the proposed contract

to Wulf, not Miller, because Staheli knew Miller lacked authority to execute it. ROA.144.[8]

All of this supports Wulf's testimony, in which he explains that he's "the boss" and that only he or Ricci had authority to make decisions. ROA.370–71. No evidence contradicts this. Instead, the ALJ noted that Wulf and Ricci would "defer" to or accept Miller's hiring decisions. ROA.814 n.7, ROA.815. But that just confirms that Miller's "decisions" had to be run through Ricci or Wulf; it does not show that Miller had independent authority to make these decisions for the production.

Further, it's worth noting here that Wulf and Ricci could not get in touch with Miller for approximately eight hours after the strike was called on June 13, but (the same day) he texted Local 399's Staheli with information about the filming. ROA.292–93, ROA.363–64, ROA.380–82, ROA.606–07. In one of those texts, Miller tells Staheli "obviously of course I would love for everything that I do to be union so I can get

[8] The "recommend" authority in §152(11) doesn't apply here because, as the ALJ explained, such recommendation "requires the absence of an independent investigation by superiors and not simply that the recommendation be followed." ROA.827. The evidence establishes that Miller had to run his recommendations up the chain.

insurance and all the rest of the benefits." ROA.184, ROA.606. At best, Miller had divided loyalties.

Accordingly, there is no substantial evidence to support the finding that Miller was a supervisor or agent under the NLRA.

C. 3486 Did Not Violate §8(a)(3) by Discharging and Declining to Reinstate the Striking Drivers

The Board adopted the ALJ's conclusion that the 3486 Production violated Section 8(a)(3) when it discharged the striking drivers and declined to accept their unconditional offer to return. *See* ROA.808. But the evidence is insufficient to sustain the Board's finding that the drivers' strike "was motivated at least in part by Miller's unfair labor practices, and thus qualifies as an unfair labor practice strike." *Id.* Second, even if it were a ULP strike, the Board has failed to meet its evidentiary burden to "prov[e] by substantial evidence that . . . [the drivers'] discharge was improperly motivated" by antiunion sentiment. *Cannady*, 466 F.2d at 586.

1. The Drivers' Strike Does Not Qualify as a ULP Strike

Work stoppage does not constitute a ULP strike unless it is motivated by an employer's unfair labor practices. *See, e.g.*, *Post Tension of Nev., Inc.*, 352 N.L.R.B. 1153 (N.L.R.B. Aug. 29, 2008). Conversely, "[a]n

economic strike is one that is not caused by an unfair labor practice." *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 515 (4th Cir. 1998) (holding that substantial evidence did not support Board's finding of ULP strike where conclusion was based solely on self-serving testimony of union officials). And "the mere fact" that an alleged ULP preceded a strike "is not sufficient proof of causation" to render a work stoppage a ULP strike. *Id.* at 517. In "examining the union's characterization of the purpose of the strike, the Board and court must be wary of self-serving rhetoric of sophisticated union officials." *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1981); *accord Facet Enter., Inc. v. NLRB*, 907 F.2d 963, 977 (10th Cir. 1990).

Here, the ALJ concluded that the drivers' strike was motivated by Miller's alleged June 11 unfair labor practices and thus constituted a ULP strike. ROA.831. This conclusion rests solely on the testimony of union agent Staheli and striking employee Brewer, *see id.* (citing testimony from the transcript), which is entirely self-serving. Likewise, the Board did not provide any reasoning of its own when it adopted the ALJ's finding. ROA.808.

But the record demonstrates that the union representatives planned to use the work stoppage—a "common tactic" for "leverage" against an employer—to exact economic concessions. ROA.143–44 (Staheli's testimony); ROA.600 (June 12 email from Staheli to Brewer, explaining "ULPs work as leverage and if all goes south we can use them to get people paid and force the company to hire everyone back. . . . I have all ready [*sic*] filed a charge with the NLRB, the more we have the better the leverage"). Indeed, Staheli had been planning to secure a union contract for the drivers employed by Wulf for months—since the 3484 Production in April. ROA.100–01, ROA.815. With the 3484 Production, however, Staheli had determined there was insufficient "leverage" to obtain employment benefits by securing a union contract because, with filming near completion, the 3484 drivers were merely "sitting in one location for an extended period of time" and thus a work stoppage "wouldn't [have had] a huge effect on the production." ROA.102. Consequently, Staheli decided not to organize the 3484 Production. ROA.815.

The June 11 ULP charge thus served as the ideal pretext for achieving the union's predetermined goal of acquiring employment benefits for the drivers. Indeed, Staheli's own contemporaneous words say as much.

The evening of June 11—*after* Staheli had already filed the ULP charge and a mere two days before the vote to strike—Staheli plainly stated the union's motivations, emailing Wulf, "We are interested in getting a deal that allows your driver crew to get health insurance and retirement." ROA.599; *see also* ROA.818 ("Staheli recalled sending Owner Wulf a draft [collective-bargaining agreement] to recognize and allow [the drivers] to organize *so they can receive health insurance and retirement benefits*") (emphasis added).

The union representatives grew increasingly incensed by Wulf's failure to respond immediately and sign the collective-bargaining agreement—at a time when Wulf was "very busy," ROA.829, preparing for the start of production. *See* ROA.599 (June 11 email from Staheli to Wulf, warning "We are getting off on the wrong foot by you refusing to talk to us"); *see also* ROA.596–99 (email exchange before the strike). Thus, after not immediately securing a signed agreement from Wulf, the union representatives upped the ante on June 13 and opted for a work stoppage to achieve this same goal. *See* ROA.115, ROA.604, ROA.819 (vote to strike occurred on June 13).

Ultimately, the union representatives made a strategic decision to file a ULP charge hoping to shield striking drivers from the consequences of an economic strike. *See Pirelli*, 141 F.3d at 519. And, indeed, despite the union representatives' self-serving statements to the contrary, the record demonstrates that the strike was merely a renewed effort to secure economic benefits for the drivers—not to protest statements made by Miller. And while union officials may want "to have one's cake and eat it too—attaining the protections of unfair labor practice strikers while striking for economic reasons," that motivation does not render the strike a ULP strike. *Id.* Because the Board lacks substantial evidence that Miller's statements motivated the strike, this Court should set aside this finding and hold that the drivers participated in an economic strike.

Further, because 3486 replaced the striking drivers with permanent employees during the strike, ROA.824, and (as discussed further below) because the striking workers had improperly moved and damaged production equipment after striking, ROA.155, ROA.820–21, the 3486 Production had a "'legitimate and substantial business justification[]' for refusing to reinstate" the drivers. *Medite of N.M., Inc. v. NLRB*, 72 F.3d 780, 787 (10th Cir. 1995) (quoting *NLRB v. Fleetwood Trailer Co.*, 389

U.S. 375, 378 (1967)). Thus, this Court should further hold that 3486's refusal to reinstate the striking drivers did not violate §8(a)(3). *See id.* (holding that economic strikers are not entitled to reinstatement where employer can show a "legitimate and substantial business justification" for declining to reinstate them, and "[i]f an employer has replaced a striking employee with a permanent employee during the strike, that constitutes a legitimate and substantial business justification").

2. The 3486 Production Was Not Improperly Motivated by Antiunion Sentiment

The NLRA precludes "*discrimination* in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3); *see NLRB v. Western Bank and Office Supply Co.*, 283 F.2d 603, 605 (10th Cir. 1960) ("The Act proscribes the right to hire and fire only when it is employed as a discriminatory device."). Therefore, an employee "can be discharged for a good reason, a bad reason, or no reason at all where antiunion motivation has not been established by substantial evidence." *Cannady*, 466 F.2d at 586. And as this Court has recognized, the NLRA "does not allow [the] Board to act as a super-employer in derogation of the right of the employer to select its employees or discharge them." *NLRB v. Interstate Builders, Inc.*, 351

F.3d 1020, 1027 (10th Cir. 2003) (internal quotations omitted). Instead, an employee's discharge violates the Act only if "anti-union animus *actually contributed* to the discharge decision." *Id.* (quoting *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 398 (1983), overruled in part on other grounds by *Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276–78 (1994)). An employer "does not violate the NLRA . . . if any anti-union animus that he *might have* entertained *did not contribute at all* to an otherwise lawful" decision not to rehire. *Transp. Mgmt.*, 462 U.S. at 398 (emphasis added).

To determine the employer's motivation in discharging an employee, the Board and reviewing courts apply a burden-shifting approach by which the General Counsel must prove that the employee's protected conduct was "a substantial or motivating factor in the discharge decision." *Tschiggfrie*, 896 F.3d at 885 (noting analysis from *Wright Line*, 251 N.L.R.B. 1083 (N.L.R.B. Aug. 27, 1980)). Only if the Board has set forth sufficient evidence to meet this standard does the burden then shift to the employer "to show that it would have taken the same action for a legitimate, nondiscriminatory reason regardless of the employee's protected activity." *Id.* The Board must consider, in addition to direct

evidence, various factors to determine an employer's motivation, including "the employer's knowledge of the union activities, the employer's commission of other unfair labor practices, the timing of the employer's action, and the credibility of its explanation of the reasons for the discharge." *Interstate Builders*, 351 F.3d at 1027.

Here, after voting to strike, the drivers—at Local 399's Staheli's direction—moved the 3486 Production's equipment. ROA.127, ROA.153–54, ROA.352, ROA.820–21. The strikers even used the 3486 Production's portable toilets while they picketed. ROA.242, ROA.822–23.

There is no dispute that the equipment either belonged to Wulf or was leased to him, and Staheli admitted that he never received approval from Wulf or anyone else associated with the 3486 Production to move the equipment. ROA.155, ROA.165–66. Staheli also admitted that he had no contracts with vendors. ROA.155. Staheli and Brewer claimed authorization from the equipment owners/lessors. ROA.155, ROA.820–21. But the leases placed legal possession of and responsible for that equipment in Wulf, not Staheli or the drivers. The ALJ's finding that Staheli "recalled taking reasonable precautions with the various vehicles and equipment" is thus beside the point. ROA.820. (It's also contradicted by the

testimony of equipment damage.) The vendors were not authorized to take the equipment in the first place. *See* Utah Code Ann. § 70A-2a-211; 3 Hawkland UCC Series § 2A-211:2 (discussing scope of lessor's obligation and explaining that a lessor warrants "a right to possession and use of the goods so that the lessee will not be dispossessed"). Because of these actions, Wulf had to spend time locating equipment (and personal property), filming was delayed, and 3486 had to rent new equipment. ROA.228–29, ROA.257–58, ROA.281–82. Wulf even called the police because "[t]hey'd stolen my stuff without my permission." ROA.364.

Thus, the record shows that 3486 had an "honest belief" that the strikers engaged misconduct, *Gen. Tel. Co. of Mich.*, 251 N.L.R.B. 737, 738–739 (N.L.R.B. Aug 27, 1980), supported by "some specificity in the record linking particular employees to particular acts of misconduct." *Beaird Indus.*, 311 N.L.R.B. 768, 769 (N.L.R.B. May 28, 1993). But the Board ignored this misconduct and addressed the strikers' picketing conduct, which the Board excused despite the union's admission that the picketers intended to disrupt the filming. ROA.453–54.

The Board therefore failed to show that the employees engaged in protected conduct—the drivers did the opposite when they moved 3486's

equipment and intentionally disrupted the production. Necessarily, then, the Board could not show that the employees' conduct here was "a substantial or motivating factor in the discharge decision." *Tschiggfrie*, 896 F.3d at 885. And, even if the Board had met its burden, the record further shows that 3486 had a legitimate, non-discriminatory reason for discharging and not reinstating them.

Because the striking workers dispossessed the 3486 Production of its equipment—after calling the strike—3486 did not violate §8(a)(3) by discharging and not reinstating the drivers.

II. NLRB LACKS AUTHORITY TO AWARD COMPENSATORY DAMAGES

The compensation that NLRB ordered the 3486 Production to make to the drivers—*i.e.*, compensation for "any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful discharges," ROA.809—is a form of compensatory damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). But NLRB lacks the authority to award compensatory damages. Indeed, NLRB itself never attempted to make such an award until December 2022—in *Thryv, Inc.*, 372 N.L.R.B. No. 22, 2022 WL 17974951 (N.L.R.B. Dec. 13, 2022), vacated in part on other grounds, *Thryv Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024)—nine decades after the NLRA was

adopted. And, here, the Board applied *Thryv* retroactively. But the NLRA limits the Board to equitable remedies. *See* 29 U.S.C. § 160(c). And constitutional avoidance principles preclude the Board's claimed power to award compensatory damages. The Court should reverse NLRB's order of compensatory damages.

A. The Board awarded compensatory damages here

NLRB ordered the 3486 Production to pay the striking drivers compensation for "any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful discharges," including compensation "for the adverse tax consequences, if any, of receiving lump-sum backpay awards." ROA.809. This is a form of compensatory damages. *See State Farm*, 538 U.S. at 416 (describing compensatory damages as a remedy "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct").

In wrongful-discharge torts, compensatory damages are awarded to the wrongfully discharged employee. *Touchard v. La-Z-Boy Inc.*, 148 P.3d 945, 953–54 (Utah 2006). The Board itself recognizes that "compensatory damages" are "special remedies" beyond the scope of "standard remedial" awards (*i.e.*, reinstatement, make-whole, cease-and desist-language, and

posting notices). NLRB, *Casehandling Manual, Part 3, Compliance Proceedings* § 10506.2 (Oct. 19, 2020), https://tinyurl.com/rfbwchwd; *see also Thryv*, 102 F.4th at 737 ("novel, consequential-damages-like labor law remedy").

Therefore, the Board's award here includes compensatory damages.

B. The NLRA Circumscribes NLRB's Authority

According to the NLRA, the Board may award equitable remedies only; it is authorized to issue orders "requiring [employers] to cease and desist" from ULPs and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c). The classic equitable power is the power to order someone to take an action or refrain from taking an action. *See, e.g., Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) ("[T]he power of the Board 'to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of a violation where those consequences are of a kind to thwart the purposes of the [NLRA].") (citation omitted); *see also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (describing Board's "cease and desist" orders as "somewhat analogous" to "injunction[s]").

This is precisely what §160(c) provides. A discretionary award of back pay "is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Int'l Union v. Russell*, 356 U.S. 634, 642–43 (1958). In short, the NLRA authorizes the Board to impose equitable awards that may or may not include back pay. *Id.*; *cf. also Curtis v. Loether*, 415 U.S. 189, 197 (1974) ("In Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy.").[9]

The Supreme Court has long recognized that "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Int'l Union v. Russell*, 356 U.S. 634, 643 (1958); *see also Gurley v. Hunt*, 287 F.3d 728, 731 (8th Cir. 2002) ("Courts have emphasized that the NLRB is not authorized to award full compensatory … damages to individuals affected by the unfair labor practice"). Indeed, the Board "is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws." *Shepard*

[9] Title VII's remedial provision was "modeled" on 29 U.S.C. § 160(c). *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975).

v. NLRB, 459 U.S. 344, 351 (1983). Accordingly, it does not have the authority to award "full compensatory damages for injuries caused by wrongful conduct." *Russell*, 356 U.S. at 643.

And the NLRB, like every other agency, has "no power to act … unless and until Congress confers power upon" it. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

The Board itself has long recognized that it "does not award tort remedies." *Freeman Decorating Co.*, 288 N.L.R.B. 1235 n.2 (N.L.R.B. May 31, 1988). Indeed, the Board never claimed otherwise until its December 2022 decision in *Thryv*—issued nine decades after the NLRA was adopted. In *Thryv*, the Board purported to "revisit and clarify" its previous decision. 2022 WL 17974951, at *9. In fact, the Board arrogated to itself a new power to award compensatory damages. Despite the long history recognizing the *equitable* (only) authority granted by §160(c), the Board in *Thryv* claimed that awarding compensatory relief is "necessary to more fully effectuate the make-whole purposes of the [NLRA]." 2022 WL 17974951, at *10 (footnote omitted). But as the Fifth Circuit explained, the Board's award there was "a novel, consequential-damages-like labor law remedy." *Thryv*, 102 F.4th at 737.

Cases interpreting Title VII are apposite because, as noted above, the remedy in Title VII was modeled after Section 160(c) here. The Supreme Court has looked to §160(c) as "guidance as to the proper meaning of the same language" in Title VII's remedy provision. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849 (2001). As a result, the Supreme Court held Title VII "does not allow awards for compensatory … damages." *United States v. Burke*, 504 U.S. 229, 238 (1992). Notably, Congress altered the remedies available under Title VII when it passed the Civil Rights Act of 1991, expressly allowing compensatory damages. *See Burke*, 504 U.S. at 241 n.12. But Congress has not amended Section 160(c). To the contrary, a bill that would have granted NLRB the power to award compensatory damages failed. *See* S. 420, 117th Cong., 1st Sess., § 106 (Feb. 24, 2021), https://t.ly/N2fOL; H.R. 842, 1st Sess., 117th Cong. § 106 (Mar. 11, 2021), https://t.ly/VUGRe.

The Board thus steps far beyond the statutory text and Supreme Court precedent construing §160(c) as authorizing awards of compensable damages.

C. The Board's claim of authority to award compensatory damages violates the major questions doctrine

The major questions doctrine applies when, as here, (1) an agency "'claims to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority,' (2) which results in a "fundamental change to a statutory scheme;" (3) involving a "major social and economic policy decision." *West Virginia v. EPA*, 597 U.S. 697, 723, 724, 730 (2022) (simplified). In these circumstances, the Board must identify "'clear congressional authorization'" for its newly claimed power involving a "'major policy decision[].'" *Id.* at 723 (citations omitted). It cannot do so.

1. As just explained, the Board did not claim the authority to impose compensatory damages until December 2022—nine decades after the NLRA was adopted in 1935. And "'the want of assertion of power by those who presumably would be alert to exercise it'" is "'significant in determining whether such power was actually conferred.'" *West Virginia*, 597 U.S. at 725 (citation omitted).

2. The Supreme Court further explained that Section 160(c) "did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Russell*, 356

U.S. at 643. The Board's new reading of Section 160(c) would, therefore, result in a "'fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind." *West Virginia*, 597 U.S. at 728 (simplified).

3. The Board's claimed authority to award compensatory damages involves a "major social and economic policy decision[]." *West Virginia*, 597 U.S. at 724. NLRB itself recognizes that its "jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with 'Right to Work' laws." *Jurisdictional Standards*, NLRB (June 24, 2024, 10:00 AM), https://tinyurl.com/374xbtxw. And with this broad jurisdiction, NLRB now claims power to hold employers liable for "foreseeable harms" such as "credit-card debt, interest and late fees on credit-card debt, penalties incurred from making an early withdrawal from a retirement account to defray living expenses, and loss of a car or home if the employee is unable to make loan, rent, or mortgage payments." *Thryv*, 372 N.L.R.B. No. 22 at *27. The scope of the Board's

claimed power involves major economic considerations almost by definition.

4. Because the major questions doctrine applies, the Board must identify "'clear congressional authorization'" for its newly claimed power involving a "'major policy decision[].'" *West Virginia*, 597 U.S. at 723 (citations omitted). The Board cannot do so. 29 U.S.C. § 160(c) authorizes the Board to order an employer to cease-and-desist unlawful conduct and/or to take "affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." The Board claims that the term "including" gives it "the power to issue remedies beyond the reinstatement and backpay expressly authorized." *Thryv*, 2022 WL 17974951, at *15. But as explained above, an order to reinstate employees—with or without back pay—is a classic *equitable* remedy. *Russell*, 356 U.S. at 642–43; *Curtis*, 415 U.S. at 197. As the Supreme Court explained, the "power to order affirmative relief under §[160(c)] is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Russell*, 356 U.S. at 642–43. The Board cannot "point to clear congressional authorization for the power" to award compensatory damages. *West Virginia*, 597 U.S. at 723

(simplified). This Court should therefore hesitate to read Section 160(c) broadly. And without clear congressional authorization, the Court should conclude that the Board lacks the authority to order compensatory relief.

D. The imposition of compensatory damages here violates 3486's due process rights

The Due Process Clause requires "fair notice of conduct that [wa]s forbidden," *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), a requirement that applies "the severity of the penalty," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). As this Court holds, it is "undoubtedly inappropriate for agencies to create liability by advancing novel interpretations during administrative proceedings." *Blanca Tel. Co. v. FCC*, 991 F.3d 1097, 1118 (10th Cir. 2021).

Here, the conduct at issue in this case took place in 2021—before the Board discovered its authority to impose compensatory damages in December 2022. By retroactively applying *Thryv*'s compensatory-damages rule against Petitioners, the Board violated their right to due process of law. The damages award should therefore be reversed.

E. If read as broadly as the Board contends, §160 would violate the non-delegation doctrine

If Section 160(c) of the NLRA is read to permit the Board to create new remedies of such wide scope, then it provides no discernible

standards, no principles, and no limits as to which remedies are allowed or not. If this broad reading is accepted, Section 160(c) would grant the NLRB unfettered legislative power that the Constitution vests in Congress alone.

The Constitution vests "*All* legislative Powers" in Congress. U.S. CONST. art. I, § 1 (emphasis added). This clause prohibits any "delegation of [legislative] powers." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). Congress may, however, authorize executive agencies "to carry out [a] declared legislative policy"—but only if accompanied by an intelligible principle to cabin and guide the exercise of administrative discretion. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 426 (1935). Congress may not "[leave] the matter to the [executive] without standard or rule, to be dealt with as he please[s]." *Id.* at 418. *See also Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825) (emphasizing Congress must decide the "important subjects").

In *Panama Refining*, a provision of the National Industrial Recovery Act (NIRA) purported to delegate to the President the authority to prohibit the transportation of hot oil in commerce. The Supreme Court held this delegation unconstitutional because it did not define the

"circumstances and conditions in which the transportation is to be allowed or prohibited." *Panama Refin.*, 293 U.S. at 430. As a result, the delegation gave "the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415.

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court considered another part of NIRA that gave the President discretion to approve or prescribe rules of conduct and industry codes as he saw fit. Because this authority allowed the President to "enact[] laws for the government of trade and industry throughout the country, the Supreme Court held that it constituted "virtually unfettered" discretion. *Id.* at 542. The Court acknowledged that some portions of the NIRA—such as its prohibition on allowing the President to approve industry codes that would encourage monopolies—limited the scope of the President's delegated powers. *Id.* at 522–23. Nevertheless, the Court concluded that NIRA violated the separation of powers because nothing in the text of the statute guided the President's exercise of discretion in deciding what specific rules should govern the lawful conditions of trade or industry. *Id.* at 538.

Here, the text of §160(c) provides neither an objective direction to award compensatory damages nor an intelligible principle guiding the NLRB's discretion. The text provides no direction to NLRB regarding the circumstances that warrant awarding forms of relief beyond the equitable remedies consistently awarded during the nearly nine-decade history of the NLRA. The text offers no guidance on whether any upper bound exists to the amount of damages the Board is permitted to award once it ventures beyond the remedies of reinstatement and backpay. By contrast, the back pay remedy at least has the virtue of being readily calculable based on factors such as wages over a fixed amount of time—which limits NLRB's discretion.

Nor may the Board infer an intelligible principle from the NLRA's general purpose of preventing unfair labor practices. Rather, an intelligible principle must be firmly rooted in statutory text rather than in self-serving interpretations of a statute's general purpose. *Panama Refin.*, 293 U.S. at 417–18; *Schechter*, 295 U.S. at 541–42. Otherwise, by authorizing agencies to "effectuate [a law's] policy," Congress would write blank check for agencies to take virtually any action. *See Schechter*, 295 U.S. at 523.

Here, as in *Panama Refining*, Congress "has declared no policy, has established no standard, [and] has laid down no rule" to define "circumstances and conditions" in which NLRB may exercise the remedial authority it now claims. 293 U.S. at 430. Permitting NLRB to implement such a capacious reading of its remedial power would transform the Board from agents tasked with carrying out a declared congressional policy into "unaccountable 'ministers'" who assume the role of lawmaker. *West Virginia*, 597 U.S. at 737 (Gorsuch, J., concurring). As a result, this Court should vacate the Board's decision.

III. THE NLRB'S IN-HOUSE PROCESS VIOLATED PETITIONERS' RIGHTS UNDER ARTICLE III AND THE SEVENTH AMENDMENT

The NLRA authorizes the Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce," 29 U.S.C. § 160(a), after conducting a hearing, §160(b). In these hearings, the Board acts as investigator, prosecutor, judge, jury, and appellate court (with fact-finding power). The "Government's case" is conducted by NLRB-employed attorneys from the applicable Regional Office, and the case is presented to an NLRB-employed ALJ. 29 C.F.R. § 101.10(a); *see also* §§ 101.2, .4, .8 (describing procedures). *See* About NLRB: Division of Judges Directory, https://tinyurl.com/yavfvj83, last visited July 29, 2024.

In these hearings, the Federal Rules of Evidence and of Civil Procedure apply only "so far as practicable." 29 C.F.R. § 101.10(a). At the end of the hearing, the ALJ prepares a decision with findings of fact, legal conclusions, and a recommended remedy, §101.11(a), which purportedly may include compensatory damages (*see Thryv*, 372 N.L.R.B. No. 22).

An ALJ's decision becomes final unless a party files "exceptions"—*i.e.*, an appeal—to the NLRB. 29 C.F.R. §§ 101.11(b), .12(b). If an appeal is filed, the NLRB itself reviews the entire record. §101.12(a). The NLRB then issues a decision and order in which it may "adopt, modify, or reject" the ALJs findings of fact and recommendations. *Id.*

Here, the Board's conclusion that Petitioners engaged in unfair labor practices is not supported by substantial evidence, and the Board's award of compensatory damages exceeds its statutory authority. These issues were discussed above. But more fundamental problems exist: the NLRB's in-house proceeding itself violated Petitioners' rights to (A) a trial before an independent, life-tenured judge in an Article III court and (B) a jury trial.

A. Petitioners are entitled to defend their core private rights in an Article III court

1. Only Article III judges may exercise the "judicial Power of the United States"

"The judicial Power of the United States" is vested solely in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "Under the basic concept of separation of powers that flows from the scheme of a tripartite government adopted in the Constitution, 'the judicial Power of the United States' cannot be shared with the other branches." *SEC v. Jarkesy*, 144 S.Ct. 2117, 2131 (2024) (simplified) (citations omitted).

The structural principles secured by the separation of powers protect the governmental branches and individual liberty. *Bond v. United States*, 564 U.S. 211, 223 (2011). Article III "protects liberty" through "its role in implementing the separation of powers" and "by specifying the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). These characteristics—life tenure (with good behavior) and fixed salaries—were adopted to ensure independent judgment free of influences from Congress and from the Crown, who had "'made Judges dependent on his Will alone, for the tenure of their offices, and the

amount and payment of their salaries.'" *Id.* at 484 (quoting DECL. OF INDEPENDENCE ¶11).

Critically, Article III cannot serve its purposes "if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III," which is why the Supreme Court has "long recognized that . . . Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 284 (1856)). Indeed, "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." *Martin v. Hunter's Lessee*, 14 U.S. 304, 330–31 (1816).

Therefore, "matters concerning private rights may not be removed from Article III courts." *Jarkesy*, 144 S.Ct. at 2131 (citations omitted).

2. The Board's in-house adjudication violated Petitioners' rights to a hearing before an independent Article III judge

NLRB purported to restrict Petitioners' private rights outside Article III courts. *See Cummings v. Missouri*, 71 U.S. 277, 321–22 (1866) (discussing fundamental right to pursue an avocation); ROA.809 (enjoining Petitioners and imposing award of compensatory damages against 3486).

The case was heard not by an independent Article III judge, but by Executive Branch officers—an NLRB-employed ALJ and, on appeal, the Board itself.

Post-hearing review in this Court does not save this unconstitutional process because when private rights are at issue, parties are entitled to an Article III proceeding in the first instance. *See* Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 590 (2007) ("When core private rights are at stake, [] not just any sort of 'judicial' involvement [will] do," and courts must "be able to exercise their own judgment" about the details relevant to a particular case or controversy.).

But even if post-hearing judicial review could "constitutionalize" an administrative hearing by (belatedly) offering private parties an Article III hearing, no proper Article III hearing takes place here because judicial "review of the Board's decisions on the merits is deferential, and the scope of [courts'] inquiry limited." *Coreslab Structures (TULSA), Inc. v.*

NLRB, 100 F.4th 1123, 1135 (10th Cir. 2024) (citation omitted).[10] This deferential standard of review allows the Board to exercise judicial power. *See* 29 U.S.C. § 160(b)–(d), (k), (*l*); 29 C.F.R. §§ 101.1–.43 (authorizing Board to conduct hearing and resolve factual and legal disputes, make findings of fact, and issue binding orders).

Further, it is improper to apply the substantial-evidence standard to facts not found by a jury. According to the Constitution, "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, *than according to the rules of the common law*." U.S. CONST. amend. VII (emphasis added). The substantial-evidence standard of appellate review arose in the context of jury trials and applies *only* to jury-found facts. *See, e.g.*, *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963). Its application to agency-found facts is improper.

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[10] In *Loper Bright*, the Supreme Court held that 5 U.S.C. § 706(2), which provides courts "shall decide all relevant questions of law," "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference." 144 S.Ct. at 2261. Accordingly, Petitioners submit that judicial deference to the Board's interpretation of the NLRA is improper. If the Court concludes that this deference still applies, then Petitioners' Article III claim is even stronger, as the deference would effectively cede part of "the judicial Power" to a non-Article III agency. *Id.* at 2273.

Accordingly, the NLRB's in-house action against Petitioners violated their Article III right to a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955).

B. The NLRB's infringement of Petitioners' core private rights and its imposition of a damages award violated Petitioners' Seventh Amendment rights to a jury trial

The Constitution also ensures a specific form of judicial process—the civil jury trial. The Seventh Amendment guarantees that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. One is entitled to a jury trial when claims, even statutory claims, (1) are similar to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and (2) provide a legal remedy. *Tull v. United States*, 481 U.S. 412, 417–18 (1987); *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (holding that the remedy is the more important factor) (citing *Tull*, 481 U.S. at 421). Because "the remedy is all but dispositive" for the Seventh Amendment analysis, that factor is discussed first. *Jarkesy*, 144 S.Ct. at 2129.

1. The NLRB imposed legal damages here

Compensatory damages are a legal remedy that triggers the Seventh Amendment. *See Jarkesy*, 144 S.Ct. at 2129–30. Under the NLRA,

employers found liable for an unfair labor practice can be required to reinstate the employee "with or without back pay," 29 U.S.C. § 160(c), a remedy the Supreme Court considers to be equitable, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). But as noted above, the Board ordered the 3486 Production to compensate the striking drivers "for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered" because of their "unlawful discharges," including for any adverse tax consequences of receiving lump-sum backpay awards. ROA.809. These compensatory damages are legal remedies that require a jury trial.

Indeed, "money damages are the prototypical common law remedy." *Jarkesy*, 144 S.Ct. at 2129. Thus, by incorporating a compensatory damages remedy into its ULP claims, *see Thryv*, 372 N.L.R.B. at *10, the NLRB has exceeded the bounds of the equitable remedies *Jones & Laughlin* permitted it to seek without a jury. Even where legal issues are "'incidental' to equitable issues," the right of trial by jury is preserved. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962). Because unfair labor practice claims "can be said to 'soun[d] basically in tort,' and seek legal relief," "the Seventh Amendment jury guarantee extends to" this statutory

claim. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999); *Jarkesy*, 144 S.Ct. at 2128 ("The Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'").

2. A ULP claim is in the nature of a common law claim, in which legal rights are determined

The Seventh Amendment applies to ULP claims brought by the NLRB because they are tort-like in nature. *See Monterey*, 526 U.S. at 709–11. A suit at common law includes any "suit[] in which *legal* rights [a]re to be ascertained and determined." *Id.* at 708. Statutory causes of action require a jury if they are "'analogous'" to 18th-century English common law causes of action. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998). This comparison looks at "both the nature of the statutory action and the remedy sought." *Id.*

Establishing the nature of the statutory action does not require the identification of a "precise[]" analog in 18th-century English common law. *Tull*, 481 U.S. at 421 (rejecting the necessity of an "'abstruse historical' search"). The comparison is to categories of actions that were brought at common law (*i.e.*, tort, contract, etc.). *See Monterey*, 526 U.S. at 711. For example, the cause of action for violations of constitutional or statutory rights by a state official in 42 U.S.C. § 1983 is a suit at common

law because it "sound[s] in tort and s[eeks] legal relief." *Id.*; *see also Curtis v. Loether*, 415 U.S. 189, 195 (1974). It doesn't matter whether there is an "action equivalent to" the statutory action under consideration. *Monterey*, 526 U.S. at 709; *see Jarkesy*, 144 S.Ct. at 2138 (noting public-rights exception for "actions that were not suits at common law *or in the nature of such suits*") (simplified) (emphasis added) (citation omitted).

Like a §1983 claim, the NLRB's ULP claim sounds in tort. *See Monterey*, 526 U.S. at 711. With respect to ULPs, the NLRA "merely defines a new legal duty, and authorizes the [NLRB] to compensate a [charging party] for the injury caused by the defendant's wrongful breach." *Curtis*, 415 U.S. at 195; *see also United States v. ERR, LLC*, 35 F.4th 405, 412 (5th Cir. 2022). This is the essence of a tort claim. *See* 3 Blackstone, Commentaries on the Laws of England *115–19 (1768); *Monterey*, 526 U.S. at 727 (Scalia, J., concurring in part) ("[T]orts are remedies for invasions of certain rights.").

More specifically, the NLRA prohibits employers from engaging in "unfair labor practice[s]" and empowers the NLRB to adjudicate whether an employer has violated that prohibition. 29 U.S.C. §§ 158, 160(a)–(c). Effectively, the NLRA outlaws common law wrongful discharge. And a

claim for wrongful discharge is "'a tort so widely accepted in American jurisdictions today'" courts "'are confident that it has become part of our evolving common law.'" *Tamosaitis v. URS Inc.*, 781 F.3d 468, 486 (9th Cir. 2015).

3. ULP Claims Do Not Fall Within the Public Rights Exception

The Board will likely argue that no jury is required because of the "public rights" exception to Article III jurisdiction, discussed in *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). Not so. The public rights exception, which allows Congress to "assign" certain "distinctive areas involving governmental prerogatives" to non-Article III tribunals, does not apply here. *Jarkesy*, 144 S.Ct. at 2127. This case does not involve any of those "distinctive" areas—revenue collection, immigration, tariffs, Indian relations, public lands administration, and public benefits—subjects that by long-established history are owned by or have a tradition of plenary control by the federal government. *Id.* at 2132–34; *see id.* at 2147 (Gorsuch, J., concurring) (noting "serious and unbroken historical pedigree" of distinctive "public rights" exceptions).

Here, the regulation of labor relations, far from being owned by or within the plenary control of the federal government, is based on

Congress's interstate commerce power, which is limited by that "constitutional grant" and the "explicit reservation of the Tenth Amendment." *Jones & Laughlin*, 301 U.S. at 30–32; *see Jarkesy*, 144 S.Ct. at 2136 (noting public rights exception does *not* apply broadly to any power exercised by Congress). Further, because ULP claims are in the nature of common law claims, they involve private—not public—rights. *See Jarkesy*, 144 S.Ct. at 2135–36. And the public rights doctrine does not allow Congress "to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Granfinanciera*, 492 U.S. at 51–52. "[T]o hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Id.* at 52 (discussing *Atlas Roofing*).

"Therefore, Congress may not withdraw it from judicial cognizance." *Jarkesy*, 144 S.Ct. at 2136 (simplified). Regardless, "'even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts.'" *Jarkesy*, 144 S.Ct. at 2134 (citation omitted).

* * *

"Suits at common law" refers "not merely [to] suits, which the *common* law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and determined[.]" *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The NLRB's ULP claims here determined Petitioners' legal rights, and the Board imposed a legal remedy. As a result, the NLRB's in-house adjudication violated Petitioners' Seventh Amendment right to a jury trial.

C. Challengers may raise constitutional issues for the first time on appeal

The Board may respond, pursuant to 29 U.S.C. § 160(e), that Petitioners are precluded from raising constitutional challenges for the first time before this Court. The Court should reject this argument because the Board has no power to resolve these claims and it would have been futile for Petitioners to have raised them below.

The Supreme Court has "consistently recognized a futility exception to exhaustion requirements." *Carr v. Saul*, 593 U.S. 83, 93 (2021) (citations omitted); *see also Shalala v. Illinois Council on Long Term Care, Inc.,* 529 U.S. 1, 13 (2000). "It makes little sense to require litigants to present claims to adjudicators *who are powerless to grant the relief*

requested." *Id*. (emphasis added) (simplified); *see also McCarthy v. Madigan,* 503 U.S. 140, 147–48 (1992) (exception for inadequate or unavailable administrative remedies).

As in *Carr*, Petitioners here "assert purely constitutional claims about which [NLRB officers] have no special expertise and for which they can provide no relief." 593 U.S. at 93. Neither the ALJs nor the Board has the authority to decide whether the Board's proceeding themselves—irrespective of any orders or decisions made during the proceeding—are unconstitutional under Article III or the Seventh Amendment. These claims "are . . . outside the [Board's] competence and expertise." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 (2010). And judges—not agencies—are the experts in the "field" of legal interpretation, a field which is "'emphatically,' 'the province and duty of the judicial department.'" *Loper Bright*, 144 S.Ct. at 2273 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

This Court may consider Petitioners' constitutional claims.

CONCLUSION

The Court should grant the Petitioners' petition, deny the Board's cross-application for enforcement, vacate the Board's Decision and Order,

and award all further Petitioners all further relief to which they are entitled.

ORAL ARGUMENT STATEMENT

Petitioners respectfully submit that oral argument would assist the Court in deciding this case. This case involves complex issues, and oral argument may help the Court address the errors committed by the Board and decide the nuanced legal issues involved.

DATED: August 1, 2024.

Respectfully submitted,

s/ Oliver J. Dunford

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 12,835 words, excluding the parts of the Brief excluded by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Century Schoolbook 14-point font, a proportionately spaced typeface.

DATED: August 1, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify further that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

I certify that the foregoing document was served by electronic mail on August 1, 2024, on the following:

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