NO. 24-60608

In the United States Court of Appeals for the Fifth Circuit

HIRAN MANAGEMENT, INCORPORATED,
DOING BUSINESS AS HUNGRY LIKE THE WOLF,
Petitioner–Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent–Cross-Petitioner.

On Review From the
National Labor Relations Board
No. 16-CA-303914

PETITIONER'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

(1) Case Number 24-60608: *Hiran Management, Inc. doing business as Hungry Like the Wolf v. NLRB*

(2) The undersigned counsel of record certifies that the following individuals and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Melaina (Mel) Alexander Ashton Cano Knowshaidymar (Shea) Cuevas Sarah Havemann Jordan Logan Natalie (Nelly) Reul Kenneth (Kenny) Thronton *Alleged Discriminatees*	

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ORAL ARGUMENT STATEMENT

Hiran respectfully submits that oral argument would assist the Court in deciding this case. The case involves complex issues, and oral argument may help the Court address the Board's errors and decide the nuanced legal issues involved.

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JURISDICTIONAL STATEMENT

Petitioner Hiran Management, Inc. d/b/a Hungry Like the Wolf petitions for review of the National Labor Relations Board's Decision and Order dated November 4, 2024. *Hiran Management, Inc. d/b/a Hungry Like the Wolf and Dara Kiel*, 373 N.L.R.B No. 130 (Nov. 4, 2024); ROA.828–852. The Fifth Circuit has jurisdiction under 29 U.S.C. § 160(f) because Petitioner is an aggrieved party and the Decision and Order is a final, appealable order. Venue is appropriate because Petitioner is headquartered within the Fifth Circuit.

NLRB petitioned for enforcement of the Decision and Order on December 3, 2024. This Court has jurisdiction over the cross-petition under 29 U.S.C. § 160(e).

ISSUES PRESENTED FOR REVIEW

1. Did NLRB, as a matter of law, err by refusing to consider evidence that four of Petitioner's "employees"—Logan, Kiel, Alexander, and Cuevas—were, in fact, supervisors; and, if so, did NLRB err as a matter of law by concluding that Petitioner violated NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1), when it terminated those supervisors?

2. Does NLRA § 10(c), 29 U.S.C. § 160(c), which authorizes equitable relief, allow the Board to order legal damages and, if so, does § 10(c) violate the major questions doctrine, Petitioner's due process rights, and the non-delegation doctrine?

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

4. Did Petitioner sufficiently preserve all disputed issues?

GLOSSARY

Act: National Labor Relations Act, 29 U.S.C. §§ 151–169

ALJ: Administrative Law Judge

Board: National Labor Relations Board

Hiran or **Hiran Management:** Petitioner Hiran Management, Inc. d/b/a Hungry Like the Wolf

NLRA: National Labor Relations Act, 29 U.S.C. §§ 151–169

NLRB: National Labor Relations Board

ROA: Record on Appeal

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

Section 10(c) or **§ 10(c):** 29 U.S.C. § 160(c)

Section 10(e) or **§ 10(e):** 29 U.S.C. § 160(e)

TOAST: software program used in the restaurant industry to, inter alia, enter diners' orders and accept payment

ULP: unfair labor practice (here, a violation of § 8(a)(1))

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE CASE

A. The Hiransombooms and Their Restaurant

In July 2022, Niroj "Nick" Hiransomboom and his wife, through Petitioner Hiran Management, purchased Hungry Like the Wolf—a struggling, 1980's-themed karaoke restaurant in Houston, Texas. ROA.363, ROA.483–84.[1] As recommended by the previous owners, Hiran maintained the existing staff. ROA.483, ROA.489. To manage the restaurant, Hiran hired Paul Peters, who oversaw eight "front of house" (non-kitchen) employees, *i.e.*, supervisors, hosts, bartenders, servers, and bussers. ROA. 485, ROA.840. Those individuals were Jordan Logan, Dara Kiel, Knowshaidymar (Shea) Cuevas, Ashton Cano, Melaina (Mel) Alexander, Sarah Havemann, Natalie (Nelly) Reul, and Kenneth (Kenny) Thornton. ROA.840.

Perhaps unsurprisingly, the immediate transition to new management was not seamless. Both employer and employees raised concerns. Staff complained that inventory was not always available, that scheduling was erratic, that Peters made sexist and demeaning remarks, that he gave some employees additional responsibilities without increased pay or

[1] All relevant facts, unless stated otherwise, occurred in 2022.

proper training, and that the technology (called "TOAST") used to enter orders and accept payments did not always track employees' tips accurately. ROA.841–42. On the other hand, employees made mistakes that Hiran Management had to address. For example, because of reconciliation errors made by Cano, Peters lent him money multiple times, ROA.425, ROA.846–47; Cuevas, who was asked to close the restaurant, lost a set of keys, ROA.157, ROA.847; and employees complained about Peters's unwillingness to use TOAST and made comments about his age, ROA.840.

Given these challenges, tensions grew over the first several weeks of new ownership. As one employee put it, "both sides" found themselves in "a pretty tense work environment," which is not unusual for the restaurant industry. ROA.226. Both sides believed the other was engaging in unprofessional conduct. *See, e.g.*, ROA.166, ROA.062–63. Unfortunately, by mid-September—just two months into Hiran's ownership—the relationships had irretrievably soured.

B. The September 18th Meeting

Hoping to salvage things, however, Peters scheduled a meeting for September 18, a Sunday, with the front-of-house staff to address the

issues, including employee performance and ways to increase profitability at the restaurant. ROA.087, ROA.842. This was the first meeting between Peters and staff since Hiran took over the restaurant. ROA.227. The front-of-house staff except Thornton attended, though Kiel was present only via FaceTime with Alexander. ROA.842. A ninth employee, Adriana Perswell, was also present. ROA.842.

Though the specific accounts vary somewhat, it is undisputed that the meeting became acrimonious almost immediately. Cano testified that Peters and Perswell "got into a shouting match." ROA.843 n.12. Alexander testified multiple times that Peters and Perswell "yelled" at each other and that their interaction was "explosive." ROA.313, ROA.314. Cuevas confirmed that the two "were arguing so much that we couldn't get through the meeting." ROA.166. Logan recounted that employees were asking questions and that, though Peters asked everyone to calm down, "the questions really didn't stop." ROA.121. The meeting concluded quickly, after a heated exchange between Perswell (who accused Peters of feeding female staff "a load of shit," *i.e.*, empty promises) and Peters (who told Perswell to "shut the fuck up"). ROA.843. Perswell announced

that she quit, after which she and the other employees walked out. ROA.843.

Three of the departing employees, Cano, Logan, and Alexander, immediately went to discuss the evening's events with Kiel at her second job. ROA.843. Those employees moved to a second location, joined by others, and Kiel apparently communicated with employees who were not there via a group chat. *Id.* Employees testified that they decided to go on strike at that time. *Id.*

C. Employees Do Not Show Up for Work

The restaurant did not open on Mondays, so the first shifts following Sunday's September 18th meeting were scheduled for Tuesday, September 20. ROA.843–44. That Monday, Kiel texted a list of demands to Peters and wrote that "the staff" had "collectively decided" to strike. ROA.844. Of the eight employees, only Cuevas appeared for work on Tuesday because, she said, she needed the money. ROA.845. She worked for about an hour but, when the other employees sent her money, she left. ROA.845. No employee appeared for any other scheduled shift that week. ROA.845. Without front-staff employees, Hiran was forced to turn away business. ROA.050.

The employees returned to the restaurant on September 23 to pick up their checks. ROA.845. When they arrived, there were two documents posted: a breakdown of the payments employees were owed, and an invitation to meet with the restaurant's lawyer Bruce Hiransomboom (Nick's cousin). ROA.845. Later that day, Cano emailed Bruce to set up a meeting. ROA.845. Attached to the email was a list of demands for discussion at the meeting. ROA.845.

Alexander, Kiel, and Cano met with Bruce in his office on September 29. ROA.846. The four discussed the list of demands, both economic and noneconomic, for multiple hours. ROA.846. Bruce said that he would discuss the demands with Nick and get back to the employees. ROA.846. Approximately a week later—October 6—Bruce emailed Cano and stated that the employees were no longer employees of Hiran Management. ROA.846. Later that month, Peters resigned from the restaurant due to stress. ROA.840.

D. NLRB's In-House Hearing and Decisions

NLRB Counsel filed an administrative complaint, alleging that Hiran Management, Inc. d/b/a Hungry Like the Wolf violated NLRA Section 8(a)(1), 29 U.S.C. § 158(a)(1), by discharging the eight employees for

engaging in protected concerted activity to discourage them from further concerted activity. ROA.555–56. NLRB enforcement lawyers prosecuted the case against Hiran November 27–29, 2023, before an NLRB-employed ALJ, at NLRB's offices in Houston, Texas. The ALJ issued her decision on February 13, 2024, ruling in favor of the NLRB. ROA.733–72.

Hiran Management appealed the ALJ's decision to the Board, which, with a few minor amendments, adopted the ALJ's rulings, findings, and conclusions. ROA.836–39.[2] The Board ordered, among other things, that Hiran cease and desist from engaging in unlawful activity and offer full reinstatement to the employees; it further mandated that Hiran "make whole" the employees "for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the" unfair labor practices (ULPs). ROA.837–38.

Hiran filed its Petition for Review in this Court on November 26, 2024, and NLRB filed a Cross-Application for Enforcement on December 3, 2024.

[2] When discussing the Board's order, references will include the ALJ's findings and conclusions adopted by the Board.

SUMMARY OF ARGUMENT

This case is about an administrative agency's unlawful concentration and exercise of judicial, legislative, and executive authority. ***First***, acting as judge, the Board erred by refusing to consider evidence that four of Hiran's "employees" were in fact supervisors and, thereby, erred by concluding that Hiran's dismissal of those employees violated NLRA § 8(a)(1). ***Second***, acting as legislator, the Board erred when it imposed legal damages against Hiran even though the NLRA authorizes only equitable relief. 29 U.S.C. § 160(c). In the alternative, the Board's authority to impose legal damages violates the major questions doctrine, the Due Process Clause, and the non-delegation doctrine. ***Third***, the Board violated Hiran's rights to an independent Article III court and to a jury when it required Hiran to participate in a process in which the Board acts as prosecutor, judge, jury, and appellate court.

STANDARD OF REVIEW

Courts of Appeals review NLRB's findings of fact for substantial evidence and its legal conclusions *de novo*. *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014) (citing *Sara Lee Bakery Grp., Inc. v. NLRB*, 514 F.3d 422, 428 (5th Cir. 2008)). NLRB's factual findings are "'conclusive' if they are 'supported by substantial evidence on the

record considered as a whole.'" *Hudson Inst. of Process Rsch. Inc. v. NLRB*, 117 F.4th 692, 699 (5th Cir. 2024) (quoting 29 U.S.C. § 160(e), (f) and *STP Nuclear Operating Co. v. NLRB*, 975 F.3d 507, 513 (5th Cir. 2020)). And "[w]hile a reviewing court 'may not reweigh the evidence . . . or substitute [its] judgment for that of the [NLRB],' its review is not '*pro forma*' or 'merely a rubber stamp.'" *Id.* at 699–700 (quoting *Creative Vision Res., LLC v. NLRB*, 882 F.3d 510, 515 (5th Cir. 2018)).

ARGUMENT

I. The Board Erred by Concluding that Hiran Violated § 8(a)(1) by Terminating Supervisors

"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). Accordingly, it is "'clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.'" *Tesla, Inc. v. NLRB*, 120 F.4th 433, 440 (5th Cir. 2024) (quoting *Universal Camera*, 340 U.S. at 488). "[T]o survive substantial evidence review, then, the Board has to consider 'contradictory evidence or evidence from which

conflicting inferences could be drawn.'" *Id.* (quoting *Dish Network Corp. v. NLRB*, 953 F.3d 370, 377 (5th Cir. 2020)).

Here, the Board refused to consider Hiran's argument that four of the "employees"—Alexander, Cuevas, Logan, and Kiel—were in fact supervisors under the NLRA. According to the Board, Hiran's attempt to raise this issue via an affirmative defense in its post-hearing brief was untimely—even though both parties submitted evidence and disputed the issue. The Board's failure to consider the issue was error as a matter of law. Alternatively, because the Board discussed the employment status of the employees, Hiran submits that substantial evidence does not support the Board's conclusion that the four employees were non-supervisors.

Either way, because these four "employees" were supervisors under the NLRA and therefore not entitled to protection thereunder, the Board erred by concluding that Hiran violated § 8(a)(1) by terminating Alexander, Cuevas, Logan, and Kiel.[3]

[3] In an abundance of caution, Petitioner hereby reserves all rights under *Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771 (2023).

A. The Parties Submitted Evidence Concerning, and Disputed, the Employment Status of Alexander, Cuevas, Logan, and Kiel

Supervisors are not entitled to protection under the NLRA. Therefore, the question whether a particular employee is a supervisor is of utmost importance. The NLRA defines a "supervisor" as:

> any individual having 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). As interpreted by the Supreme Court, that language means employees are statutory supervisors if: "(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712–13 (2001) (quoting *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573–74 (1994)). An employee's supervisory status is a question of fact. *Int'l Bhd. Elec. Workers v. NLRB*, 973 F.3d 451, 457 (5th Cir.

2020) (citing *Entergy Gulf States v. NLRB*, 253 F.3d 203, 208 (5th Cir. 2001)).

Here, testimony at the hearing demonstrated that four of the "employees" were supervisors under the NLRA:

- **Melaina (Mel) Alexander** admitted that she performed "managerial duties, such as making schedules, taking inventory, things outside of the typical server bartender range." ROA.300. While her overall pay for carrying out these responsibilities was inconsistent and unfinalized, she "definitely was able to clock in as a shift supervisor on one or more occasions" and received supervisor compensation for those shifts. ROA.302, ROA.347. In her own words, she "was paid as a shift supervisor." ROA.347.

- **Knowshaidymar (Shea) Cuevas** was hired as a bar manager and, as part of that role, "help[ed] with supervision over other employees." ROA.157. She also was given keys to the restaurant to close up after her shift. ROA.157. Alexander said she believed Cuevas was a supervisor. ROA.381.

- **Jordan Logan** testified that Hiran promoted her to supervisor in August and offered her a raise to assume those additional duties and that she performed supervisory duties "up until [her] last day of work." ROA.139–40. In that capacity, she created staff schedules (with Peters's approval), managed inventory, opened the restaurant, set up the cash drawers, had access to the safe, and balanced the computer at the end of the day. ROA.109. She had the authority to "direct" others' work, ROA.110, "[made] sure that [employees] were completing their specific tasks," ROA.141, and agreed that "all the employees did what [she] asked them to do," ROA.141. Cano confirmed that Logan "had supervisory duties," and that, with regard to scheduling, she "did all of the work, from what [he had] seen." ROA.441.

- **Dara Kiel** testified that she undertook managerial tasks that included scheduling and doing "the manager duties" in the

> TOAST system. ROA.221. She "voluntarily accept[ed] a position as a shift supervisor" and continued performing the duties that came with that position. ROA.224, ROA.225, ROA.266. Logan testified that Kiel "definitely had supervising shifts," ROA.114, and Alexander considered Kiel to hold a supervisor role in addition to other roles, ROA.382.

In sum, the evidence shows that Alexander, Cuevas, Logan, and Kiel each had responsibilities to direct and assign employees, that those responsibilities required the use of independent judgment, and that they were undertaken in the interest of Hiran. 29 U.S.C. § 152(11); *Ky. River Cmty. Care*, 532 U.S. at 712–13. These four "employees" were, then, supervisors under the NLRA. *Id.*

B. The Board Erroneously Failed to Consider this Evidence

Hiran raised the supervisory status of these four employees as an affirmative defense in both its post-hearing brief to the ALJ and its exceptions to the ALJ's decision, ROA.776, ROA.881–84. In support, Hiran pointed to specific parts of the record, discussed above, which established the supervisory roles and responsibilities of Alexander, Cuevas, Logan, and Kiel. ROA.883–84. The Board (by adopting the ALJ's decision) precluded Hiran from relying on this evidence on the ground that Hiran's affirmative defense was untimely raised. ROA.857–58.

This ruling is error. While affirmative defenses raised for the first time in a post-hearing brief are generally untimely, this rule applies only when the "late" notice "deprive[s] the Board of a full and fair opportunity to litigate the issue before the ALJ." *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520 (5th Cir. 2007). Here, Hiran presented evidence throughout the hearing related to the supervisory duties of four employees, and the Board had a full opportunity to litigate the "supervisory" issue before the ALJ. And, indeed, Hiran and the Board questioned the employees about their responsibilities, *see, e.g.*, ROA.110, ROA.301–02, and the ALJ gave detailed consideration to this evidence, ROA.841. Because the parties had reason to—and did—litigate the facts relevant to Hiran's affirmative defense during the trial, there was no compelling reason for the ALJ and the Board to dismiss it out of hand, thus depriving Hiran of the ability to appeal it to an Article III court.

Finally, it is well-established that pleadings may be amended to conform to the evidence even after judgment. Fed. R. Civ. P. 15(b); *see Gallup, Inc.*, 334 N.L.R.B. 366 (2001) (concluding the Board may find and remedy a ULP not specifically alleged in the complaint if the issue is closely connected to the subject matter of the complaint and has been

fully litigated). As detailed above, evidence presented at the hearing at least raised the question whether Alexander, Cuevas, Logan, and Kiel were supervisors. Accordingly, the ALJ/Board erred by precluding Hiran from amending its affirmative defenses and thereby ignoring this affirmative defense.

C. In the Alternative, Substantial Evidence Does Not Support the Board's Conclusion that Alexander, Cuevas, Logan, and Kiel Were Non-Supervisors

"In reaching its conclusion on the supervisory status of an employee, the Board must engage in 'reasoned decisionmaking.' The Board may not 'ignore[] a portion of the record, and the court must 'consider the facts that militate or detract from the NLRB's decision as well as those that support it." *Int'l Bhd. Elec. Workers*, 973 F.3d at 457 (citations omitted). Therefore, if the ALJ/Board did consider Hiran's affirmative defense (ROA.841) and concluded that Alexander, Cuevas, Logan, and Kiel were not supervisors, the conclusion that they were not supervisors is not supported by substantial evidence.

Here, the ALJ noted that Logan "was supposed to be a supervisor," lacked hiring or firing authority, and could not reprimand anyone. ROA.841. Despite Logan's testimony agreeing that she "ha[d] the

authority to direct [employees'] work," ROA.110, and her testimony that employees "did what [she] asked them to do," ROA.141, the ALJ somehow found that Logan could not direct employees' work. ROA.841. And even though Logan, Kiel, and Alexander all crafted the work schedule, the ALJ disregarded this authority to "assign" employees to their shifts. The ALJ referenced Cuevas and Kiel's managerial tasks, but only to emphasize that Cuevas and Kiel did not receive additional compensation. ROA.841. And while the ALJ also discussed Alexander's managerial duties, ROA.841, she neglected to make clear that Alexander was paid as a supervisor, ROA.302, ROA.347.

But "[i]t is settled that anyone who has the authority to use independent judgment in the execution or recommendation of any of the functions listed in section 2(11) is a supervisor." *Monotech of Miss. v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). And despite undisputed evidence that these four employees could "assign" and "direct" other employees, the Board concluded otherwise by focusing solely on compensation, even though a supervisor's pay is not dispositive to the determination of supervisory status. *See* 29 U.S.C. § 152(11) (speaking in terms of authority

rather than compensation); *see also, e.g.*, *Sweeney & Co. v. NLRB*, 437 F.2d 1127, 1131 (5th Cir. 1971).

Accordingly, the Board failed to "consider 'contradictory evidence or evidence from which conflicting inferences could be drawn.'" *Tesla*, 120 F.4th at 440 (citation omitted). As a result, the Board's conclusion that Alexander, Cuevas, Logan, and Kiel were not supervisors is not supported by substantial evidence and should be reversed.

D. The Board Erroneously Concluded that Logan, Alexander, Kiel, and Cuevas Lawfully Participated in Concerted Activities

As the Supreme Court long ago explained, supervisors are "exclude[ed] from the coverage of the [NLRA]." *Fla. Power & Light Co. v. Int'l Bhd. of Elec. Workers, Loc. 641*, 417 U.S. 790, 807 (1974). Accordingly, employers have the "right to discharge such supervisors because of their involvement in union activities or union membership." *Id.* at 808 (citations omitted). The NLRB has also made this principle clear. In *Parker-Robb Chevrolet, Inc.*, the Board admitted that a line of its prior decisions had "unduly extended" the NLRA to apply to "supervisors who merely join with rank-and-file employee protected activity and who are then subjected to the same discharge . . . unlawfully meted out to those

employees." 262 NLRB 402, 403 (1982). The Board stated further that "[n]o matter how appealing from an equitable standpoint," those cases "disregard[ed] the fact that *employees*, but not *supervisors*, are protected against discharge for engaging in union or concerted activity." *Id.*

Even assuming the Board was correct in finding that Hiran terminated all eight individuals for participating in concerted activity, it erred in concluding that its terminations of Logan, Kiel, Alexander, and Cuevas were unlawful. Because these four individuals were statutory supervisors, they could be lawfully terminated under the NLRA for participating in concerted activities with rank-and-file employees. *See Parker-Robb Chevrolet.*

II. NLRB Lacks Authority to Award Legal Damages

The Board awarded legal damages when it ordered Hiran to "make whole" the eight employees "for any loss of earnings and other benefits, *and for any other direct or foreseeable pecuniary harms* suffered as a result of the discrimination against them . . . ." ROA.838 (emphasis added). Section 10(c) of the NLRA, however, authorizes only equitable orders, which may include only incidental monetary relief for things like back-pay. 29 U.S.C. § 160(c). The Board itself recognized the limits of § 10(c)

until December 2022, when it claimed to discover new authority in the 90-year-old NLRA. This Court should reject the Board's attempt to re-write § 10(c). *Cf. Health Care & Retirement Corp.*, 511 U.S. at 580 ("Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board's decision, not the other way around.") (citations omitted). The Court should therefore reverse the Board's order of legal damages.

A. NLRB Awarded Legal Damages in This Case

The compensation that NLRB ordered here—*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) (describing compensatory damages as those "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct") (citations omitted); *see also* Restatement (Second) of Torts § 903, Cmt. *a* (Am. Law. Inst. 2024) (Compensatory damages "are designed to place [a clamaint] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.").

The Board itself recognizes that this type of relief constitutes legal damages. *See Thryv, Inc.*, 372 N.L.R.B. No. 22, 2022 WL 17974951 (Dec. 13, 2022), vacated in part on other grounds, *Thryv Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024). There, the Board noted that it had invited comments on whether it should "*modify* its traditional make-whole remedy in all pending and future cases to include relief for *consequential* damages . . . ." *Id.* at *9 n.8 (emphasis added);[4] *see also Meyer Tool, Inc. & William Cannon-El III*, 366 N.L.R.B. No. 32, 2018 WL 1256648, at *1 n.3 (Mar. 9, 2018) (rejecting General Counsel's request for "consequential damages incurred as a result of the" employer's ULP because that "relief" "would require a change in Board law").

Further, while the Board did not elaborate on the scope of "foreseeable pecuniary harms" applicable here, it has elsewhere clarified the types of harms that should generally be included in this category. It has explained that an unlawfully discharged employee may, for example, "be faced with interest and late fees on credit cards, or penalties if she must

[4] The Board later caught its Freudian slip and repeatedly claimed in *Thryv* that it was not imposing a practice of awarding consequential damages because they are "more suited for the common law of torts and contracts." *Thryv, Inc.*, 2022 WL 17974951, at *14.

make early withdrawals from her retirement account in order to cover her living expenses. She might even lose her car or her home, if she is unable to make loan or mortgage payments." *Thryv, Inc.*, 2022 WL 17974951, at *15. The Board also noted potential "transportation or childcare costs" and "out-of-pocket medical expenses." *Id.*[5] Compensation for these sorts of harms constitute legal damages.

The breadth of the Board's award is no doubt what led this Court to describe a similar award as "a novel, consequential-damages-like labor law remedy." *Thryv*, 102 F.4th at 737.

B. The NLRA Does Not Grant the Board the Authority to Award Legal Damages

The NLRA authorizes NLRB to award only equitable remedies—not legal ones. This distinction stems from the historic tradition in both England and the United States of "the divided bench," made up of courts of equity and courts of law. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002). Most relevant here, a key difference

[5] Notably, the Board described compensation for these exact harms as "consequential damages" just prior to issuing its decision in *Thryv*. *Voorhees Care & Rehab. Ctr.*, 371 N.L.R.B. No. 22, 2021 WL 3812220, at *5 n.14 (Aug. 25, 2021) (referring to this verbatim list of potential harms as "consequential damages").

between those courts was the remedies they offered. Equitable relief included remedies such as injunctions or restitution—in other words, orders directing action (or inaction) or disgorgement. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). In contrast, legal remedies were punitive or compensatory in nature, providing monetary relief for losses incurred as a result of unlawful behavior. *Id.*

This context clarifies that the NLRA provides for only equitable relief because that law authorizes NLRB to order only action or inaction: to "require[e] [employers] to *cease and desist* from [an] unfair labor practice, and to take such *affirmative action* including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c) (emphasis added). These directives to act (or not to act) constitute classic equitable remedies. *See, e.g.*, *Local 60 v. NLRB*, 365 U.S. 651, 655 (1961); *see also NLRB v. Starbucks Corp.*, 125 F.4th 78, 95 (3d Cir. 2024) (citing Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 553 (2016)) ("By empowering the Board to order entities 'to cease and desist' and to take 'affirmative action,' Congress granted it the authority to order equitable remedies.").

Section 10(c)'s allowance for backpay, cited as an example of affirmative action the Board may take, further shows the NLRA limits the Board to awarding only equitable remedies. Backpay—while a form of monetary relief—is considered a form of restitution *incidental to the equitable award*, and thus equitable in nature. *See Starbucks*, 125 F.4th at 95–96 (citing *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.").[6]

Further, § 10(c) makes backpay discretionary, which is a symptom of the general principle that the NLRB's provision for limited monetary relief is secondary to its main purpose of addressing ULPs. The Supreme Court made plain this hierarchy in *Int'l Union v. Russell*, which involved the question whether the NLRA preempted state suits for ULPs. 356 U.S. 634, 645 (1958). In holding that it did not, the Court noted the limited remedies available under the NLRA and the expanded options available under state law. *See id.* ("To the extent that a back-pay award may

[6] Title VII's remedial provision was "modeled" on NLRA § 10(c). *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975).

provide relief for victims of an unfair labor practice, it is a partial alternative to a suit in the state courts for loss of earnings.").

In short, "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Id.* at 643. *See also id.* at 642–43 (explaining that a discretionary award of backpay "is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices"); *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967) ("The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."); *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.").

The Supreme Court's cases interpreting Title VII lend additional support to the view that § 10(c) provides for solely equitable relief. These cases are apposite to determining the scope of § 10(c) because, as noted above, the remedy in Title VII was modeled after § 10(c). The Supreme Court has thus looked to § 10(c) for "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). In considering Title VII's remedial provision, the Court held that it "does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and *other* equitable relief." *United States v. Burke*, 504 U.S. 229, 238 (1992) (emphasis added).[7] Notably, Congress altered the remedies available under Title VII to include compensatory damages. *See id.* at 241 n.12.[8] But Congress has not amended § 10(c). To

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[7] The Board is likely to argue that the *Thryv* remedy is permissible notwithstanding *Burke* because it is pecuniary in nature and covers the "consequences" of ULPs, rather than the nonpecuniary types of tort damages described in *Burke*. *See, e.g.*, *Int'l Union of Operating Eng'rs v. NLRB*, 127 F.4th 58, 85 (9th Cir. 2025). But the Board does not and cannot claim that the NLRA allows for every pecuniary relief. Nor does the NLRA allow relief for every foreseeable consequence of a ULP.

[8] The *Burke* Court's treatment of these amendments is particularly relevant here because it indicates that § 10(c) does not offer tort-like damages (*i.e.*, compensatory and consequential damages). The respondents in *Burke*—three employees who had received backpay from a previous settlement for alleged discriminatory underpayments through Title VII—sought to recover the amount of taxes that had been withheld from that backpay award, arguing that the backpay award constituted "damages received . . . on account of personal injuries" under 26 U.S.C. § 104(a)(2), and thus should be excluded from their gross incomes under that statute. *Burke*, 504 U.S. at 232. Even though the previous remedial provision in Title VII (the one modeled after § 10(c)) controlled for purposes of the lawsuit, the employees argued that the amendments expanding Title VII's remedial scope supported their view that the backpay award was

the contrary, legislation that would have allowed NLRB to award compensatory damages failed to become law. *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 long concurred with the Supreme Court that the NLRA confers limited power to grant monetary relief, and it even acknowledged that it "does not award tort remedies." *Freeman Decorating Co.*, 288 N.L.R.B. 1235 n.2 (1988). That longstanding position changed, however, in late 2022—roughly nine decades after the NLRA's enactment—when the Board discovered the power to award consequential damages as a "necessary" means of "more fully effectuat[ing] the make-whole purposes of the [NLRA]." *Thryv, Inc.*, 2022 WL 17974951, at *9, *10. In *Thryv*, the Board purported to merely "revisit and clarify" its previous decisions that "ha[d] not always made clear that [the Board] define[s] make-whole relief to include direct or foreseeable pecuniary harms resulting from . . . unfair labor practices." *Id.* at *10. But in reality, the Board in *Thryv* arrogated

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"inherently tort-like in nature." *Id.* at 241 n.12. The Court disagreed, finding instead that "Congress' decision to permit jury trials and compensatory and punitive damages under the amended Act signal[ed] a marked change in its conception of the injury redressable by Title VII . . . ." *Id.*

to itself a new power to compensate employees for losses that had previously fallen outside the scope of the make-whole remedy. *See id.* at *27 (Comm'rs Kaplan and Ring, dissenting in part) (stating that monetary losses within the Board's newly claimed remedy had not previously been included in the make-whole remedy).

The Board's construction of § 10(c) to authorize compensatory damages goes far beyond the statutory text and Supreme Court precedent. The NLRA does not allow NLRB to award the legal relief it did here.[9]

C. If the NLRA Does Grant NLRB Authority to Award Legal Damages, Then It 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) and which involves a "major social and economic policy decision." *West Virginia v. EPA*, 597 U.S. 697, 723–24, 731 (2022) (simplified). In these

[9] The Acting General Counsel of the NLRB recently rescinded several former memos that urged Regions to seek "full remedies" for victims of unlawful conduct. *See* N.L.R.B. GC 25-05 Rescission of Certain General Counsel Memoranda (Feb. 14, 2025). While these rescissions suggest that NLRB may not seek full compensatory damages as part of its make-whole relief in the future, it does not change the fact that Hiran has been ordered to pay them in this case.

circumstances, the agency must identify "'clear congressional authorization' for the power it claims." *Id.* at 723. The Board cannot do so here.

First, as discussed, the Board did not claim authority to impose compensatory or consequential damages until its December 2022 decision in *Thryv*—issued roughly 90 years after the NLRA's adoption in 1935.

Second, the Board's expansive interpretation of § 10(c) ushers in the very scheme the Supreme Court has already said § 10(c) does *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. Consequently, the Board's action "effect[s] 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) (quoting *MCI Telecomm. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994)).

Finally, the Board's power grab involves a "major social and economic policy decision[]." *West Virginia*, 597 U.S. at 730. NLRB itself describes its jurisdiction as "very broad" and states that it "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, https://tinyurl.com/374xbtxw (last visited Jan. 25, 2025). NLRB's new-found power to hold "the great majority of non-government employers" liable for "foreseeable harms" ranging from late fees on credit card debt to childcare and transportation costs, *see Thryv*, 2022 WL 17974951, at *27, thus involves major economic considerations almost by definition.

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). It cannot do so. The statutory text does not indicate that the Board can order legal remedies; § 10(c) authorizes orders to cease-and-desist and to take "affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." The Board claims the word "including" confers "the power to issue remedies beyond the reinstatement and backpay expressly authorized." *Thryv*, 2022 WL 17974951, at *15. But, as explained above (pp. 20–26), reinstatement and backpay are classic *equitable* remedies.

See Starbucks, 125 F.4th at 96; *Curtis*, 415 U.S. at 197. How a provision authorizing equitable remedies indicates Congressional intent to authorize legal remedies is, at least, unclear. And the major questions doctrine demands more clarity than that. This Court should therefore hesitate to read § 10(c) broadly and, given the lack of clear congressional authorization, conclude that the Board does not have the authority to order the legal relief it did here.

D. The Retroactive Imposition of Legal Damages Here Violates Hiran'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 to "the severity of the penalty," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see also United States v. AMC Ent., Inc.*, 549 F.3d 760, 774 (9th Cir. 2008) (vacating district court's award and remanding for modification of remedial order—a series of detailed injunctive orders—consistent with due process requirements).

Here, the conduct at issue in this case took place between July and October 2022—*before* the Board's December 2022 discovery that it had authority to impose compensatory damages. The Board's order thus "'operates retroactively,'" *i.e.*, it "seeks to impose 'new legal consequences to

events completed before its' announcement." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015); *see Thryv*, 2022 WL 17974951, at *21 (applying new rule "retroactively in this case and in all pending cases in whatever stage") (cleaned up).

Therefore, "retroactively applying" *Thyrv* "would compromise the "familiar due process considerations of fair notice, reasonable reliance, and settled expectations." *Monteon-Camargo v. Barr*, 918 F.3d 423, 430–31 (5th Cir. 2019) (cleaned up) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).

By retroactively applying *Thryv*'s compensatory-damages rule against Hiran, the Board violated its right to due process of law. The damages award should therefore be reversed.

E. The Board's Reading of § 10 Would Violate the Non-delegation Doctrine

If § 10(c) permits the Board to order new remedies of such wide scope, then it provides no discernible standards, principles, or limits as to which remedies are allowed. Under so broad a reading, § 10(c) would give 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 bars "delegation of [legislative] powers." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). And while Congress may authorize executive agencies "to carry out [a] declared legislative policy," it may not do even that unless the authorization is accompanied by an intelligible principle to cabin and guide the exercise of administrative discretion. *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 426, 430 (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." *Pan. Refin.*, 293 U.S. at 430. Consequently, 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—like 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 NLRB promotes a reading of § 10(c) that neither directs the award of legal damages nor provides an intelligible principle to guide NLRB's purported discretion to make such awards. It does not suggest

when remedies other than the equitable ones laid out in § 10(c)—and consistently applied over the last 90 years—are appropriate. It does not say whether there is any limit on the amount of damages the Board may award once it ventures beyond the equitable remedies of reinstatement and backpay. The backpay 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 in crafting its awards. But tort-like compensatory relief for indirect harms offers no such limit. *See Thryv, Inc.*, 2022 WL 17974951, at *27 (Comm'rs Kaplan and Ring, dissenting in part) (interpreting the Board's decision to include "all losses indirectly caused by an unfair labor practice . . . , regardless of how many steps removed the losses are from the unfair labor practice in the chain of causation, so long as the losses are deemed 'foreseeable'").

To the extent the Board infers an intelligible principle from the NLRA's general purpose of preventing ULPs, it may not do so. An intelligible principle must be firmly rooted in statutory text—not self-serving interpretations of a statute's general purpose. *Pan. Refin.*, 293 U.S. at 417–18; *Schechter Poultry*, 295 U.S. at 541–42; *see also Gundy v. United States*, 588 U.S. 128, 175 (2019) (Gorsuch, J., dissenting) (quoting *Mer-*

tens, 508 U.S. at 261) ("[S]urely we must all agree that broad and sweeping statements like these about 'a statute's "basic purpose" are . . . inadequate to overcome the words of its text regarding the specific issue under consideration.'"). Were it otherwise, Congress could write a blank check for agencies to take virtually any action merely by authorizing them to "effectuate [a law's] policy." *See Schechter Poultry*, 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. Allowing 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 Petitioner's Rights Under Article III and the Seventh Amendment

The NRLA authorizes the Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce," after conducting a hearing. 29 U.S.C. § 160(a), (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 Division of Judges Directory*, NLRB https://tinyurl.com/yavfvj83, (last visited January 26, 2025).

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); ROA.852.[10] 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 and consequential damages (*see Thryv*, 372 N.L.R.B. No. 22).

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[10] The ALJ's clear misunderstanding of the rule against hearsay offers one example of the process's inadequacy. Petitioner objected, for example, when the General Counsel elicited evidence from a witness about what other employees said during the meeting, testimony that was being offered for the truth of what happened at the meeting. ROA.120. The ALJ overruled the objection on grounds that since the witness "was there and she heard it, it's not hearsay." ROA.120–21. Separately, the ALJ herself asked a witness what another employee said. ROA.317. In response to Petitioner's objection, the ALJ said she was asking for "a response back to her [the witness]. That's not going to be hearsay." ROA.317. The ALJ then included the substance of this hearsay testimony in the initial decision. ROA.843.

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.*

Accordingly, and irrespective of the errors made in the proceeding below, more fundamental problems exist: the NLRB's in-house proceeding itself violated Hiran's rights to (A) a trial before an independent, life-tenured judge in an Article III court and (B) a jury trial.

A. Petitioner Is Entitled to Defend 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*, 603 U.S. 109, 127 (2024) (simplified) (citations omitted).

The structural principles secured by the separation of powers are "essential to the preservation of liberty." *The Federalist No. 51*, at 348 (Madison) (J. Cooke ed., 1961). To better secure individual liberty, this framework "protect[s] each branch of government from incursion by the others." *Bond v. United States*, 564 U.S. 211, 222 (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 THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

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*, 603 U.S. at 111 (citations omitted).

2. The Board's In-House Adjudication Violated Petitioner's Rights to a Hearing Before an Independent Article III Judge

NLRB purported to restrict Petitioner's 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.837–38 (enjoining Hiran and imposing award of consequential damages). 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* Caleb E. 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 can take place here because "[j]udicial review of NLRB decisions and orders is limited and deferential." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018). 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); *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656–57 (5th Cir. 2012) (quoting *Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999)) (explaining that the court "may not reweigh the evidence, try the case de novo, or substitute [its] judgment for that of the board, 'even if the evidence preponderates against the [Board's] decision.'"); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1181 (5th Cir. 1982) (quoting *NLRB v. L.B. Priester & Son, Inc.*, 669 F.2d 355, 359 (5th Cir. 1982)) (stating that it must uphold the NLRB's resolution of "the legal

effect of a given set of facts" so long as it is "'reasonable, consistent with the [NLRA], and based on findings supported by substantial evidence.'").

Likewise, the "substantial evidence" standard makes post-hearing review insufficient. 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. Balt. & Ohio R.R. Co.*, 372 U.S. 108 (1963). Its application to *agency*-found facts is improper and, as discussed fully below, denies Hiran its right to a jury trial.

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 Petitioner's Core Private Rights and its Imposition of a Damages Award Violated Petitioner's 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. A party 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*, 603 U.S. at 123.

1. The NLRB Imposed Legal Damages

Pursuant to the Seventh Amendment, consequential damages—a legal remedy—may not be awarded outside of a jury trial. *See Jarkesy*, 603 U.S. at 122–24. Under the NRLA, employers found liable for a ULP can be required to reinstate the employee "with or without back pay," 29 U.S.C. § 160(c), a remedy the Supreme Court holds to be equitable, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). But, as explained above, the NLRB in 2022 "revisit[ed]" its precedent and adopted a new policy—nine decades after the NLRA was adopted—requiring com-

pensation for all "direct or foreseeable pecuniary harms" from ULPs. *Thryv, Inc.*, 2022 WL 17974951, at *9–10.

Here, the Board ordered compensatory and consequential damages when it ordered Hiran to compensate the employees "for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them . . . ." ROA.830. These remedies are legal in nature and thus require a jury trial.

Indeed, "money damages are the prototypical common law remedy." *Jarkesy*, 603 U.S. at 123. Thus, by incorporating a compensatory and consequential damages remedy into its ULP claims, *see Thryv*, 2022 WL 17974951, at *10, the NLRB has exceeded the bounds of the equitable remedies that *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 ULP 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*, 603 U.S. at 122 ("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. Colum. 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, 415 U.S. at 195. It doesn't matter whether there is an "action equivalent to" the statutory action under consideration. *Monterey*, 526 U.S. at 709; *see Jarkesy*, 603 U.S. at 137–38 (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 William 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). *See, e.g.*, Kerry R. Lewis, Note, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 Tulsa L.J. 571, 589–90 (1991) (describing English common law claims for, among other things, breach of contract for wrongful discharge). *See also* 1 William Blackstone, *Commentaries on the Laws of England* *75 (1768) ("[N]o master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term . . . ."); Stuart M. Speiser et al., 11 *American Law of Torts* § 34:83 (2024) (describing tort of wrongful termination, *i.e.*, when an (1) "employee was discharged by his or her employer" and (2) "the employer breached a contract or committed a tort in connection with the employee's termination"); *see id.* § 34:85 (observing pedigree back to English common law).

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 allows Congress to "assign" only certain "distinctive areas involving governmental prerogatives" to non-Article III tribunals. *Jarkesy*, 603 U.S. at 120. But this exception—"which is, after all, an *exception*" that "has no textual basis in the Constitution," *Jarkesy*, 603 U.S. at 131—does not apply here.

To start, this case does not involve any of those "distinctive" areas (revenue collection, immigration, tariffs, Indian relations, public lands administration, and public benefits) that by long-established history are owned by or have a tradition of plenary control by the federal government. *Id.* at 129–31; *see id.* at 153–54 (Gorsuch, J., concurring) (noting "serious and unbroken historical pedigree" of distinctive "public rights" exceptions).

Rather, 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*, 603 U.S. at 135 (noting public rights exception does *not* broadly apply 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*, 603 U.S. at 133–36. And Congress may not "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*).

Even if such claims did concern public rights, however, the legal remedies the NLRB seeks to impose here take this case outside the scope of the public rights exception. As discussed above, these remedies aim at private rights far beyond the narrower purpose of the NLRA to address ULPs. *See Int'l Union of Operating Eng'rs*, 127 F.4th at 98–99 (Bumatay, J., dissenting in part). The NLRB cannot have it both ways by contending Hiran's rights are public while imposing private, tort-like damages.

Because ULP claims generally and the remedies specifically ordered in this case both involve vindication of private rights, the public

rights doctrine does not apply. "Therefore, Congress may not withdraw it from judicial cognizance." *Jarkesy*, 603 U.S. at 134 (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* 603 U.S. at 112 (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 Hiran's legal rights, and the Board imposed legal remedies. As a result, the NLRB's in-house adjudication violated Hiran's Seventh Amendment right to a jury trial.

C. Petitioner May Present Constitutional Issues in Court Without Having Raised Them in an Agency Adjudication

The Board may respond that, pursuant to 29 U.S.C. § 160(e), this Court may not consider Hiran's constitutional claims because they were not raised before the Board. The Court should reject this argument. Hiran did in fact present these arguments to the Board. But even if it did

not, raising these arguments below would have been futile because the Board has no power to resolve these particular claims.

1. Hiran Raised Its Constitutional Arguments to the Board

In reviewing the ALJ's decision, the Board rejected as untimely Hiran's constitutional arguments because they were not raised before the ALJ herself. ROA.836 n.1. The Board cited NLRB's own precedents for this policy,[11] ROA.836 n.1 (citing *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989)).[12] But this policy is contrary to the language of the NLRA. According to NLRA § 10(e), courts may hear objections raised "before the Board, its member, agent, or agency." 29 U.S.C. § 160(e). Hiran here brought its contentions before the Board when it excepted to the ALJ's

[11] Incidentally, the Board's practice of not considering issues unless presented to the ALJ is more restrictive than the applicable regulations, which explicitly envision the availability of Board review of issues raised in exceptions or cross-exceptions to the ALJ's decision. *See* 29 C.F.R. § 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.").

[12] The Board also cited the Third Circuit decision enforcing *Yorkaire*. *NLRB v. Yorkaire*, 922 F.2d 832 (Table) (3d Cir. 1990). But that decision enforced the Board's order without analysis and, in any event, is not binding on this Court.

decision, ROA.776, 887–88, and this is all the NLRA requires to preserve these arguments for judicial review.

This Court's precedents confirm Hiran's view. In *Thryv*, for example, the NLRB argued that judicial review of certain issues was barred because they had been raised only in the answer to the General Counsel's complaint and in a motion for reconsideration following the Board's decision. 102 F.4th at 741. This Court disagreed, finding "no basis for the Board's position in the text of § 10(e)." *Id.* at 742. Rather, this court's "precedent says a party can properly exhaust its arguments by raising them for the first time in a motion for reconsideration before the Board." *Id.* To the extent the NLRB finds fault with Petitioner for elaborating on the constitutional issues in its brief accompanying its exceptions, Petitioner notes that this Court has considered supporting briefs for purposes of determining the proper scope of judicial review. *See, e.g.*, *In-N-Out Burger, Inc.*, 894 F.3d at 720; *Hallmark-Phoenix 3, LLC v. NLRB*, 820 F.3d 696, 713 (5th Cir. 2016).

2. Extraordinary Circumstances Allow this Court to Consider Hiran's Constitutional Challenges

Even assuming Hiran's constitutional arguments were untimely because not presented to the ALJ, this Court should nonetheless consider

them because it would have been futile for Petitioner 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. Ill. 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*." *Carr*, 593 U.S. at 93. (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*, Hiran here "assert[s] 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 an ALJ nor the Board has the authority to decide whether the Board's proceeding itself—irrespective of any orders or decisions made during the proceeding—is unconstitutional under Article III, the Due Process Clause, 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 depart-

ment.'" *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Requiring Hiran to present those arguments to the Board when it is powerless to consider them would be a fruitless exercise for both Hiran and the General Counsel, and it would offer no benefit to judicial review.

This Court may consider Petitioner's constitutional claims.

CONCLUSION

The Court should grant Hiran's petition, deny the Board's cross-application for enforcement, vacate the Board's Decision and Order, and award Hiran all further relief to which it is entitled.

DATED: February 18, 2025

Respectfully submitted,

s/ Oliver J. Dunford

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CERTIFICATE OF SERVICE

I certify that on February 18, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth 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.

s/ Oliver J. Dunford
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CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(g) that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,712 words, excluding those parts Fed. R. App. P. 32(f) excludes.

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 it has been prepared using Century Schoolbook 14-point font, a proportionately spaced typeface.

DATED: February 18, 2025

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