Nos. 23-1953, 23-2241

In the United States Court of Appeals

FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner/Cross-Respondent

v.

STARBUCKS CORPORATION,
DBA Starbucks Coffee Company,

Cross-Petitioner/Respondent

On Application for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF STARBUCKS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, National Federation of Independent Business Small Business Legal Center, Inc., and National Retail Federation are not publicly traded corporations. They have no parent corporation, and no publicly held company has 10% or greater ownership of their stock.

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Coalition for a Democratic Workplace ("CDW") is composed of hundreds of organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry. CDW's members are joined by their mutual concern over regulatory

[1] All parties have consented to the filing of this brief. *See* FED. R. APP. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than amici, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief.

overreach by the NLRB that threatens employees, employers, and economic growth.

NFIB Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, NFIB Legal Center frequently files amicus curiae briefs in cases that will impact small businesses.

Established in 1911, the **National Retail Federation** ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To ensure that the

retail community's position is heard, the NRF often files amicus curiae briefs expressing the views of the retail industry on a variety of topics, including those arising under the National Labor Relations Act ("NLRA").

* * *

Amici's members include thousands of employers subject to the NLRA who have a strong interest in its proper interpretation and application. In this case, the National Labor Relations Board ("NLRB" or "Board") applied authority that it recently claimed in *Thryv, Inc.*, 372 NLRB No. 22 (Dec. 13, 2022), to order employers "to compensate affected employees" for all harms that may flow from an unfair labor practice. But the Board's newfound authority violates the NLRA's careful limits on affirmative relief and dramatically expands the scope of available remedies beyond what Congress has statutorily authorized. Amici submit this brief to illustrate how the Board's decision is inconsistent with text and precedent, and represents the latest overreach in a torrent of decisions radically reinterpreting the NLRA.

SUMMARY OF ARGUMENT

The language, structure, and purposes of the NLRA preclude any award of monetary damages beyond the compensation that the employer wrongfully discontinued and would otherwise have provided to the employee. When employees are discharged or suspended, Section 10(c) specifies that the available remedies are reinstatement "with or without back pay." 29 U.S.C. § 160(c). The statutory text thus shows that even backpay is not invariably warranted. And the statute goes on to state that backpay awards are *impermissible* if the employee "was suspended or discharged for cause." *Id.*

It is well established that the Board lacks authority to create, impose, or award additional monetary relief merely because it believes such relief would be desirable in a particular case. Congress did not "vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940). Instead, "affirmative action to 'effectuate the policies of th[e] Act' is action to achieve the remedial objectives which the Act sets forth." *Id.* at 12. And the Act limits the available remedies to backpay. Nothing

more. Nowhere does the Act permit the Board to create, impose, or award monetary damages that exceed the remuneration that the employer would otherwise have paid to the suspended or discharged employees.

This conclusion respects Congress's choice not to "establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *UAW v. Russell*, 356 U.S. 634, 643 (1958). Congress did not create a private right of action for injured individuals, nor did it establish the Board for the "adjudication of private rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940). And in contrast to other statutes, like Title VII of the Civil Rights Act of 1964, Congress has never amended the NLRA to expressly authorize compensatory or consequential damages on top of backpay. *See* 42 U.S.C. § 1981a. Such authorization would raise serious constitutional concerns, empowering an administrative agency to award legal relief for private injuries outside of Article III courts and the right to a jury trial.

Despite these obstacles, the NLRB recently determined in *Thryv* that it has expansive authority to mandate a whole range of damages whenever an employee is unlawfully suspended or terminated. And it applied that faulty decision here. But *Thryv* cannot be reconciled with

the text of the Act and substantially exceeds the Board's authority; it should not stand. This Court should decline to enforce the Board's application of *Thryv*.

ARGUMENT

The monetary relief that the Board awarded below includes compensatory damages—substantively indistinguishable from consequential damages—beyond the authorized remedy of backpay. Such an award exceeds the Board's statutory authority. The Board's novel endorsement of such damages in *Thryv* identifies no statutory basis. And, to make matters worse, such relief raises serious constitutional concerns by denying regulated parties their right to impartial Article III courts and trial by jury under the Seventh Amendment. If the Court does not set aside the Board's decision in full, it should at a minimum set aside the Board's award of this unauthorized monetary relief.

I. Congress placed explicit limits on the Board's authority to award damages under the NLRA, which the Supreme Court has reaffirmed.

A. In originally enacting the NLRA in 1935, Congress chose not to grant the Board authority to award compensatory damages.

Section 10(c) of the NLRA does not permit awards of general compensatory damages. By its terms, Section 10(c) identifies "back pay" as

the only monetary relief that the Board may award to employees who suffer harm from an unfair labor practice. On finding that a person has committed an unfair labor practice, the Board "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the NLRA]." 29 U.S.C. § 160(c). This statutory language has remained unchanged since the NLRA's original enactment in 1935. *See* National Labor Relations Act, Pub. L. No. 74-198, § 10(c), 49 Stat. 449, 454 (1935).

As this provision indicates, backpay is an optional supplement to reinstatement or other forms of affirmative action that the Board may require. *See United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665 (1954) (describing the backpay remedy as a "minor supplementary" form of relief). Backpay is not automatic. In some cases, Section 10(c) expressly contemplates an award of reinstatement "*without* back pay." 29 U.S.C. § 160(c) (emphasis added). Regardless, backpay is the only monetary supplement that Section 10(c) allows.

That was no mere oversight. On the contrary, it was extremely important to the NLRA's passage and constitutionality. From the start, the

NLRA was designed to empower the Board to adjudicate *public rights* in the public interest, not *private rights* for the benefit of private parties. As the Supreme Court clarified soon after the Act's passage, the NLRA established "[t]he Board as a public agency acting in the public interest." *Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 265 (1940). The statute does not deputize employees or employers to effectuate its objectives in the manner of "parties in litigation determining private rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940). Thus, when the Board seeks to enforce its orders, it does so "as a public agent, not to give effect to a 'private administrative remedy.'" *Amalgamated Util. Workers*, 309 U.S. at 269.

The statute's legislative history reflects the same understanding:

> No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal.

H.R. REP. NO. 74-1147, at 24 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3074 (1949)

[hereinafter NLRA HIST.]. In short, "the primary objective of Congress in enacting the National Labor Relations Act" was "stability of labor relations," not private rights of action. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949).

The NLRA's focus on the public interest was central to its passage because the Constitution prohibits delegating judicial functions to administrative agencies. These constitutional principles condition the extent of the Board's power. Congress may not bestow the federal "judicial Power" on adjudicatory bodies that are not Article III courts, *see* U.S. CONST. art. III, § 1; it may only empower agencies to adjudicate "public rights." *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462, 484 (2011). Cases of "public rights" are those "arising 'between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,'" and they contrast with "matters 'of private right, that is, of liability of one individual to another under the law as defined.'" *Id.* at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)); *see also* U.S. CONST. amend. VII (recognizing a right to trial by jury).

Congress was aware of the potential constitutional problems when it considered the NLRA in 1935. That year, the Supreme Court invalidated the National Industrial Recovery Act, and the industry advisory committee that it established, as "an unconstitutional delegation of legislative power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 537-42 (1935). Members of the Court took issue with the creation of broad-based, "roving commission" authority to "inquire into evils and upon discovery to correct them." *Id.* at 551 (Cardozo, J., concurring).

The NLRA's supporters deemed it essential for the Board to focus on the adjudication of public rights, with limited discretionary authority, and to avoid acting as a "roving commission." For example, the statute's legislative history contains pervasive references to the importance of limiting the Board's authority, in contrast with what the Supreme Court held was unconstitutional in *Schechter Poultry*. S. REP. NO. 73-1184 (1934), *reprinted in* 1 NLRA HIST. 1102 ("(1) The Board is to enforce the law as written by Congress; and (2) the Board acts only when enforcement is necessary."); S. REP. NO. 74-573 (1935), *reprinted in* 2 NLRA HIST. 2308 ("Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that

in their judgment are deemed to be unfair."); H.R. REP. NO. 74-969 (1935), *reprinted in* 2 NLRA HIST. 2932 ("section 11 . . . grants no roving commission, but is limited to the exercise of powers and functions embodied in sections 9 and 10"); *id*. at 2933 ("The Board is to be solely a quasi-judicial body with clearly defined and limited powers" and "[i]ts policies are marked out precisely by the law") (minority view of Rep. Marcantonio); 2 NLRA HIST. 3207 (same); *see also* H.R. REP. NO. 74-972 (1935), *reprinted in* 2 NLRA HIST. 2965-66, 2978-79; H.R. REP. NO. 74-1147 (1935), *reprinted in* 2 NLRA HIST. 3059, 3076, 3077.

Against this backdrop, the 1935 Congress rejected earlier proposed versions of the legislation that would have granted the Board broader authority. For example, the Senate's first proposal expressly authorized awards of "damages":

> If upon all the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an appropriate order directed to such person. The order may require such person to cease and desist from such unfair labor practice, or to take affirmative action, *or to pay damages*, or to reinstate employees, or to perform any other acts that will achieve substantial justice under the circumstances.

S. 2926, 73d Cong. § 205(c) (1934) (emphasis added), *reprinted in* 1 NLRA HIST. 6.

This provision for damages was criticized harshly at committee hearings. One witness objected, for example, that "no rule [was] established" to constrain the Board's ability to "require the employer to pay damages," arguing that this raised "due process" concerns. *To Create A National Labor Board: Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. 362 (1934) (statement of James A. Emery, General Counsel, National Association of Manufacturers), *reprinted in* 1 NLRA HIST. 396. The bill reported out of committee omitted the reference to damages, instead authorizing "an order requiring such person to cease and desist from such unfair labor practice, or to take affirmative action or to perform any other acts that will achieve substantial justice under the circumstances." S. 2926, 73d Cong. § 8(c) (as reported by S. Comm. on Education and Labor, May 10, 1934), *reprinted in* 1 NLRA HIST. 1091.

The next year, yet another proposal authorized the Board's cease-and-desist orders to also require "such affirmative action, including restitution, as will effectuate the policies of this Act." S. 1958, 74th Cong.

§ 10(d) (1935), *reprinted in* 1 NLRA HIST. 1302. A Senate Committee memorandum explains the change:

> The broad term "restitution" is used in S. 1958 to take in the host of varied forms of reparation which the National Labor Relations Board has been making in its present decisions, to suit the needs of every individual case. An effort to substitute express language such as reinstatement, back pay, etc., necessarily results in narrowing the definition of restitution, which may include many other forms of action.

STAFF OF S. COMM. ON EDUC. & LABOR, COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) SEN. COMM. PRINT 34 (Comm. Print 1935), *reprinted in* 1 NLRA HIST. 1360.

But the broad provision for "restitution" was criticized on constitutional grounds as well. Industry groups argued that authorizing the Board "to assess damages, require restitution, and make its findings of fact in such regard conclusive upon the courts" violated Article III, the Seventh Amendment, and due process because such "restitution or redress in civil damages" amounted to deciding "private rights" rather than "public rights." *National Labor Relations Board: Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. 244, 848-53 (1935) (statement of James A. Emery, General Counsel, National Association of

Manufacturers), *reprinted in* 2 NLRA HIST. 1630, 2234-39; *see also id.* at 445-46, 448 (statement of Robert T. Caldwell, Attorney, American Rolling Mill Co.) (raising Seventh Amendment objections to the Board's "power to make reparations"), *reprinted in* 2 NLRA HIST. 1831-32, 1834.

Ultimately, Congress selected a more specific and narrower formulation—"reinstatement with or without back pay," 29 U.S.C. § 160(c)—instead of the broader proposed terms "restitution" and "damages." Even as "the remedial power of the Board is 'a broad discretionary one,'" *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969) (citation omitted), Congress deliberately made the Board's remedial power narrower than it could have been with respect to monetary relief. Congress "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. Instead, the Board's "power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Id.* at 642-43; *see also* 29 U.S.C. § 160(a); *Amalgamated Util. Workers*, 309 U.S. at 269-70 ("Both the [Board's] order and the [court's] decree [of enforcement] are aimed at the prevention of the unfair labor practice.").

It is true, of course, that backpay orders "restore to the employees in some measure what was taken from them because of the Company's unfair labor practices," and in this respect "somewhat resemble compensation for private injury." *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943). And courts have occasionally applied damages-like concepts like "actual losses" and "mitigation of damages" to the Board's authority to order backpay. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941).

But the Board can order backpay to restore that type of loss *only* because backpay is a "remedial objective[] which the Act sets forth" in express terms. *Republic Steel*, 311 U.S. at 12. In other words, concepts such as mitigation actually *constrain* the Board's authority by preventing it from awarding windfall monetary relief—such as when a discharged employee makes a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge*, 313 U.S. at 199-20; *see also id.* at 198 n.7 (approving the Board's longstanding practice, since *Crossett Lumber Co.*, 8 NLRB 440 (1938), *enf'd*, 102 F.2d 1003 (8th Cir. 1938), of deducting only "net earnings" to allow "for the expense of getting new employment which, but for the discrimination, would not have been necessary").

None of these concepts change the Board's primary mission: vindicating the *public* interest in stopping unfair labor practices. *See, e.g.*, *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 363 (1946) ("The purpose of [Section 10(c)'s] 'back pay' allowance is to effectuate the policies of the Labor Act for the preservation of industrial peace."). The Board cannot order a remedy merely because it thinks that remedy "would effectuate the policies of the Act" or would "deter[] persons from violating the Act." *Republic Steel*, 311 U.S. at 11-12. As the Supreme Court has long made clear, the Board's authority to devise remedies "does not go so far as . . . enabling the Board to inflict upon the employer *any penalty it may choose . . . , even though the Board be of the opinion that the policies of the Act might be effectuated by such an order*." *Consol. Edison Co. of N.Y.* v. *NLRB*, 305 U.S. 197, 235-36 (1938) (emphasis added).

B. The 1947 NLRA amendments confirm Congress's understanding that backpay is the only form of monetary relief the Board may award.

Two legislative additions to Section 10(c) in 1947 reinforce these points. First, the 1947 amendments added language reiterating that "where an order directs reinstatement of the employee, *back pay may be required* of the employer or labor organization." Labor Management

Relations Act of 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136, 147 (emphasis added) (codified at 29 U.S.C. § 160(c)).

Second, Congress directed that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *Id.* Fast forward to today, and this amendment, targeting backpay, would have a huge loophole if the Board had unstated statutory authority to order other monetary relief. But Congress adopted this important amendment with the understanding that backpay was the only form of monetary relief that the Board could order alongside reinstatement. *See* H.R. REP. NO. 80-245, at 27, 42 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 318, 333 (1948) [hereinafter "LMRA HIST."]. Indeed, this restriction was so significant that President Truman highlighted it in vetoing the legislation, and Senator Taft addressed it in opposing the veto.[2]

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[2] 93 CONG. REC. 7501 (June 20, 1947), *reprinted in* 1 LMRA HIST. 917; 93 CONG. REC. A3233 (June 21, 1947), *reprinted in* 2 LMRA HIST. 1627. The LMRA was enacted over President Truman's veto when two-thirds majorities in the House and Senate voted to override the veto. 93 CONG. REC. 7504 (June 20, 1947), *reprinted in* 1 LMRA HIST. 922-

In short, both amendments reflect Congress's understanding that the available monetary relief for an unlawfully discharged or suspended employee is limited to backpay as a potential monetary supplement to the prescribed affirmative relief of reinstatement. And both additions further reflect Congress's understanding that even backpay is not always appropriate. Had Congress intended to make other monetary remedies available, it would have added something like the earlier proposals rejected in 1935. *See supra* pp. 11-14. Instead, Congress amended Section 10(c) in these limited ways.

C. A comparison of the NLRA with other statutes confirms that compensatory damages are not available.

To be sure, Section 10(c) does not *expressly* prohibit monetary damages beyond backpay. But "[t]he absence of a prohibition is not . . . equivalent to an authorization." *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 804 (D.C. Cir. 1997) (holding that Section 10(c) does not authorize attorney's fees). It is a basic principle of statutory interpretation that "[w]here Congress has consistently made express its delegation of a particular power,

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23 (reflecting two-thirds majority vote in the House); 93 CONG. REC. 7692 (June 23, 1947), *reprinted in* 2 LMRA HIST. 1656-57 (reflecting two-thirds majority vote in the Senate).

its silence is strong evidence that it did not intend to grant the power." *Alcoa Steamship Co. v. Fed. Maritime Comm'n*, 348 F.2d 756, 758 (D.C. Cir. 1965). A comparison of the NLRA with other remedial statutes confirms that the Board lacks authority to award general compensatory damages on top of backpay. When Congress has intended to bestow such authority, it has done so explicitly.

The clearest example is Title VII of the Civil Rights Act of 1964. "Title VII's remedial scheme was expressly modeled on the backpay provision of the National Labor Relations Act." *United States v. Burke*, 504 U.S. 229, 240 n.10 (1992) (citing 29 U.S.C. § 160(c)); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975). As originally enacted, Title VII provided:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).

Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (codified as amended at 42 U.S.C. § 2000e-5(g)(1)).

This language closely resembles Section 10(c) of the NLRA. And like Section 10(c), Title VII's provision has been characterized as having a "make whole" purpose. *See Albemarle Paper*, 422 U.S. at 419. Courts have recognized that Title VII's remedy "consist[ed] of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination." *Burke*, 504 U.S. at 239; *accord Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892, 899 (3d Cir. 1993).

But courts have also acknowledged the limits to this remedial scheme. In particular, Congress "declined to recompense Title VII plaintiffs for anything beyond the wages properly due them," like "any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages (*e.g.*, a ruined credit rating)." *Burke*, 504 U.S. at 241; *see also Robinson*, 982 F.2d at 898 ("Title VII did not allow awards for compensatory damages."). The same conclusion follows from Section 10(c) of the NLRA, which is substantively indistinguishable and, again, provided the

model for this Title VII language. *E.g.*, *Burke*, 504 U.S. at 240 n.10; *Albemarle Paper*, 422 U.S. at 419 n.11.

Another example is the Age Discrimination in Employment Act of 1967 ("ADEA"). It "provides for 'such legal or equitable relief as may be appropriate to effectuate the purposes of [the statute],'" plus recovery "of wages lost and an additional equal amount as liquidated damages." *Comm'r v. Schleier*, 515 U.S. 323, 325 (1995) (citations omitted). As with Section 10(c) and Title VII, the Supreme Court has ruled that the ADEA provides no compensation for "consequential damages." *Id.* at 336 (quoting *Burke*, 504 U.S. at 239). That is true even though the ADEA (unlike the NLRA) specifically authorizes liquidated damages in addition to lost wages. *See id.*

The "circumscribed remedies" of these statutory provisions "stand in marked contrast" to other statutes that grant much broader remedial authority or authorize consequential damages expressly. *Burke*, 504 U.S. at 240. For example, the Fair Housing Act of 1968 broadly provides that courts "may award to the plaintiff actual and punitive damages." 42 U.S.C. § 3613(c)(1); *see Burke*, 504 U.S. at 240 (contrasting Title VII with the Fair Housing Act). And the Family and Medical Leave Act of 1993

provides that when an employee has no lost wages, salary, benefits, or other compensation, he or she may recover "any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care." 29 U.S.C. § 2617(a)(1)(A)(i)(II).

When Congress wishes for broader compensatory damages to be available, it says so. Title VII again provides an instructive example. In the Civil Rights Act of 1991, Congress passed new legislation permitting a much broader range of "compensatory and punitive damages" in Title VII cases, including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." 42 U.S.C. § 1981a(a)(1), (b)(3). Congress would need to take similar affirmative measures to enable consequential damages under the NLRA.

Indeed, right now, Congress is considering a bill that would do just that. The Richard L. Trumka Protecting the Right to Organize Act of 2023 would amend Section 10(c) by expressly adding:

> [I]f the Board finds that an employer has discriminated against an employee in violation of paragraph (3) or (4) of section 8(a) or has committed a violation of section 8(a) that results in the discharge of an employee or other serious economic harm to an employee, the Board shall award the

> employee back pay without any reduction (including any reduction based on the employee's interim earnings or failure to earn interim earnings), front pay (when appropriate), consequential damages, and an additional amount as liquidated damages equal to two times the amount of damages awarded.

H.R. 20, 118th Cong. § 106 (2023); *see also* H.R. 842, 117th Cong. § 106 (2021) (same); H.R. 2474, 116th Cong. § 2(f) (2019) (same). Although Congress has repeatedly considered such proposals, it has yet to pass any. This failure to enact legislation permitting damages reinforces that Section 10(c) in its current form does not authorize such relief. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (noting that Congress had "squarely rejected proposals to give the FDA jurisdiction over tobacco," among other reasons for concluding that the FDA lacked authority to regulate tobacco products).

II. The compensatory damages awarded here are indistinguishable in substance from consequential damages and beyond the Board's authority.

In this case, the Board expanded the significant monetary relief already ordered by the Administrative Law Judge ("ALJ"). *Starbucks*

Corp., 372 NLRB No. 50 (Feb. 13, 2023).[3] In a significant departure from the Board's longstanding focus on Section 10(c)'s categories of reinstatement and backpay, the panel below included relief that accorded with the Board's recent divided decision in *Thryv*. *See Starbucks*, 372 NLRB No. 50, slip op. at 1 n.3.

But *Thryv* was unprecedented (and for good reason). There, for the first time in its history, the Board held that make-whole relief in cases of unlawful suspension or discharge must include recovery "*for all direct or foreseeable pecuniary harms*," in addition to reinstatement, backpay, lost

[3] The ALJ's damages order, it should be noted, reflected another recent departure from the Board's traditional approach to make-whole relief. As noted above, the Board's traditional practice has been to exclude any relief based on job-search expenses and similar costs except as an *offset* against interim earnings that otherwise reduced the employee's backpay recovery. *See, e.g.*, *Crossett Lumber*, 8 NLRB at 498 (calculating "net" interim earnings based on expenses associated with working elsewhere); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955), *enf'd*, 228 F.2d 871 (6th Cir. 1955) (applying the principle that "extra expenses of transportation, room, and board incurred by discriminatees in searching for work—expenses which diminished their gross interim earnings—shall be deducted therefrom in order to compute net interim earnings"); *cf. Phelps Dodge*, 313 U.S. at 198 n.7 (same). In 2016, however, a divided Board expanded the definition of make-whole relief to include "a new policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings and separately from taxable net backpay." *King Soopers, Inc.*, 364 NLRB 1153, 1160 (2016). The ALJ followed this "new policy" here. *Starbucks, Inc.*, 372 NLRB No. 50, slip op. at 33.

benefits, and job-search expenses. *Thryv*, 372 NLRB No. 22, slip op. at 6 (emphasis in original). For the reasons already discussed, this understanding of the Board's remedial authority cannot be squared with the statutory language, history, or precedent. Two aspects of *Thryv* raise particular statutory and constitutional concerns and underscore why the Court should reject this expansion of Board authority.

First, the *Thryv* majority created a long list of new items—never before considered part of NLRB make-whole relief—that now ostensibly must be considered as part of a damages recovery despite an attenuated relation to an employer's unlawful conduct. Such items as "interest and late fees on credit cards" and other "credit card debt," "penalties" based on "early withdrawals" from a "retirement account" to cover living expenses, compensation for loss of a "car" or "home" based on an inability "to make loan or mortgage payments" or "rent," and new or increased "transportation or childcare costs," among other things. 372 NLRB No. 22, slip op. at 9-10 (citation omitted).

The majority's claimed authority to award a wide range of damages will require extensive litigation over the purported foreseeability of the expenses. Courts regularly face such issues and deny requests for these

sorts of consequential damages precisely because they were not foreseeable at the relevant time or proximately caused by the defendant's conduct. *See, e.g.*, *Marland v. Safeway, Inc.*, 65 F. App'x 442, 448 (4th Cir. 2003) (loss-of-credit and lost-profit damages were not foreseeable or proximately caused by defendant); *Rosas v. U.S. Small Bus. Admin.*, 964 F.2d 351, 359 (5th Cir. 1992) (loss-of-credit damages were "unsupported"); *Maalouf v. Salomon Smith Barney, Inc.*, No. 02-cv-4770, 2004 WL 2008848, at *5 (S.D.N.Y. Sept. 8, 2004) (loss-of-credit and loss-of-health damages were "entirely speculative"), *aff'd sub nom. Maalouf v. Citigroup Glob. Mkts., Inc.*, 156 F. App'x 367 (2d Cir. 2005). And, in all events, the majority's claimed authority conflicts with Congress's legislative choices and should not be upheld by this Court. *Cf. Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) ("We have . . . parted company with the Board's interpretation where it was 'fundamentally inconsistent with the structure of the Act' and an attempt to usurp 'major policy decisions properly made by Congress.'" (citation omitted)).

Second, the *Thryv* majority has expanded its remedies to include consequential damages—in substance if not by name—which clearly goes beyond statutory make-whole relief. The *Thryv* majority disclaimed any

"policy or practice of awarding consequential damages" as such. *Thryv*, 372 NLRB No. 22, slip op. at 9. It conceded that "'consequential damages' is a term of art used to refer to a specific type of legal damages awarded in other areas of the law" like "the common law of torts." *Id.* at 8-9. And it recognized that the Board has never claimed authority to "award tort remedies." *Id.* at 9 (citation omitted).

The *Thryv* majority, then, acknowledged that awarding "consequential damages" would exceed the Board's statutory authority. Yet even while disclaiming the concept of "consequential damages," the majority made the tort concept of "foreseeability" its focus. *See id.* at 11 ("while the Board's make-whole remedy may 'somewhat resemble compensation for private injury' like that imposed in a tort proceeding, the relief we issue is nevertheless purely statutory in nature and specifically designed to effectuate the purposes of the Act" (citations omitted)).

The *Thryv* majority's efforts to recast its new remedy as being unrelated to tort law's "consequential damages" involves nothing more than conclusory assertion that tries to elevate form over substance. The majority may feel that NLRA damages should include the recovery of all costs—however indirect the connection might be—that were potentially

"foreseeable" by any party deemed to have violated the Act. But this is the type of justification that the Supreme Court has repeatedly found insufficient. *Republic Steel*, 311 U.S. at 12 (Board is not "free to set up any system of penalties which it would deem adequate" to "deter[] persons from violating the Act"); *Consol. Edison*, 305 U.S. at 235-36 (Board cannot "inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order").

To make matters worse, the Board's effort to smuggle common-law damages into agency adjudication creates serious constitutional problems. As noted, proponents of the original NLRA were careful to avoid creating civil remedies for private rights in part because they knew that such provisions might violate Article III and the Seventh Amendment. *See supra* Section I.A; Starbucks Br. 60-63; *Jarkesy v. SEC*, 34 F.4th 446, 451-59 (5th Cir. 2022), *cert. granted*, No. 22-859 (argued Nov. 29, 2023).

These serious constitutional doubts provide further reason to hold that the NLRA does not authorize the monetary relief awarded in *Thryv* and in this case. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that

even when the Board's interpretation of the NLRA is "otherwise acceptable," courts will not defer to that interpretation if it "would raise serious constitutional problems," but rather "will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

The dissenting Board members in *Thryv* aptly identified these problems:

> On its face, [the majority's] standard would permit recovery for any losses indirectly caused by an unfair labor practice, regardless of how long the chain of causation may stretch from unfair labor practice to loss, whenever the loss is found to be foreseeable. In our view, this standard opens the door to awards of speculative damages that go beyond the Board's remedial authority. We further observe that the Board faces potential Seventh Amendment issues if it strays into areas more akin to tort remedies. Those concerns also militate against the majority's "direct or foreseeable" standard. Moreover, even if the Board does have the authority to award such remedies, doing so would invite protracted litigation over causation at compliance, including intrusive and potentially humiliating inquiries into employees' personal financial circumstances for the purpose of determining whether and to what extent the employee's own financial decisions contributed to the losses. Compliance with make-whole orders awarding monies to which employees are indisputably entitled will be delayed by such litigation. Accordingly, from the majority's decision to adopt a

> "direct or foreseeable pecuniary harms" standard, we dissent.

372 NLRB No. 22, slip op. at 16 (Members Kaplan and Ring, concurring in part and dissenting in part). But, as they highlighted, "[t]he Constitution, the Act, and Supreme Court precedent place limits on the Board's authority, . . . and the Board is duty-bound to respect those limits." *Id.* at 21. This Court too should refuse to endorse *Thryv* and should deny the Board's effort to enforce that ruling here.

CONCLUSION

The Court should set aside the Board's award of monetary relief.

Dated: December 11, 2023

Respectfully submitted,

s/ Philip A. Miscimarra

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COMBINED CERTIFICATES OF COMPLIANCE

In accordance with Local Appellate Rules 28.3(d) and 46.1(e), I certify that all attorneys whose names appear on this brief are members in good standing of the bar of this Court or have filed an application for admission.

In accordance with Local Appellate Rule 31.1(c), I certify that the texts of the electronic brief and paper copies are identical and that Microsoft Defender Offline scanned the file and did not detect a virus.

In accordance with Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,118 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count of Microsoft Word 365. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: December 8, 2023

s/ Philip A. Miscimarra
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CERTIFICATE OF SERVICE

I certify that, on December 8, 2023, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users. Pursuant to Local Appellate Rule 31.1, as amended by the April 29, 2013 order, seven copies of this brief were sent to the Clerk of the Court for delivery.

Dated: December 8, 2023

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