Nos. 23-1335, 23-1403

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MCLAREN MACOMB,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

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

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BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Stephanie A. Maloney
Maria C. Monaghan
U.S. Chamber
Litigation Center
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Carter G. Phillips
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Katherine A. Roberts
Sidley Austin LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

Counsel for Amicus Curiae

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Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, *Amicus Curiae* states that all parties have consented to the filing of this brief in support of Petitioner. In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amicus Curiae* states that no party's counsel authored this brief in whole or in part; and no entity or person, aside from *Amicus Curiae,* its counsel, or its members, has contributed money to fund the preparation or submission of this brief.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the 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. *See*, *e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003 (6th Cir. 2023); *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009); *People v. Amazon.com*, 169 N.Y.S. 3d 27 (N.Y. App. Div. 2022).

Many of *Amicus*'s members are subject to the National Labor Relations Act ("NLRA" or "Act") and have a strong interest in its interpretation and application. In this case, the National Labor Relations Board ("NLRB" or "Board") overruled two recent decisions to hold that union and non-union employers who offer voluntary severance agreements with standard confidentiality and non-disparagement provisions constitutes an unfair labor practice, because such offers inherently interfere with, restrain, or coerce employees' rights under Section 7 of the

NLRA. Under the Board's new rule, it is irrelevant whether the terminated employee's decision to accept the benefit is wholly voluntary or whether there is *any* other unlawful employer conduct or indicia of coercion. Instead, the mere *offer* of these standard severance agreement provisions is unlawful. *See*, *e.g.*, *McLaren Macomb*, 372 N.L.R.B. No. 58, at 3 (Feb. 21, 2023) ("*McLaren*") (Agency Record ("AR") 375) ("What matter[s is] whether the agreement, on its face, restrict[s] the exercise of statutory rights").

The Board's new rule is the latest dramatic overreach in a torrent of decisions radically re-interpreting the NLRA. The rule is inconsistent with text and precedent. It substantially exceeds the Board's statutory authority, which is limited to addressing employer conduct that actually coerces or restrains employees' exercise of Section 7 rights. It fails to consider employees' statutory right to refrain from engaging in Section 7 activities. It ignores the interests of employers and terminated employees in resolving their differences confidentially and the public policy favoring the informal settlement of disputes. And finally, like many recent Board decisions, it overturns established precedent and thus exacerbates the ongoing regulatory uncertainty that employers face under the current Board.

BACKGROUND

Respondent McLaren Macomb operates a hospital in Mt. Clements, Michigan, employing approximately 2300 people. *McLaren*, p. 1 (AR 374). For 350

service employees, Local 40 RN Staff Council, Office of Professional Employees International Union ("OPEIU") is the certified bargaining representative. *Id.* When government regulations during the COVID pandemic prohibited the Hospital from performing elective and outpatient procedures, the Hospital ceased providing outpatient services and temporarily furloughed 11 bargaining unit employees as non-essential. In June 2020, those employees were permanently laid off. *Id.*

The Hospital proffered all 11 employees a "Severance Agreement, Waiver and Release" that offered severance to each employee if he or she signed the agreement. All signed. *Id.* The agreements required the employee to release the Hospital from any claims arising out of his or her employment or termination. *Id.* They also contained a confidentiality clause that prohibited the employee from disclosing the terms of the agreement to any third person "other than [their] spouse" or "for the purposes of obtaining legal counsel or tax advice." *Id.* at 2 (AR 375). Significantly, the confidentiality clause did authorize disclosure "upon legal compulsion by a court of agency." *Id.* And finally, the agreements included a non-disclosure and non-disparagement clause (hereafter "non-disparagement clause"), in which the employee agreed "not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature" gained through his or her employment, and "not to make statements to [the] Employer's employees or to the general public which could disparage or harm the image of the Employer." *Id*. If the

employee breached any of these provisions, the Agreement authorized the Hospital to seek injunctive relief and actual damages. *Id.*

OPEIU filed unfair labor practice charges with the NLRB, asserting that the Hospital had violated sections 8(a)(5) and (1) of the NLRA by, among other things, proffering a severance agreement that included the above provisions. *Id.* The Board's Administrative Law Judge ("ALJ") agreed that the Hospital violated the Act on other grounds, but concluded that the proffer of the severance agreement did not violate the Act, relying on *Baylor University Medical Center*, 369 N.L.R.B. No. 43 (Mar. 16, 2020), and *IGT d/b/a International Game Technology*, 370 N.L.R.B. No. 50 (Nov. 24, 2020).

The Board's Decision. On review of the ALJ's decision, the Board held that by offering voluntary severance agreements with these provisions, the Hospital unlawfully restrained and coerced the furloughed employees in the exercise of their rights under Section 7 of the NLRA. In doing so, the Board overruled *Baylor* and *IGT*, in which the Board had held that the legality of a severance agreement turns not simply on its language, but also on the circumstances under which the agreement was presented to employees. In *Baylor*, the Board had explained that a severance agreement cannot have a reasonable tendency to coerce employees unless it is proffered in circumstances that are deemed coercive, *i.e.*, where the employer has discharged the employee in violation of the Act or committed another unfair labor

practice. 369 N.L.R.B., slip op. at 1-2. And, in *IGT*, the Board had held that proffering a severance agreement is unlawful only where the employer has also committed an unfair labor practice that "support[s] a finding that the Respondent has discriminated against employees for engaging in section 7 activity." 370 N.L.R.B., slip op. at 1-2 n. 7.

Here, the Board rejected the approach taken in *Baylor* and *IBT*. Instead, it found that standard severance provisions addressing confidentiality and non-disparagement are unlawful, stating that "[i]nherent in any proffered severance agreement requiring workers not to engage in protected concerted activity is the coercive potential of the overly broad surrender of NLRB rights if they wish to receive the benefits of the agreement." *McLaren*, p. 7 (AR 380). The Board assumed that standard confidentiality and non-disparagement provisions will prevent employees from assisting future NLRB investigations or speaking publicly about labor disputes and thus are coercive, without regard to the context in which those provisions are proffered. *Id.*

The Dissent. Member Kaplan dissented from the Board's decision to overrule *Baylor* and *IGT* and adopt this new rule. He asserted that under the Board's standard, "an employer's proffer of any severance agreement containing any term that could *possibly* be interpreted as interfering with Sec. 7 rights would be per se unlawful, without regard for whether a reasonable employee would interpret the term at issue

as coercive in the context of either the severance agreement as a whole or their former employer's history in response to activity protected by the Act." *McLaren*, p. 14 (AR 387 n.8).

In his view, the "mere action of *offering* these agreements to former employees does not constitute a violation of the Act." *Id.* at 13 (AR 386). Member Kaplan explained that the correct test under established precedent is "whether a reasonable employee would find that the proffer of the settlement agreement would interfere with, restrain, or coerce them in the exercise of their Section 7 rights." *Id.* at 14 (AR 387). He concluded that the Act is not violated where the "decision whether or not to accept severance benefits in those circumstances was entirely voluntary, absent evidence of separate unlawful conduct on the part of the Respondent that would render the proffers unlawful." *Id.* at 13 (AR 386) (citing *IGT*, 370 N.L.R.B. slip op. at 2; *Baylor*, 369 N.L.R.B. slip op. at 2 n. 6). Without such evidence, he explained, there is "no reason for an employee to believe that the employer would invoke the agreement in response to the employee's exercise of her Section 7 rights." *Id.* Finally, Member Kaplan observed that "unlike agreements pertaining to employees' former terms and conditions of employment, severance agreements do not, nor do they have the potential to, affect employees' pay or benefits or any other terms of employment that were in place before the employees were discharged." *Id.*

McLaren Guidance. Following the Board's decision, the General Counsel provided guidance to the NLRB's regional offices, relaying several sweeping conclusions she had drawn from its analysis. She reasoned that the Board's rule applied to *any* "overly broad provisions in any employer communication to employees that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights . . . if not narrowly tailored to address a special circumstance justifying the impingement on workers' rights." NLRB Off. of Gen. Counsel Memorandum GC 23-05, *Guidance in Response to Inquiries about the* McLaren Macomb *Decision*, p. 2 (Mar. 22, 2023) ("*McLaren Guidance*"). For example, she observed that other types of provisions in severance agreements may be unlawful, including non-competition clauses, non-solicitation clauses, no-poaching clauses, broad liability releases, and covenants not-to-sue. *Id.* at 3. She further opined that the rule extended to *other* types of employment agreements, such as employment contracts and offer letters. *Id.* at 2. And she asserted that proffering a severance agreement to a supervisor—a category generally not protected by the NLRA—could be unlawful in certain circumstances. *Id.* at 3.

ARGUMENT

THE BOARD'S DECISION MISINTERPRETS AND EXCEEDS ITS AUTHORITY UNDER THE NLRA AND VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

In the decision under review, the NLRB enacts a flat rule that severance agreements with standard confidentiality and non-disparagement provisions violate Section 8(a)(1) of the NLRA because they always restrain and coerce employees in the exercise of Section 7 rights. Disregarding relevant precedent, including its own, the Board says that context is irrelevant. It is beside the point that these agreements are voluntary and offered to persons who are no longer employees. It does not matter that the agreements have no effect on the former employee's terms and conditions of employment. And it is immaterial whether there are any other contextual indications that the employer's offer is coercive, such as related unfair labor practices or a persistent pattern of employer misconduct.

Instead, the Board holds that these routine provisions inherently coerce and restrain all employees in the exercise of Section 7 rights because signatory employees may at some point in the future believe the agreement bars them from exercising those rights. That decision, which is far afield from established precedent and from the protections of the NLRA, exceeds the Board's statutory authority under the Act, contravenes established precedent interpreting the Act, and constitutes arbitrary and capricious decision-making in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

Beyond the decision itself, the *McLaren Guidance* betrays the breathtaking scope of the Board's broader regulatory agenda. The guidance flags that standard confidentiality and non-disparagement provisions are illegal not only in severance agreements, but also in *other* employment-related agreements. And it announces that an employer may not include non-solicitation, non-compete and other standard clauses in employment-related agreements, because those provisions too may coerce or restrain employees in the exercise of Section 7 rights.

Section 7 is too slender a reed to bear the weight of all these novel prohibitions. Had Congress intended the Board to be an all-purpose regulator of the terms of agreements between companies and their past, present, and future employees, it would have said so. It did not. The Board's shift in this direction continues its recent trend of overturning precedent in ways that are inconsistent with the NLRA. The Board's decision cannot be reconciled with the text of the Act and substantially exceeds its authority; and it should not stand.

A. Standard Confidentiality and Non-Disparagement Provisions in Severance Agreements Do Not Coerce or Restrain Employees' Exercise of Section 7 Rights.

The starting point for analysis is the statutory text. *See*, *e.g.*, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). Section 7 of the NLRA provides employees with rights to "self-organization, to form, join, or assist labor organizations" and to engage in "other concerted activities for the purpose of collective bargaining or other

mutual aid or protection." 29 U.S.C. § 157. Significantly, Section 7 also expressly provides that employees have "*the right to refrain* from any or all such activities." *Id.* (emphasis added). Section 8(a)(1) of the NLRA makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 157." *Id.* § 158.

As the text reveals, "Section 7 focuses on the right to organize unions and bargain collectively." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1624. *See id.* at 1630 ("[The NLRA] safeguards first and foremost workers' right to join unions and engage in collective bargaining.") (citation omitted); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991) ("central purpose of the [NLRA is] to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations"). By protecting employees' decisions not to participate in Section 7 activities, this provision also plainly contemplates that employees may choose to waive their rights to engage in these labor-related activities.

An employer's proffer of a voluntary severance agreement containing generic confidentiality and non-disparagement provisions does not, by itself, "interfere with, restrain, or coerce" employees in their exercise of Section 7 rights under any natural reading of the statutory text. Indeed, the Board's prohibition of such offers takes it far afield of Section 7's stated purpose: to protect (i) "self-organization"; (ii) form[ing], join[ing], or assist[ing] labor organizations"; and (iii) "bargain[ing]

collectively." 29 U.S.C. § 157. Standard confidentiality and non-disparagement provisions do not even address labor-related activities, let alone require departing employees to refrain from such activities. The only basis on which a proposed severance agreement might be viewed as having a reasonable tendency to do so is if the employer is engaged in some other coercive or threatening conduct or has a history of having done so in the past—precisely the conduct the Board says is *irrelevant* to whether an agreement with these standard clauses is coercive or threatening.[1]

Moreover, the departing employee's decision whether to sign the agreement is voluntary; the employee is not giving up any benefits arising from employment and can decide whether to accept or reject the additional consideration the employer is offering in exchange for the departing employee's agreement. To the extent a departing employee may view a confidentiality or non-disclosure provision as touching on future labor-related activities vis-à-vis a past employer, the employee's

[1] Nor can the Board leverage Section 7's protection of employees' concerted activities for "other mutual aid and protection" as a basis for prohibiting employers from proffering any agreement that includes confidentiality and non-disclosure provisions that cover activities unrelated to labor. As the Supreme Court explained, the "other mutual aid and protection" phrase "appears at the end of a detailed list of activities speaking of 'self-organization, form[ing], join[ing], or assist[ing] labor organizations' and 'bargain[ing] collectively.' 29 U.S.C. § 157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the proceeding specific words." *Epic Sys. Corp.*, 138 S. Ct. at 1625 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

right to sign the agreement is protected by the statutory provision permitting employees to "refrain from any or all such activities."[2]

The Board's rule—that the NLRA categorically forbids employers from including confidentiality and non-disparagement provisions in severance agreements—is nowhere to be found in this statutory text. At best, it is an "interpretation" so "aggressively prophylactic" that it falls far outside the Board's authority to interpret and apply Section 7 and Section 8(a)(1) to protect employees' labor-related rights. *Cf. EPIC Sys. Corp.*, 138 S. Ct. at 1625 (holding that enforcing individual arbitration clauses in employment contracts does not coerce or restrain employees in the exercise of their Section 7 right to engage in concerted activity); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) ("the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do").[3]

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[2] The General Counsel was dismissive of this potential employee interest, stating "[i]n that unlikely scenario, I would reiterate that the Board protects public rights that cannot be waived in a manner that prevents future exercise of those rights regardless of who initially raised the issue," *McLaren Guidance* at 3. The guidance thus ignores Section 7's protection of employees' rights to choose *to refrain from* Section 7 activities.

[3] Indeed, the question whether the Board can prohibit employers from using these standard provisions—and potentially numerous others, if the *McLaren Guidance* is accepted—in all employment-related agreements may present a "major question," *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-14 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). The NLRB seeks to leverage its general authority to prevent employers from restraining and coercing employees' exercise of Section 7 rights into a sweeping authority to regulate all

Nonetheless, the Board claims that proffering severance agreements with confidentiality and non-disparagement clauses threatens and coerces employees in exercising Section 7 rights, because employees may be afraid to share their views and experiences with other employees or to assist the NLRB with future investigations of the employer. Of course, the agreements at issue here *permitted* disclosure in response to agency and court orders in investigations. *See supra* at 3. And the question of whether the proffer will have that effect is surely dependent *not* on the language of the clause, but on the entire labor-related context of the proffer—precisely the context that the Board refused to consider.[4]

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terms of employment relationships. But it has no clear congressional authorization for the power it now claims. And in the decades-long history of the NLRA, the Board has never asserted that it can impose a flat ban on the terms of employers' severance agreements. Such agency authority would have significant implications for employment relationships. The Board cannot clear the high bar for claiming such authority now.

[4] The Supreme Court has also explained that the NLRA sets up a process for employers and employees to enter into agreements, but the Act does not purport to dictate the terms of collective bargaining agreements or of other employment contracts. *See*, *e.g.*, *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 485-86 (1960) ("Congress was generally not concerned with the substantive terms on which the parties contracted"); *id.* at 487 (the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"). The Board has no power to dictate the terms of employment contracts or severance agreements in the union or non-union setting, apart from its authority to prevent unfair labor practices. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 340 (1944) ("[t]he Board, of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction"). This Board decision, however, arrogates that power to itself. For all union and non-union employers within the Act's jurisdiction, the Board has declared agreements with standard confidentiality and non-disparagement clauses unlawful, and the Board's General

In sum, nothing in the text of the NLRA supports the Board's per se rule that an employer's proffer of a severance agreement containing generic confidentiality and non-disparagement provisions violates the Act.

B. The Board's Rule Cannot Be Reconciled With Precedent Interpreting and Applying Section 7.

An employer commits an unfair labor practice in violation of Section 8(a)(1) when its "'conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights.'" *Meijer, Inc. v. NLRB*, 463 F.3d 534, 539 (6th Cir. 2006) (quoting *In re All. Steel Prods., Inc.*, 340 N.L.R.B. 495, 495 (2003)). To qualify as a prohibited threat or coercion, an employer's statement must warn of adverse consequences in a way that "would tend to coerce a reasonable employee" not to exercise labor-related rights. *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 938 (3d Cir. 1980) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

An employer's alleged threat or coercive act "is not viewed in a vacuum, however." *FDRLST Media, LLC v. NLRB,* 35 F.4th 108, 122 (3d Cir. 2022).[5] The

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Counsel has strongly signaled that the same fate may await non-solicitation, non-compete and other generally utilized clauses.

[5] This case illustrates the current Board's overreach. There the Board charged the employer, a "right-leaning internet magazine," with violations of its employees' Section 7 rights based on the tweet of its executive director. The Third Circuit disagreed, recognizing that "the Board's authority to find an unfair labor practice is not unlimited" and reasoning that the Board "spent its resources investigating an online media company with seven employees because of a facetious and sarcastic

employer's conduct "must be examined 'in light of *all* the existing circumstances." *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009, 1020 (3d Cir. 1980) (emphasis added). The NLRB's unfair labor practice finding must be based "upon the whole course of conduct revealed by [the] record." *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 479 (1941). *See also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[a]ny assessment of the precise scope of [impermissible] employer expression, of course, must be made *in the context of its labor relations setting*").

A blanket rule that standard provisions in severance agreements *always* restrict employees' rights contravenes this established authority that threats and coercion must be assessed in light of all existing circumstances. Without supporting context and evidence—such as related or persistent unfair labor practices—it is purely speculative that an employer would apply standard confidentiality and non-disclosure provisions in a severance agreement to "specifically and expressly require the waiver of Section 7 rights." *McLaren*, p. 14 (Dissent) (AR 387). For example, this Court has reversed a Board determination of an alleged employer threat to employee rights where "[n]ot a single" worker testified to feeling threatened or coerced, finding the "silence of the record" to be "significant." *NLRB v. Windemuller Elec., Inc.*, 34 F.3d 384, 393 (6th Cir. 1994). Likewise here, the Board did not present

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tweet by the company's executive officer" that "falls far short of th[e] standard" for threats. 35 F.4th at 126.

any of the 11 employees that signed these severance agreements as witnesses in proceedings before the Administrative Law Judge. *see* Hospital Br. 33-34. In other words, the record is "silen[t]" about whether any departing employee felt threatened or coerced.

Here, the Board issued a sweeping rule to regulate the content of all severance agreements *without regard to the labor relations context* in contravention of *Gissel Packing Co.*, 395 U.S. at 617, and the other precedent cited above. *Cf. also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (a "claim of unequal bargaining power is best left for resolution in specific cases" as part of the inquiry into whether the agreement "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'") (citation omitted). For this reason alone, the rule cannot stand.

Before its decision in this case, the Board's longstanding precedent had also always considered the surrounding circumstances as critical to determining whether an employer's proffer of a severance agreement including confidentiality or non-disclosure provisions coerces or interferes with employee rights. For example, in both *Baylor* and *IGT*, the Board held that, "absent outside circumstances that could render the proffers coercive, the mere action of *offering* these agreements to former employees does not constitute a violation of the Act," *McLaren*, p. 13 (AR 386) (Dissent) (citing *IGT*, 370 N.L.R.B. No. 50, slip op. at 2; *Baylor*, 369 N.L.R.B. No.

43, slip op. at 1-2). The Board reasoned that, absent some unlawful employer conduct, the terminated employees' decisions whether to accept severance agreements were entirely voluntary, *i.e.*, not coerced. And, the Board found that absent evidence that the employer had previously attempted to violate Section 7 rights, "there would be no reason for an employee to believe that the employer would invoke the agreement in response to employee's exercise of her Section 7 rights." *Id.* Finally, the Board observed that severance agreements do not involve or have the potential to affect any employee's terms and conditions of employment. *Id.* All of these points were key to the Board's holding that, without more, the mere proffer of a voluntary severance agreement with standard confidentiality and non-disclosure provisions dos not violate the Act. *See also Hughes Christensen Co.*, 317 N.L.R.B. 633, 634-35 (1995) (rejecting argument that broad release in settlement agreement violated the Act).

The Board claims its new rule—assessing the language of voluntary severance agreements without regard to employer conduct—is consistent with "long-standing precedent." *McLaren*, p. 13 (AR 386). As the dissenting Board member highlights, however, in each of the decisions the Board majority cited as precedent, the employer *had engaged in unlawful conduct* connected with the proffer of the severance agreement. In *Shamrock Foods Co.*, 366 N.L.R.B. No. 117, slip op. at 29 (June 22, 2018), *enforced*, 779 F. App'x 752 (D.C. Cir. 2019) (per curiam), and

Metro Networks, Inc., 336 N.L.R.B. 63, 66-67 (2001), the employer had unlawfully discharged the employee to whom the severance agreement was offered. In *In re Clark Distribution Systems, Inc.*, 336 N.L.R.B. 747 (2001), the employer who proffered the severance agreement committed numerous violations of the Act, and thus the Board concluded that it had unlawfully conditioned severance benefits on the employee's agreement not to participate in Board processes.

To justify its flat acontextual rule as consistent with precedent, the Board points to overbroad statements in those past decisions about the language of the severance agreements. Those statements do not change the facts: in each case where the Board previously found a severance agreement unlawful, the employer had engaged in *other* unlawful conduct that supported the Board's finding that the employer's conduct reasonably tended to interfere with employee's exercise of their Section 7 rights. "[T]he presence of prior conduct suggesting a proclivity to violate the Act *would* affect the way in which employees would interpret the severance agreement." *McLaren*, p. 14 (AR 387) (Dissent). But absent this or similar context, there is no basis for such a finding about a voluntary severance agreement with standard confidentiality and non-disclosure provisions. *Cf. NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 153-54 (6th Cir. 1967) ("[t]o justify a broad order preventing violations of a general section of the Act, there must be evidence in the

record to demonstrate that the employer has a tendency or a proclivity to engage in such unlawful conduct").

Relatedly, the Board has ignored its responsibility to balance employer and employee rights in interpretating and applying Section 7. As the Supreme Court has instructed, "[l]ike so many others, [Section 7] rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer and employee." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). *See also NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1996) (requiring the Board to accommodate the parties' interests "with as little destruction of one as consistent with the maintenance of the other"); *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1212, 1216 (6th Cir. 1997) (balancing employer's interests against union's section 7 rights); *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 583-84 (8th Cir. 1965) (same). The Board myopically considered only the speculative and abstract interest that a departing employee might have in engaging in labor-related activity with respect to its former employer in the future. It utterly failed to consider either the employer or employees' interests in entering into severance agreements on termination of the employment relationship. Both employers' and employees' interests are established and substantial.

Confidentiality and non-disparagement provisions in severance agreements are "fairly common, . . . to protect employers and employees when an employment

relationship ends." *Edwards v. Arthur Andersen LLP*, 47 Cal. Rptr. 3d 788, 811 (Cal. Ct. App. 2006), *aff'd in part*, *rev'd in part*, 189 P.3d 285 (Cal. 2008). *See also EEOC v. CVS Pharm., Inc.*, 809 F.3d 335, 336 (7th Cir. 2015); Daniel S. Braverman & Olivia Loftin, Lab. & Emp. Law Daily Wrap Up, *Expert Insights—Your Standard Severance Agreements May Now Violate the NLRA* (Mar. 20, 2023); Daniel Pasternak, Law360, *Handling Severance Pact Language after the NLRB Decision* (Feb. 28, 2023).

Such clauses "serve a valid legal purpose." *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 457-58 (5th Cir. 2005); *see also EEOC v. Severn Trent Servs., Inc.*, 358 F.3d 438, 440, 444 (7th Cir. 2004). Employers routinely seek to prevent competitors and current employees from learning about their compensation practices upon settlement or termination of employees; they may also wish to protect their reputations and images in the relevant communities. Indeed, employees are often as concerned as employers about maintaining the confidentiality of their termination-related arrangements. Moreover, they can spare both employers and former employees the time, expense, and risks of unpredictable adjudication. *See Shernoff v. Hewlett-Packard Co.*, 2006 U.S. Dist. LEXIS 95167, at *8 (D.N.J. July 17, 2006), *aff'd*, 302 F. App'x 83 (3d Cir. 2008).

These provisions also serve the "[s]trong public policy in favor of settlement." *Shernoff*, 2006 U.S. Dist. LEXIS at 8. Indeed, the Board itself "has long had a policy

of encouraging the peaceful, non-litigious resolution of disputes" *Indep Stave Co.*, 287 N.L.R.B. 740, 741 (1987), which numerous courts have approved. *See Fast Food Workers Comm. v. NLRB*, 31 F.4th 807, 813 (D.C. Cir. 2022) (citing, *inter alia*, *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944)).

Further, an employee's decision voluntarily to enter into a severance agreement including confidentiality and non-disclosure provisions is a decision to refrain from exercising Section 7 rights in certain circumstances. As explained above, the Act expressly protects the employee's right to refrain from doing so. The Board's decision ignores this employee interest in assessing whether the proffer of severance agreements with such provisions coerces or threatens departing employees.

Severance agreements have long included confidentiality and non-disparagement provisions without any indication from the NLRB or other regulatory authorities that the NLRA makes them per se unlawful. The NLRB's recent "discovery" that even the proffer of a severance agreement containing these provisions coerces or threatens departing employees' exercise of their Section 7 rights without regard to context, the balancing of affected interests, or a showing of unconscionability would surely surprise the Congress that enacted the NLRA to "encourag[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U.S.C.

§ 151.[6] *Cf. also Epic Sys. Corp.*, 138 S. Ct. at 1619 ("This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the [NLRB].").

In sum, consistent with the current Board's cavalier approach to past precedent and interpreting the NLRA, the Board has entirely disregarded employer interests, and as well as employee interests in refraining from Section 7 activities, in interpreting and applying the Act in this case. It has thus failed to conduct the contextual analysis and balancing of interests required by established precedent. Its new flat rule is, accordingly, inconsistent with the Act and arbitrary and capricious under the APA.[7]

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[6] In an analogous situation involving Title VII, numerous courts have held that employers' proffering of severance agreements to terminated employees, "conditioning benefits on promises not to file changes with the EEOC is not enough, in itself, to constitute 'retaliation" actionable under Title VII. *CVS Pharm.*, 809 F.3d at 341 (citing *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 793 (7th Cir. 2005)); *EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015); *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 503 (6th Cir. 2006) (holding that a severance agreement that conditions severance pay on a promise not to file a change with the EEOC does not violate Title VII's antiretaliation provisions).

[7] The Board may contend that deference saves its statutory interpretation. But "deference arises in the rare case when no superior statutory reading can be found, not when an inferior construction competes with a best reading." *FDRLST Media*, 35 F.4th at 133 (Matey, J. concurring). The best reading of the NLRA grants no such power to the Board. Moreover, as this Court is no doubt aware, the fate of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), is before the Supreme Court this term in *Loper Bright Enterprises v. Raimondo*. The Chamber has argued that modern *Chevron* deference, coupled with permissive non-delegation precedent, has eroded the separation of powers. Overreading *Chevron*, courts have given federal agencies free rein to enact their own new regulatory requirements, change positions, and

C. The Board's Order Should Be Viewed in Context of its Current Regulatory Agenda.

The Board's assertion of a new and unbounded power to set the terms of severance agreements should not be viewed in isolation. What has been said above shows that the Board's decision to establish a flat ban on severance agreements containing standard confidentiality and non-disparagement provisions cannot be upheld. The Board's new rule is, however, only one part of the Board's current agenda overruling precedent and asserting expanded authority. Recently, the Board has taken steps to overturn numerous precedents.

- The Board has announced a new framework lowering the threshold for the Board to issue a bargaining order without ordering an election, *Cemex Constr. Materials Pac., LLC*, 372 N.L.R.B. No. 130 (Aug. 25, 2023).
- The Board has proposed a rule to rescind the 2020 joint employer rule, *see Standard for Determining Joint-Employer Status*, 87 Fed. Reg. 54,641 (Sept. 7, 2022).
- The Board has engaged in an unprecedented expansion of its remedial authority to include consequential damages, *see Thryv, Inc.*, 372 N.L.R.B. No. 22 (Dec. 13, 2022).
- The Board has overturned its longstanding precedent balancing employer and employee interests in work rules. *See Stericycle, Inc.*, 372 N.L.R.B. No. 113 (Aug. 2, 2023) (overruling *The Boeing Co.*, 365

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expand their own authority. This regime is harmful to business as it results in instability, uncertainty, and a lack of accountability. As a result, the Chamber has joined those encouraging the Supreme Court to reconsider the premises underlying *Chevron* and the courts' implementation of that decision. *See generally* Amicus Brief of The Chamber of Commerce of the United States, in *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. July 24, 2023).

N.L.R.B. No. 154 and *LA Specialty Produce Co.*, 368 N.L.R.B. No. 93 (2019)).

- Its General Counsel has announced her view that non-compete agreements violate the NLRA. *See* NLRB Off. of Gen. Counsel Memorandum GC 23-08, *Non-Compete Agreements that Violate the National Labor Relations Act* (May 30, 2023) (nearly all noncompetition agreements with employees "could reasonably be construed by employees to deny them the ability to quit or change jobs," diminishing the employees' willingness to exercise their statutory rights to organize for fear of termination and reducing their bargaining power during a labor dispute).
- The General Counsel issued a memorandum which seeks to bar employers from convening employee meetings during working time to address union representation unless they provide assurances that participation is entirely voluntary. *See* NLRB Off. of Gen. Counsel Memorandum GC 22-04, *The Right to Refrain from Captive Audience and Other Mandatory Meetings* (Apr. 7, 2022).

This list could go on; but the point is that the current Board has announced and is executing an aggressive agenda to rewrite federal labor law by overruling numerous past decisions and acting in excess of its authority. The Board's prohibition of routine confidentiality and non-disparagement provisions in severance agreements is just one component of the current Board's overreach. [8]

[8] The Board's overreach in this case is particularly striking because on the Board's own view, it was unnecessary to the resolution of this case. All Board members agreed that the Hospital violated Sections 8(a)(1) and 8(a)(5) of the Act by deciding to permanently furlough and enter into severance agreements with 11 employees. *McLaren*, p. 1 (AR 373); *id.*at 13 (Dissent) (AR 386). Setting aside the merits of that decision, it resolved the case. The Board had no reason "to address circumstances not present in this case and to overrule the sound law of *Baylor* and *IGT*." *McLaren*, p. 13 (Dissent) (AR 386).

CONCLUSION

For the reasons set forth in this brief and that of the Hospital, the Board's decision contravenes the NLRA and established precedent, exceeds the Board's authority under the Act, and is arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act. This Court should vacate that decision.

Respectfully submitted,

/s/ Carter G. Phillips

Carter G. Phillips
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Katherine A. Roberts
Sidley Austin LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

Stephanie A. Maloney
Maria C. Monaghan
U.S. Chamber
Litigation Center
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

September 18, 2023

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), 32(a)(7)(B), and 32(g), and Sixth Circuit Rule 32(a), I certify that the foregoing brief is in 14-point proportionally spaced Times New Roman font, and contains 6,187 words, as determined by the Microsoft Word 2016 word-processing system, exclusive of the portions of the brief excepted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

September 18, 2023

/s/ Carter G. Phillips
Carter G. Phillips
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on September 18, 2023. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

September 18, 2023

/s/ Carter G. Phillips
Carter G. Phillips
Counsel for Amicus Curiae