No. _____

In the
Supreme Court of the United States

MACY'S INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

By its terms, the National Labor Relations Act authorizes the Board to impose only those (equitable) remedies appropriate for an administrative agency incapable of furnishing jury-trial rights. For 90 years, the Board stayed within those remedial confines. But in 2022, the Board shattered them, holding in *Thryv, Inc.*, 372 NLRB No. 22 (2022), that it may order employers to compensate employees for all pecuniary harms "foreseeably" suffered as a consequence of an unfair labor practice. Three circuits have squarely rejected that power grab, holding that *Thryv* remedies exceed the Board's statutory authority and run headlong into the Seventh Amendment. But the Ninth Circuit openly broke from them here, blessing the Board's novel consequential-damages remedies. Adding insult to injury, the Ninth Circuit sharply departed from this Court's caselaw in deeming Macy's' perfectly reasonable give-us-the-weekend response to an unanticipated union maneuver as "inherently destructive," creating another split with its sister circuits that faithfully follow this Court's teachings.

The questions presented are:

1. Whether an employer's practice that has no noted effect on employees' collective-bargaining rights and is not motivated by anti-union animus is inherently destructive of union rights and violates the National Labor Relations Act.

2. Whether the National Labor Relations Board has the statutory or constitutional authority to order employers to pay "any … direct or foreseeable pecuniary harms" their employees incur "as a result of" an unlawful labor practice.

PARTIES TO THE PROCEEDING

Petitioner is Macy's Inc. It was Petitioner/Cross-Respondent/Intervenor below.

Respondents are the National Labor Relations Board and International Union of Operating Engineers, Stationary Engineers, Local 39. They were Respondent/Cross-Petitioner and Respondent/Cross-Petitioner/Intervenor below, respectively.

CORPORATE DISCLOSURE STATEMENT

Macy's Inc. is a publicly held corporation, and it has no parent corporation. The only publicly held company that owns 10% or more of the common stock of Macy's Inc. is The Vanguard Group, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. Nat'l Lab. Rels. Bd.*, No. 23-124 (9th Cir.), judgment entered January 21, 2025; amended opinion issued and petition for rehearing en banc denied October 21, 2025; order staying the mandate for 30 days issued October 28, 2025.
- *Macy's Inc. v. Nat'l Lab. Rels. Bd.*, No. 23-150 (9th Cir.), judgment entered January 21, 2025; amended opinion issued and petition for rehearing en banc denied October 21, 2025; order staying the mandate for 30 days issued October 28, 2025.
- *Nat'l Lab. Rels. Bd. v. Macy's Inc.*, No. 23-188 (9th Cir.), judgment entered January 21, 2025; amended opinion issued and petition for rehearing en banc denied October 21, 2025; order staying the mandate for 30 days issued October 28, 2025.
- *Macy's Inc.*, 372 NLRB No. 42 (2023), Board decision and order, incorporating with noted modifications Administrative Law Judge's decision, issued January 17, 2023.

Petitioner is not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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No one thinks that the National Labor Relations Board can convene a jury. The Board's statutory authority to remedy unfair labor practices is limited accordingly. The National Labor Relations Act authorizes no damages remedies, but "empower[s]" the Board "to prevent any person from engaging in any unfair labor practice" and authorizes "charges in that respect" to be brought before the Board, not a jury. 29 U.S.C. §160(a), (b). If the Board finds a violation—i.e., if it upholds the charges it itself brought—the Act directs it to "issue … an order requiring [the employer] 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 Act]." *Id.* §160(c). Those are classic equitable remedies suitable for an administrative agency, but nothing in the Act authorizes the Board to award damages. "The NLRA therefore limits the Board's remedial authority to equitable, not legal, relief." *NLRB v. Starbucks Corp.* (*Starbucks I*), 125 F.4th 78, 95 (3d Cir. 2024).

In 2022, the Board shattered those remedial limits, divining a power to order employers to pay a sweeping form of consequential damages that exceeds a chancellor's wildest dreams. *See Thryv, Inc.*, 372 NLRB No. 22 (2022), *overruled on other grounds*, *Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024). Despite Section 160(c)'s express limitations, the Board concluded that it could order employers to "compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of" an unfair labor practice—which the Board held extends

to such things as "interest and late fees on credit cards," "penalties if [an employee] must make early withdrawals from [a] retirement account," "increased … childcare costs," and "other costs [incurred] to make ends meet." *Id.* at 9, 15.

The Third Circuit squarely rejected that remedial power grab, holding that it "exceeds [the Board's] authority under" the Act, which limits the Board to equitable remedies and thus does not permit the Board to seek a monetary award that "exceed[s] what the employer unlawfully withheld." *Starbucks I*, 125 F.4th at 95, 97. Two other circuits have since held the same. *See Hiran Mgmt., Inc. v. NLRB*, --- F.4th ----, 2025 WL 3041862, at *6 (5th Cir. Oct. 31, 2025) ("agree[ing] with the Third Circuit's analysis … that the *Thryv* remedy goes beyond the text of the NLRA"); *NLRB v. Starbucks Corp.* (*Starbucks II*), --- F.4th ----, 2025 WL 3089798, at *10 (6th Cir. Nov. 5, 2025) (siding with "the Third and Fifth Circuits' assessment of the issue"). Here, however, the Ninth Circuit held—over a dissent from Judge Bumatay, joined by five colleagues at the en banc stage—that the *Thryv* consequential-damages remedy is permissible on the (misguided) theory that it is just a strong form of equitable backpay.

The decision below thus creates a textbook circuit conflict—and puts the Ninth Circuit on the short end of the lopsided split. Moreover, interpreting the Act to allow the Board to order what is a quintessential legal remedy absent the protection of a jury trial runs headlong into this Court's recent Seventh Amendment caselaw. *See SEC v. Jarkesy*, 603 U.S. 109 (2024).

The lack of a jury trial is particularly problematic here because the Board and the Ninth Circuit lost sight of common sense—not to mention this Court's teachings and the Act's statutory limits—in finding a violation in the first place. Macy's' conduct precipitating this litigation—asking for a few days to respond to a return-to-work offer that was presented out of the blue months into a strike—was entirely reasonable and in support of an undisputedly and indisputably legitimate bargaining position, a justification this Court blessed decades ago, *see Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). And it is equally undisputed that Macy's did *not* act out of anti-union animus or operate in bad faith.

Accordingly, under this Court's settled caselaw, the Board could have found a violation of the Act *only* by deeming Macy's conduct "'inherently destructive' of important employee rights." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). That is a high bar, requiring proof that the "natural tendency" of Macy's' conduct is to severely "discourage union membership while serving no significant employer interest." *Am. Ship Bldg.*, 380 U.S. at 312. Taking the weekend to respond to an unanticipated offer to return to work does not come close to clearing that high bar. After three months of strikes at 40 Macy's stores, Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (the "Union") abruptly offered to return by sending an after-hours email on a Friday to Macy's' offices in New York offering to return to work Monday morning. After the Union refused to provide an extension for Macy's to respond, Macy's responded by close of business Monday (i.e., *the next business day*), stating that it was

locking out employees in support of its bargaining position until a new agreement was reached. Macy's communicated a new proposal within 72 hours. Nonetheless, the Board and the Ninth Circuit deemed Macy's' timely and perfectly reasonable response to be inherently destructive conduct *as of Monday morning*.

As Judge Bumatay explained in his dissent, that is an "arbitrary rule" "as novel as it is unrealistic." App.53, 82 (Bumatay, J., dissenting). Taking one business day to respond substantively, and two days to develop and communicate a new proposal, "is not even close to meeting the exacting standard of 'inherently destructive' conduct." App.80. The Ninth Circuit's contrary conclusion puts employers in an impossible situation and departs from settled law, as the en banc dissenters underscored. *See* App.94 (Nelson, J., dissenting from the denial of rehearing en banc). It also implicates a separate circuit split, as dramatically illustrated by the fact that Macy's initially petitioned to have the case heard in the Fifth Circuit, where it would have won on the merits.

Both issues are critically important and the stakes are high. Under the Ninth Circuit's outlier approach, an employer that takes a few days too long to respond to an unanticipated union maneuver faces the prospect of being forced to pay recompense "for any inconvenience Union members faced from being unemployed" for the duration of the dispute—which, here, is now "*five years and counting*." App.90-91 (Nelson, J., dissenting from denial of rehearing en banc) (emphasis added). That is an intolerable result and one that could only happen in the Ninth Circuit.

This Court should grant review on both questions presented and reverse.

OPINIONS BELOW

The Ninth Circuit's opinion, as amended upon denial of rehearing, 155 F.4th 1023, is reproduced at App.1-109. The Ninth Circuit's initial opinion, 127 F.4th 58, is reproduced at App.110-93. The decision of the National Labor Relations Board, 372 NLRB No. 42, is reproduced at App.194-287.

JURISDICTION

The Ninth Circuit issued its amended opinion and denied petitioner's timely rehearing petition on October 21, 2025. That court had jurisdiction to review the Board's decision under 29 U.S.C. §160(e), (f); the Board had jurisdiction under 29 U.S.C. §160(a). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the National Labor Relations Act are reproduced at App.288-309.

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted the NLRA in 1935 to "'encourag[e] the practice and procedure of collective bargaining' between labor and management to resolve 'industrial disputes arising out of differences as to wages, hours, or other working conditions.'" *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 775 (2023) (quoting 29 U.S.C. §151). Section 7 of the Act protects employees' rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection." 29 U.S.C. §157. Section 8 in turn prohibits employers from engaging in certain "unfair labor practice[s]." *Id.* §158(a). As relevant here, "it shall be an unfair labor practice" under Section 8 "for an employer … (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" or "(3) … to encourage or discourage membership in any labor organization" "by discrimination in regard to … any term or condition of employment." *Id.* §158(a)(1), (3).

"Cases in this Court dealing with unfair labor practices" alleged under these provisions "have recognized the relevance and importance of showing the employer's intent or motive to discriminate or to interfere with union rights." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963). That is because Congress' "intention was to forbid only those acts that are motivated by an antiunion animus." *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 700 (1983). And resolving employer-employee disputes is a "delicate task" of "balancing" "the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner." *Erie Resistor*, 373 U.S. at 229. "In general," therefore, finding a violation of Section 8(a)(1) or Section 8(a)(3) "requires an affirmative showing of a motivation of encouraging or discouraging union status or activity." *Loc. 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 680 (1961) (Harlan, J., concurring).

This Court has recognized, however, that "[s]ome conduct may by its very nature contain the implications of the required intent." *Id.* at 675 (maj. op.). Thus, in situations involving employer conduct where no direct evidence of animus is available, this Court has "divided an employer's conduct into two classes." *Metro. Edison*, 460 U.S. at 701. In the first class is employer conduct "inherently destructive of employee interests." *Great Dane*, 388 U.S. at 33. When an employer's conduct falls in this category, "no proof of an antiunion motivation is needed," *id.* at 34, because the conduct itself "carries with it a strong inference of impermissible motive." *Metro. Edison*, 460 U.S. at 701. The second class is conduct where the "adverse effect … on employee rights is 'comparatively slight.'" *Great Dane*, 388 U.S. at 34. For cases in the latter camp, "an antiunion motivation must be proved to sustain [a Section 8(a)] charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.*

2. When the Board finds that an employer has violated Section 8, the Act directs it to "issue … an order requiring [the adjudicated violator] 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 Act]." 29 U.S.C. §160(c).

These are equitable remedies suitable for an administrative agency. *See Ex parte Lennon*, 166 U.S. 548, 556 (1897) (noting that, traditionally, "a court of equity" was empowered to "restrain[] … a contemplated or threatened action" and "require

affirmative action"). Even the authorization to order backpay is a power to order equitable relief. *See Curtis v. Loether*, 415 U.S. 189, 197 (1974) ("[B]ack pay [i]s an integral part of an equitable remedy"). Like other equitable remedies, backpay focuses on "what has the taker gained" instead of "what has the [victim] lost," *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999), and does not exceed a defendant's "net profits from wrongdoing." *Liu v. SEC*, 591 U.S. 71, 84-85 (2020). Those limits are critical, since the Board is in no position to furnish the jury-trial rights triggered by a damages remedy, and so an excessive Board remedy transgresses both statutory and constitutional limits. In short, the Board may order equitable remedies, but legal remedies like damages are off the table.

B. Factual Background

1. Macy's operates more than 700 department stores throughout the United States where it sells a wide variety of consumer goods. App.203-04. Macy's employs more than 75,000 full-time and part-time employees. About 7% of them are represented by labor unions, and Macy's has approximately 60 labor contracts with various unions. App.204. The Union here represents a unit of building engineers and craftsmen that work at approximately 40 Macy's stores in California and Nevada. App.204-05.

Macy's and the Union "have had a collective-bargaining relationship involving this unit of employees for over 20 years." App.205. The parties most recent collective-bargaining agreement ("CBA") was signed in 2018, was effective through August 31, 2020, and covered 60-70 unit employees. App.205.

The parties began negotiating a successor CBA in July 2020. App.207. This negotiating was done amidst the Covid-19 pandemic, which hit Macy's' bottom line hard, causing a net loss of $3.9 billion for 2020. App.205-06. During July and August, the parties held about 12 bargaining sessions to no avail, with the primary issues being economic. App.207-08.

Macy's provided the Union with its Last, Best, and Final Offer ("Final Offer") on August 31, 2020. App.208. The Union presented the Final Offer to its membership on September 2, 2020, and the members rejected it that same day. App.208.

2. On September 4, 2020, the Union members went on strike at the 40 Macy's locations. App.208. During the strike, individuals picketed in front of a San Francisco Macy's store every day, from the moment the store opened each morning until after the store closed each night. App.208-10. The parties held no bargaining sessions during the strike. Macy's' Final Offer expired on October 15. *See* App.257.

On November 25—the day before Thanksgiving, and nearly three months after Macy's made its Final Offer—the Union finally sent a counteroffer. App.258. After debating internally, Macy's rejected the counteroffer on Friday, December 4. App.258-60.

Then something unanticipated happened: That same Friday evening, the Union emailed Macy's' negotiator in New York after business hours, making "an unconditional offer to return [its] members to work immediately." App.260; App.79 (Bumatay, J., dissenting).

That out-of-the-blue development was not something Macy's' negotiator could process

immediately (or over the weekend, for that matter). Nor was it something the company could accommodate with the stroke of a pen; reintegrating employees who had been off the job for months requires time (and logistical gymnastics). Accordingly, Macy's' negotiator responded to the Union that same Friday evening, noting that "in order to fully evaluate the offer she needed to discuss it 'with all necessary partners,'" told the Union "please do not have the members report to work yet" and said she would "connect with" the Union by the end of the business day Pacific Time on Monday (i.e., the next business day). App.260-61.

Despite having waited almost three months to make its counteroffer, the Union deemed a one-business-day delay intolerable. Ten minutes after Macy's responded to the unexpected offer to return, the Union replied, asking: "[D]oes this mean [Macy's was] locking [the workers] out till Monday?" App.261. Macy's negotiator responded the next day (a Saturday), repeating that Macy's would respond to the Union's offer by close of business on Monday, and explaining that the Union's "unexpected offer" on "a Friday afternoon after a contentious strike of over three months, implicates several administrative, logistical, and economic issues that need to be fully evaluated on [Macy's] end with the input of several company employees." App.261. The email ended by asking "for the courtesy of giving [Macy's] until the close of business Monday to assess." App.261.

That courtesy was not extended. On Sunday morning, the Union delivered an ultimatum: "Unless you are locking [the workers] out, they will [be] showing up to work Monday morning." App.261

(second alteration in original). Macy's reiterated in a response that same day that "[t]his is not a lockout but we won't be ready for them. They have been out for 90+ days, and to think you can just flip a switch and have them back is not possible. If they show up they will be turned away so please show your members the courtesy of communicating with them." App.261-62.

That "courtesy" was not shown either. Union employees reported to work the next morning (Monday, December 7), App.262, and were sent home.

3. That evening, Macy's told the Union that it had "carefully evaluated [the Union's] offer" but that it was "not willing to reinstate bargaining unit employees until there is an agreement in place; this decision is being made in support of [its] bargaining position." App.263. Macy's also advised that it was "available for bargaining sessions on Thursday 12/10, Friday, 12/11, and Friday 12/18 from 9:00AM-11:00AM PST." App.263.

The parties met on December 10, and Macy's provided a new bargaining proposal. App.267. Macy's' negotiator testified that "she thought it was important to communicate this new offer during a bargaining session because Macy's wanted to explain to the Union why the wage increase proposal was lower than what was contained in the Final Offer and the changed circumstances in the company's business over the preceding few months." App.267. The Union presented its own counteroffer, but no agreement was reached. App.267-68.

The parties met again on December 11, with each party presenting a new proposal. But, once again, they were unable to reach an agreement. App.268.[1]

C. Board Proceedings

1. The Union filed Charge forms with the Board on December 9, 2020 (the day *before* the parties' post-strike meeting), and filed amended Charge forms on February 4, 2021, "alleging that Macy's committed an unfair labor practice by locking out the Union engineers after they gave their unconditional offer to return to work." App.8. The Board issued a Complaint and Notice of Hearing, "alleg[ing] that Macy's violated Section 8(a)(1) and (3)." App.8.

The ALJ ruled for the Union in a decision issued April 6, 2022. Even though the ALJ (correctly) found that Macy's' motive for the lockout was *not* to discriminate against union membership or because of anti-union animus, but rather was to "gain economic leverage," App.280, the ALJ went on to conclude that Macy's violated the Act when it informed the Union *on the first business day after the Union's out-of-the-blue offer to return* that it was locking out the employees until a contract was in place. According to the ALJ, Macy's' failure to concurrently propose a new contract constituted an unfair labor practice. App.9. To remedy that supposed violation, the ALJ ordered that Macy's pay reinstatement and backpay. App.9.[2]

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[1] The parties have still not come to an agreement as of the date of the filing of this petition.

[2] The ALJ also rejected Macy's' argument that its lockout was justified based on "good-faith concerns about union misconduct and sabotage" finding that Macy's' witnesses' testimony as to that motivation was not credible. App.271-80. The Ninth Circuit

2. The Board summarily affirmed the ALJ's determination that Macy's had violated the Act. App.195. Remarkably, however, "it rejected the ALJ's remedy *because it didn't go far enough*." App.50 (Bumatay, J., dissenting). Specifically, "[i]n accordance with [its] decision in *Thryv*," App.195 n.2, "the Board ordered Macy's to 'also compensate the employees for any other direct *or* foreseeable pecuniary harms incurred as a result of the unlawful lockout … regardless of whether these expenses exceed interim earnings.'" App.50 (Bumatay, J., dissenting) (alterations in original) (quoting App.195 n.2). That was a radical escalation of the remedy: "[B]ecause the Union and Macy's still haven't come to an agreement," App.50, the Board's decision to impose *Thryv* remedies means "Macy's became liable for any inconvenience Union members faced from being unemployed *for five years and counting*." App.90-91 (Nelson, J., dissenting from denial of rehearing en banc) (emphasis added).

3. Macy's petitioned for review of the Board's Decision and Order in the Fifth Circuit, while the Union petitioned for review in the Ninth Circuit. App.9-10. The Judicial Panel on Multidistrict Litigation transferred the petitions to the Ninth Circuit pursuant to 28 U.S.C. §2112, and the Board filed a Cross-Application for Enforcement of its final Order, which was consolidated with the other petitions before the Ninth Circuit. App.10. The Ninth Circuit had jurisdiction under 29 U.S.C. §160(e), (f).

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affirmed this conclusion because of the deference courts give to agency's fact and credibility determinations. App.23-24.

D. Ninth Circuit Proceedings

1. A divided Ninth Circuit panel affirmed on both the merits and the remedy, holding that Macy's' conduct was "inherently destructive of employee rights," App.124-26, and that *Thryv* remedies were authorized and appropriate, App.140-53.

Judge Bumatay dissented in relevant part. In his view, Macy's did not engage in conduct with a "natural tendency" "to *severely* 'discourage union membership while serving no significant employer interest'" as required to hold conduct unlawful under the Act. App.183-86. Judge Bumatay disagreed with the panel majority on the remedy as well, concluding that *Thryv* remedies violate the Act and cannot be imposed consistent with the Seventh Amendment. App.163-81.

2. Macy's petitioned for rehearing en banc. CA9.No.23-124, Dkt.102. On October 21, 2025, the Ninth Circuit denied the petition, and the panel issued an amended opinion alongside the order. App.1-109.

The amended majority opinion reiterated its previous holdings. According to the majority, "Macy's was 'obligated to declare the lockout *before or in immediate response* to the strikers' unconditional offer to return to work'" and "was further required to fully inform the Union fully and clearly on the conditions necessary for employees to be reinstated," App.22 (brackets omitted), by which it meant Macy's engaged in inherently destructive conduct by not having a full and detailed plan ready to go the moment the Union made its offer to return.

As to *Thryv* remedies, the majority noted its "disagree[ment]" with the Third Circuit's opinion in *Starbucks I*. App.36 n.12. The majority acknowledged

that the Board's "make-whole relief must be equitable in nature" under §160(c). App.36 n.12. But it insisted that permissible *Thryv* remedies *are* equitable in nature because they operate "like a backpay order" in the sense that they "remov[e] … the consequences of violation." App.37 n.12; App.42 (emphasis omitted).[3]

Judge Bumatay was unmoved and voiced the same critiques of the majority as in his initial dissent. *See* App.49-88. Specifically, in his view, Macy's did not violate the Act when, after the Union offered to return to work from a three-month strike on a Friday evening, Macy's requested a single business day to respond. App.76-80. Nor did Macy's engage in unlawful conduct when it imposed a lockout on Monday evening and took two business days to formulate and communicate a new proposal. App.80. In short, none of Macy's conduct was "even close to meeting the exacting standard of 'inherently destructive' conduct" as there was "no 'far reaching,' 'continuing,' or 'sever[e]' effect on collective bargaining." App.78, 80. In concluding otherwise, the majority contradicted both Ninth Circuit and Supreme Court precedent. *See* App.80-82.

As to the remedial holding, Judge Bumatay again dissented and made clear that the amended majority opinion "d[id not] go far enough" to fix the fundamental statutory and constitutional problems with the *Thryv* remedy, as the majority "still le[ft] the

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[3] The primary amendment to the majority's opinion was that it softened some language from the original opinion to "tr[y] to limit" *Thryv* remedies to those "that are 'equitable'" and removed some costs from the available remedies. App.51 (Bumatay, J., dissenting); *see also* App.46 (maj.).

door open for the Board to order foreseeable damages that are untethered from the law." App.51. While "the majority t[ook] some of the most egregious costs … off the table," it "offer[ed] no guidance on how to fashion 'equitable' foreseeable damages" and "le[ft] the Board with a wide array of costs it may impose under *Thryv*" that would violate the Act despite the majority "slapping the label that those foreseeable damages [must] be 'equitable'" on its opinion. App.51-52.

Judge Nelson, joined by Judges Callahan, Ikuta, Lee, Bumatay, and VanDyke, dissented from the denial of rehearing en banc. App.89-109. The six dissenters echoed the critiques articulated in Judge Bumatay's panel dissent on both the merits and remedy. On the merits, the dissenters noted that the Board's (and the panel majority's) affirmance of the ALJ decision "conflicts" with this Court's decision in *Great Dane* regarding inherently destructive conduct and is inconsistent with "the case-by-case assessment an inherently destructive finding requires." App.94 (collecting cases from other circuits). Regarding *Thryv* remedies, the dissenters called them out as "an extraordinary power grab" not authorized by the Act or the Seventh Amendment. App.94. The dissenting judges also noted that "no judge" at that time "but those on the panel majority" had ever "blessed" the Board's claimed power to impose such broad, damages-type remedies. App.94-109.

3. Macy's filed a motion to stay issuance of the mandate pending certiorari. CA9.No.23-124, Dkt.121. The Ninth Circuit granted a stay, while effectively requiring this petition to be filed in this Court within

"thirty days from the date th[e] order [wa]s filed," *viz.* October 28, 2025. CA9.No.23-124, Dkt.122.[4]

REASONS FOR GRANTING THE PETITION

Under this Court's caselaw, a court determining whether an employer violated Section 8(a)(1) or (3) of the NLRA based solely on circumstantial evidence should ensure that an employer had a legitimate business justification for its action. Once that low bar has been cleared, the key inquiry assesses the effects of the employer's actions on employee rights and only finds a violation where there are severe and long-lasting effects or affirmative proof of anti-union animus. *Great Dane*, 388 U.S. at 34; *Erie Resistor*, 373 U.S. at 231. This properly balances competing interests by allowing employers to act in good faith without worrying their every move will be deemed a violation. The Act's remedial structure likewise reflects these competing interests (and the constraints of the Seventh Amendment) by limiting the Board to equitable remedies.

Rather than respect the delicacy of that balance and the limits of the Act, the Ninth Circuit radically tipped the scales in favor of unions two times over.

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[4] In implicit recognition of the statutory and constitutional infirmities of *Thryv* (and the Ninth Circuit's outlier status), the Union recently sent a letter to the Board's general counsel purporting to forgo such remedies for its membership. That offer contradicts the letter and spirit of the Union's arguments to the Ninth Circuit, but it does nothing to prevent the Board from imposing that remedy on remand. It is black-letter law that once an unfair labor practice charge has been initiated, it is up the Board, and not the charging party, to select the appropriate remedies. *See Kaumagraph Corp.*, 313 NLRB No. 82, at 2 (1994).

First, the court deemed Macy's' perfectly reasonable reaction to an unanticipated union maneuver inherently destructive conduct in violation of the Act. It announced that draconian employee-favoring rule by *ipse dixit*, while eschewing any inquiry into anti-union animus or the effects of petitioner's conduct on employee rights. That conflicts with this Court's *Great Dane* decision and the approaches of several circuits that faithfully apply this Court's precedents.

Compounding that error, the Ninth Circuit gave the green light to the Board's brave new experiment with so-called *Thryv* remedies—compensatory or consequential damages that defy the Act's limitations and are breathtaking in scope. The Board's statutory power to remedy unfair labor practices has remained unchanged since 1935. It took the Board nearly 90 years—until 2022—to discover a power to order employers to pay for "direct or foreseeable pecuniary harms" arising from unlawful conduct. *Thryv*, 372 NLRB No. 22, at 14. The reason the Board took so long to discover this "highly attractive power," *Printz v. United States*, 521 U.S. 898, 905 (1997), is straightforward: It does not exist. Nor could it consistent with the Seventh Amendment. But that extra-statutory and unconstitutional power now haunts employers who operate in the Ninth Circuit.

In blessing the Board's power grab, the Ninth Circuit opened a split with the Third Circuit, which had already held that such remedies are beyond the Board's statutory authority. That is neither disputable nor disputed. Even the Board conceded below that "[t]he panel's decision breaks with the Third Circuit," which held that the *Thryv* remedy "is

unlike backpay" and therefore is *ultra vires*, and that the conflict between the two decisions is "meaningful." CA9.No.23-124, Dkt.116, at 13. The split has only deepened since the Ninth Circuit issued its opinion, with the Fifth and Sixth Circuits recently joining the Third in rejecting *Thryv*.

Nothing about the decision below is consistent with this Court's caselaw. It replaces delicate balancing with draconian employee-favoring rules and needlessly runs roughshod over employers' rights. This Court should grant review and reverse.

I. The Ninth Circuit's Merits Holding Conflicts With This Court's Cases And The Decisions Of Other Circuits Correctly Applying Them.

This Court has long held that where an employer has a legitimate business justification for its conduct, affirmative proof of anti-union animus is required to prove a violation of Section 8(a)(1) or (3) unless the employer's conduct is so "'inherently destructive' of important employee rights," *Great Dane*, 388 U.S. at 34, that "[t]he only reasonable inference that could be drawn" is that the employer was acting out of anti-union animus, *NLRB v. Brown*, 380 U.S. 278, 287 (1965). That is a high bar, which reflects the balance inherent in the NLRA of legitimate employer and employee interests by guarding employers' rights as jealously as employees'.

While this Court "has not provided a precise definition of 'inherently destructive' conduct," *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 (7th Cir. 1989), it has "shed [some] light" to guide lower courts in determining how to classify employer conduct, *Int'l Bhd. of Boilermakers, Loc. 88 v. NLRB*, 858 F.2d 756,

762 (D.C. Cir. 1988). First and foremost, the focus of the inquiry is not on whether the employer had other, more accommodating options on the table. Rather, the focus is on the effects of the employer's conduct on employees' collective-bargaining interests. *See, e.g.*, *Great Dane*, 388 U.S. at 34 (discussing the "resulting harm to employee rights" and "adverse effect … on employee rights"); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (discussing "the effect" on employees when an employer refused to reinstate them after a strike). Second, in evaluating effects, a court can find conduct "inherently destructive" only if the effects are both severe and long-lasting. *Compare, e.g.*, *Am. Ship Bldg.*, 380 U.S. at 309 (lockout not inherently destructive because it was not "demonstrably so destructive of collective bargaining"), *with, e.g.*, *Erie Resistor*, 373 U.S. at 231 (employer's conduct had "grave repercussions" on union activity, "render[ing] future bargaining difficult, if not impossible," and serving as "an ever-present reminder of the dangers connected with striking and with union activities in general").

Most circuits have gotten the message loud and clear. In the Fifth Circuit, for instance, employer conduct will not be deemed "inherently destructive" such that an anti-union-animus inference can be drawn unless the conduct is "egregious." *Elec. Mach. Co. v. NLRB*, 653 F.2d 958, 965 (5th Cir. 1981). Employer conduct that "directly and unambiguously penalizes or deters protected activity" will clear that bar, as will conduct that carries "far reaching effects which would hinder future bargaining." *Id.* at 966. But lesser intrusions on unions and their members do not suffice.

Thus, as discussed in more detail below, had Macy's been permitted to pursue its petition in the Fifth Circuit—the forum in which Macy's filed its petition for review, *see* p.13, *supra*—Macy's would have won on the merits. The conduct that the Ninth Circuit deemed "inherently destructive" of labor rights here—requesting a one-business-day grace period to respond to the Union's out-of-the-blue offer, and taking a few days to put forth a full proposal—is not even close to "egregious" behavior of the sort that is required in the Fifth Circuit. Quite the opposite: Macy's' reasonable conduct reflects the administrative complexities of bargaining with a Union representing employees working at dozens of stores. And, more to the point, Macy's' reasonable conduct plainly did not "directly and unambiguously penalize[] or deter[] protected activity," *Elec. Mach. Co.*, 653 F.2d at 965, or have "far reaching effects which would hinder future bargaining," *id.* at 966—as evidenced by the fact that the parties returned to the bargaining table *the same week Macy's declared the lockout*.

While the split with the Fifth Circuit is particularly problematic here given Macy's' initial choice of forum, the Fifth Circuit is no outlier. Similar to the Fifth Circuit, the Eighth Circuit held in *Inter-Collegiate Press, Graphic Arts Division v. NLRB*, 486 F.2d 837 (8th Cir. 1973), that locking out employees and using temporary replacements was not inherently destructive under *Great Dane*, because there was "no showing that the Union's position as bargaining agent was jeopardized or that it ha[d] suffered any diminution in its capacity to effectively represent the employees in the bargaining unit." *Id.* at 845.

Seventh and Eleventh Circuit caselaw is in accord. In *NLRB v. Sherwin-Williams Co.*, 714 F.2d 1095 (11th Cir. 1983), the Eleventh Circuit held that an employer's decision to withhold employee disability benefits during a strike was not inherently destructive conduct, because "[t]here [wa]s simply no evidence in the record to support a conclusion that [the employer's] refusal to pay disability benefits" during the strike "hindered future bargaining or created continuing obstacles to the future exercise of the Company's employees' rights." *Id.* at 1101. And in *Local 15, International Brotherhood of Electric Workers v. NLRB*, 429 F.3d 651 (7th Cir. 2005), the Seventh Circuit held that, to be "inherently destructive," "the effect" of an employer's conduct "on the collective bargaining process must be more than temporary; it must instead establish a barrier to future collective bargaining." *Id.* at 656.

In stark contrast, and in defiance of this Court's law, the Ninth Circuit *never once even mentioned the effect Macy's' lockout conduct had on employees' rights*. Instead, the Ninth Circuit simply deemed the lockout inherently destructive because Macy's "declared its lockout" one business day "after the Union gave its unconditional offer to return to work" and did not have a full and complete proposal on the table the moment it declared the lockout. *See* App.22.

That conclusion is wrong and entirely ignores at least half the requisite inquiry. For all its flyspecking of Macy's' (eminently reasonable) response to an out-of-the-blue return-to-work offer after a contentious three-month strike, the Ninth Circuit never discussed the effects Macy's' minimal delay had on the Union

and its members. It never concluded that Macy's' one- and three-business-day delays to formulate a new proposal caused severe and long-lasting damage to the employees' interests. In fact, from the majority's opinion, it is impossible to tell if there were any effects at all. And the panel never found anti-union animus on Macy's' part. Bypassing these required analyses, the majority enshrined a new draconian rule that imposes liability on employers *regardless of whether there is any effect*, much less a severe and long-standing one, on employees' rights or an affirmative showing of anti-union bias.

Had the Ninth Circuit applied the proper analysis this Court's caselaw demands, it would have been impossible to find an unfair labor practice. First, as even the ALJ acknowledged, Macy's had a substantial legitimate business justification in locking out the Union's members "to gain economic leverage" in support of its bargaining position. App.280. Nor could the ALJ have found otherwise. After all, this Court has long held that "temporarily … lay[ing] off … employees for the sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position" does not alone violate either Section 8(a)(1) or Section 8(a)(3), *Am. Ship Bldg.*, 380 U.S. at 318; App.78-79 (Bumatay, J., dissenting) (explaining the "legitimate economic purpose" of Macy's' lockout based on undisputed facts).

The only question, then, is whether Macy's' conduct was inherently destructive. The answer? "[N]ot even close." App.80 (Bumatay, J., dissenting). After a contentious, three-month strike, Macy's took one business day to formulate a response to an

unanticipated maneuver and declare a lockout in support of its bargaining position that it wanted an agreement in place before reinstating the workers; and it took an additional two days to put a complete proposal before the Union. This in no way had the type of "grave repercussions" that "render[] future bargaining difficult, if not impossible, for the collective bargaining representative" or would "stand[] as an ever-present reminder of the dangers connected with striking and union activities in general." *Erie Resistor*, 373 U.S. at 231. The Union has represented the employees for over 20 years, "and there is nothing to show that [its] ability to do so has been impaired by the lockout." *Am. Ship Bldg.*, 380 U.S. at 309. Nor has there been any indication that Macy's' lockout would affect the locked-out employees *at all* after an agreement is reached and the lockout ends. *Cf. Erie Resistor*, 373 U.S. at 231 (inherently destructive conduct would "create[] a cleavage in the plant continuing long after the strike [wa]s ended"). As Judge Bumatay put it, "all the facts reveal" there was "no 'far reaching,' 'continuing,' or 'sever[e]' effect on collective bargaining" that could justify an inherently destructive conclusion. App.78.

* * *

Under this Court's precedents, and under the governing law of most circuits, Macy's' conduct would be unobjectionable. Indeed, if this case had been litigated in the Fifth Circuit—which is where Macy's originally brought its petition, *see* p.13, *supra*—the result would have been 180 degrees different as to both merits and remedy. Macy's' loss here thus owes entirely to a random choice of the Panel on

Multidistrict Litigation. That is not a state of affairs this Court should tolerate. Certiorari should be granted.

II. The Ninth Circuit's Remedial Holding Conflicts With The Text Of The NLRA And Decisions Of Multiple Other Circuits Correctly Interpreting It.

A. The Decision Below Created an Acknowledged Split That Has Deepened Since the Amended Opinion Issued.

The Ninth Circuit's position that the Board has authority under the NLRA to order *Thryv* remedies is in clear conflict with decisions from the Third, Fifth, and Sixth Circuits.

As Judge Bumatay noted, the Ninth Circuit in this case "create[d] a needless circuit split" with the Third Circuit "in affirming the Board's [remedial] power grab." App.50 (Bumatay, J., dissenting) (citing *Starbucks I*, 125 F.4th at 97). In *Starbucks I*, the Board sought the same *Thryv* remedies against Starbucks. *See* 125 F.4th at 86. The Third Circuit held that the ordered remedy "exceed[ed] the Board's authority under the NLRA" and vacated that portion of the Board's order. *Id.* at 94. Key to the Third Circuit's holding was its recognition that "[t]he NLRA … limits the Board's remedial authority to equitable, not legal, relief." *Id.* at 95. And unlike the Ninth Circuit here, the Third Circuit concluded that the remedy ordered in its case, "like *Thryv*, purport[ed] to grant broad compensatory relief" which "resemble[d] an order to pay damages," and was therefore verboten under the Act. *See id.* at 95-97.

The Ninth Circuit's holding is also at odds with the Fifth Circuit. In *Hiran Management*, 2025 WL 3041862, which was decided just a few days after the amended opinion here, the Fifth Circuit faced another Board-ordered remedy for an employer to pay employees "for any other direct or foreseeable pecuniary harms suffered as a result" of adjudicated unfair-labor practices. *Id.* at *2. Like the Third Circuit in *Starbucks I*, the Fifth Circuit held that the Board transgressed its equitable limits by "award[ing] … full compensatory damages," "a form of legal damages." *Id.* at *6. And the Fifth Circuit was not impressed by the Board's attempt to recharacterize *Thryv* remedies as equitable by "contending that … [they are] designed to restore the status quo." *Id.* As that court aptly noted, "[L]egal relief often has the same goal," and the Board's view would lead to the conclusion that "all instances of compensatory damages could qualify as an equitable remedy." *Id.* In the end, the Fifth Circuit "agree[d] with the Third Circuit's analysis … that the *Thryv* remedy goes beyond the text of the NLRA." *Id.*

Most recently, the Sixth Circuit joined the Third and Fifth Circuits in holding that the Board has no authority under the Act to order *Thryv* remedies. In *Starbucks II*, 2025 WL 3089798, the Board once again ordered Starbucks to pay *Thryv* remedies. *See id.* at *1. In a lengthy and well-reasoned analysis, *see id.* at *7-19, the Sixth Circuit sided with the Third and Fifth Circuits in concluding that "[a]ny other direct or foreseeable pecuniary harm incurred" is "merely a verbose way of referring to consequential damages—a 'classic form of *legal* relief.'" *Id.* at *13 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993)).

That being the case, the Sixth Circuit held that "the Board's efforts" to impose *Thryv* remedies "both lack statutory authority and raise serious constitutional questions." *Id.* at *19. Accordingly, the Court "vacat[ed the Board's] award and remand[ed]" for further proceedings. *Id.* at *20.

Finally, the only Tenth Circuit judge to address the issue in *3484, Inc. v. NLRB*, 137 F.4th 1093 (10th Cir. 2025), reached the same conclusion as the Third, Fifth, and Sixth Circuits. In *3484*, Judge Eid noted that for the Board to order an employer to compensate employees for "*any* 'direct or foreseeable pecuniary harms'" would be "patently beyond its statutory authority" because "[t]hat monetary relief is the prototypical form of tort-like legal damages." *Id.* at 1116 (Eid., J., concurring in part); *see also id.* at 1121-27 (elaborating upon that conclusion).

The Ninth Circuit is thus on the short end of a lopsided circuit split. This Court should grant the petition and correct the Ninth Circuit's anomalous and dangerous ruling.

B. The NLRA Does Not Authorize the Board to Order *Thryv* Remedies.

There is a reason the Ninth Circuit is all alone in upholding *Thryv* remedies: They are not remotely consistent with the NLRA or the Seventh Amendment. The statute empowers the Board to "issue … an order requiring [an adjudicated violator] 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 this subchapter." 29 U.S.C. §160(c). Those are all equitable remedies, *see,*

e.g., *Ex parte Lennon*, 166 U.S. at 556-57 (cease and desist); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188 (1941) (reinstatement); *Curtis*, 415 U.S. at 197 (backpay), and they are equitable remedies for a reason—namely, they do not implicate jury-trial rights the Board is incapable of supplying. In *Thryv*, however, the Board jumped the statutory (and constitutional) tracks and embraced—for the first time—a sweeping power to order compensation for "direct or foreseeable pecuniary harms" such as "credit card debt," "interest and late fees on credit cards," "increased … childcare costs," and "other costs [incurred] to make ends meet." 372 NLRB No. 22, at 14-15. No chancellor would recognize those remedies; nor would the Congress that enacted the NLRA. The decision below upholding *Thryv* remedies is, therefore, deeply flawed.

The Ninth Circuit recognized that the Board lacks the authority to order legal relief and so "any make-whole relief must be equitable." App.36 n.12; *see also* App.34 (acknowledging that the Board "is not authorized to award 'consequential damages'"). But the court then adopted a conception of equitable make-whole relief that would allow the chancellor to swallow the law courts whole. In the Ninth Circuit's view, "the Board remains within its [remedial] orbit" in ordering *Thryv* remedies "because its make-whole relief is designed 'solely to "restore the status quo[,]"' so it is equitable in nature." App.34 n.11 (quoting *Jarkesy*, 603 U.S. at 123). That is deeply wrong. Virtually all relief—legal or equitable—could loosely be described as having the aim of making the victim whole, and every damages expert attempts reconstruct a but-for world without a breach and estimate the damages

necessary to "restore the status quo." *See Jarkesy*, 603 U.S. at 123. In reality, no matter how the Board and the Ninth Circuit try to spin it, *Thryv* remedies are damages by another name, and are "quintessentially legal relief with common law roots." *Starbucks II*, 2025 WL 3089798, at *19. Indeed, the Board itself called the relief in this case compensatory. *See* App.195 n.2. And, in another case, the Board Chairman characterized costs similar to those covered by *Thryv* as consequential damages. *Voorhees Care & Rehab Ctr.*, 371 NLRB No. 22, at 4 n.14 (2021).

The Board's acknowledgements are inevitable because it is clear *Thryv* remedies are legal damages, not some strong form of backpay or other equitable remedy. First, by ordering Macy's to "compensate the employees for any … direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout," App.195 n.2, the Board "measure[s] monetary relief from the perspective of the employee's loss—not the employer's gain." App.69 (Bumatay, J., dissenting). That victim-centered focus that goes beyond what an employer unlawfully withheld puts *Thryv* squarely on the legal side of the legal-equitable divide. *Del Monte*, 526 U.S. at 710; *see also* App.69 (citing Dan B. Dobbs, 1 *Dobbs Law of Remedies* 280 (2d ed. 1993), which similarly describes the difference between damages and equitable restitution); *3484*, 137 F.4th at 1126 (Eid., J., concurring in part) (collecting sources).

The Ninth Circuit "decline[d] to entertain" a square Seventh Amendment objection to the *Thryv* remedies, App.32 n.10, and offered the fig leaf that a Seventh Amendment argument could be raised in compliance proceedings, App.44 n.15. But the Ninth

Circuit's mischaracterization of the relief and mistaken assertion that it "vindicates a public right," App.35, makes that option illusory. As Judge Bumatay noted, "[t]he majority would dispense with any concerns about the legal nature of the Board's remedial scheme by declaring that the Board's foreseeable-damages regime 'vindicates a public right.'" App.52; *see also* App.107-09 (Nelson, J., dissenting from denial of rehearing en banc) (recognizing same).

The Ninth Circuit's Seventh Amendment dicta regarding "public rights" cannot stand. As this Court recently affirmed, "[t]he right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *Jarkesy*, 603 U.S. at 121. And while this Court has recognized the public rights exception, it also made clear that this exception is narrow, as it "is, after all, an *exception*." *Id.* at 131. The Ninth Circuit would have done well, therefore, to construe the Act and *Thryv* remedies in a way that did not create a "broad exemption" to Seventh Amendment jury-trial rights, App.109 (Nelson, J., dissenting from denial of rehearing en banc), thereby "rais[ing] serious constitutional doubts." *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018).[5] That it did not

[5] Constitutional concerns about diminished Seventh Amendment rights in agency proceedings are compounded by other potential constitutional violations. When agencies resolve matters "in-house," later judicial review is often (as here) deferential to the agency's factual and credibility determinations. *Jarkesy*, 603 U.S. at 117; *see also* App.10, 23-24 (panel majority affirming ALJ's and Board's credibility findings because "the

threatens Macy's' and myriad other employers' Seventh Amendment rights. This Court should grant the petition to prevent such grave injustice.

III. The Questions Presented Are Important And Cry Out For This Court's Resolution.

This Court has long recognized that resolving employer-employee disputes under the NLRA is a "delicate task." *Erie Resistor*, 373 U.S. at 228-29. Although the Act is solicitous of employee rights, Congress established the Board "to be … concerned with the administration of 'labor relations'" generally, "in which the rights of the employer are to be as jealously guarded as those of the employee[s]." *Leonard v. NLRB*, 205 F.2d 355, 357 (9th Cir. 1953). Yet while the Ninth Circuit of the Eisenhower era may have understood the assignment, the Ninth Circuit of today decidedly does not. Without finding that Macy's acted with anti-union animus, and without analyzing the effects of its lockout of union employees, the Ninth Circuit held here that Macy's engaged in inherently

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Board's 'determinations are entitled to judicial deference[,]' based on its '"special expertise in drawing" inferences of credibility and unlawful motive[.]'" (alterations in original)). At least two Justices of this Court have recently expressed skepticism about whether this setup properly respects the constitutional promise of a "fair trial in a fair tribunal," *Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring, joined by Thomas, J.) as the "close relationship" between an ALJ and the rest of the agency it works for "can make it 'extremely difficult, if not impossible, for th[e ALJ] to convey the image of being an impartial fact finder.'" *Id.* at 142 (alteration in original). This concern about an impartial fact finder was simply one more reason the Ninth Circuit should have thought twice (or three times) before giving its stamp of approval to *Thryv* remedies.

destructive conduct in violation of the Act. That holding unjustly skews the balance permanently in favor of employees and will lead to adjudicated violations even when employers' good-faith and business-justified interests have little or no adverse effect on employees. Indeed, absent this Court's intervention, the only safe course for employers in the Ninth Circuit will be to grant unions' every wish, no matter how outlandish. It is difficult to imagine a state of affairs less conducive to lasting labor peace, or an issue more in need of this Court's intervention.

The remedial issue is no less important. "[A]n agency" like the Board "literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). All the circuits who have addressed *Thryv*, including the Ninth Circuit, agree that Congress in the NLRA did not authorize the Board to order legal remedies. And yet the Ninth Circuit has now unleashed the Board to do just that by blessing *Thryv* remedies. In doing so, the Ninth Circuit ignored this Court's express (and recently repeated) admonition that "any seeming curtailment of the [Seventh Amendment] right … should be scrutinized with the utmost care." *Jarkesy*, 603 U.S. at 121 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The Ninth Circuit's aberrant holding must be corrected for all these reasons.

This case is an ideal case to resolve both issues. Though the Ninth Circuit clearly erred in its merits analysis under this Court's precedents, many courts have expressed that what constitutes "inherently destructive" conduct is not exactly pellucid. *See, e.g.*,

Esmark, 887 F.2d at 748; *Inter-Collegiate*, 486 F.2d at 844-45; *Loc. 88*, 858 F.2d at 762. This Court could, therefore, both correct the Ninth Circuit's error and provide more guidance on how to tread the divide between "inherently destructive" and "comparatively slight" conduct. This case also provides an ideal vehicle on the remedial issue, as this Court could resolve an already deep split among the circuits regarding *Thryv* remedies and put a kibosh on a growing string of Ninth Circuit decisions that diminish the Seventh Amendment in clear contravention of this Court's caselaw. *See, e.g.*, *CFPB v. CashCall, Inc.*, 135 F.4th 683 (9th Cir. 2025); *Great W. Air, LLC v. Cirrus Design Corp.*, 2024 WL 5134351 (9th Cir. Dec. 17, 2024); *FTC v. Com. Planet, Inc.*, 815 F.3d 593 (9th Cir. 2016), *abrogated on other grounds by AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021).

Finally, neither issue would benefit from further percolation. The Ninth Circuit is demonstrably unwilling to reconsider those holdings en banc. *See* App.2-3, 89-109 (denying reconsideration over the dissent of six judges). And the other circuits are unlikely to reconsider their merits and/or remedial positions, as the Fifth, Seventh, Eighth, and Eleventh Circuits' merits approaches are well-entrenched, and the Third, Fifth, and Sixth Circuits' remedial positions were all the products of well-reasoned analyses of the issue.[6] Given these deep circuit splits and the significant ramifications for employers' rights, this

[6] The Board has also indicated that it will continue to apply *Thryv* in future cases despite adverse circuit court rulings, *Airgas, USA, LLC*, 373 NLRB No. 102, at 1 n.2 (2024), adding yet another reason for this Court to review *Thryv*'s validity.

Court should grant certiorari and reverse on both questions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 26, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-124

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

MACY'S INC.,

Intervenor.

No. 23-150

MACY'S INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,

Intervenor.

No. 23-188

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MACY'S INC.,
Respondent,
INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,
Intervenor.

Argued and Submitted: Mar. 28, 2024
Filed: Jan. 21, 2025
Amended: Oct. 21, 2025

Before: Evan J. Wallach,* Jacqueline H. Nguyen, and Patrick J. Bumatay, Circuit Judges.

ORDER

The opinion and partial dissent filed on January 21, 2025 (Dkt. No. 93), and reported at 127 F.4th 58, are amended. The amended opinion and partial dissent will be filed concurrently with this Order.

* The Honorable Evan J. Wallach, United States Circuit Judge for the Federal Circuit, sitting by designation.

Judge Nguyen voted to deny the petition for rehearing en banc and Judge Wallach so recommended. Judge Bumatay voted to grant the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40.

The petition for rehearing en banc (Dkt. No. 102) is **DENIED**, and no further petitions for rehearing will be entertained in these cases.

OPINION

WALLACH, Circuit Judge:

When engaging in "collective bargaining" under the National Labor Relations Act ("NLRA" or the "Act"), "representatives of an employer and a union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences by resort to such economic weapons as strikes and lockouts, *without any compulsion to reach agreement*." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981) (emphasis added) (citations omitted); *see also* 29 U.S.C. § 158(a), (d) (listing certain prohibited unfair labor practices by an employer and imposing an obligation for collective bargaining). During negotiations over a successor collective bargaining agreement ("CBA"), communications between Macy's Inc. ("Macy's" or the "Company") and the International Union of Operating Engineers,

Stationary Engineers, Local 39 (the "Union") set off a chain reaction. The Union members voted to reject the Company's last, best, and final offer (the "Final Offer") and began a strike. After the Final Offer expired, the Union offered its proposal on wages and pensions, which Macy's then rejected. After three months, the Union ended its strike and unconditionally offered to return to work. Three days later, Macy's locked out the Union members who reported for work.

The Union filed its Charge Against Employer ("Charge") with the National Labor Relations Board ("NLRB" or the "Board"), alleging that the Company's lockout was an unfair labor practice under the NLRA. An Administrative Law Judge ("ALJ") ultimately ruled in the Union's favor.

The Board adopted the conclusion of the ALJ, who found that Macy's violated Section 8(a)(1) and (3)[1] of the Act, 29 U.S.C. § 158(a)(1), (3), when on December 7, 2020, Macy's locked out its employees without presenting a timely, clear, and complete offer that set

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[1] Under Section 8(a)(1) and (3) of the NLRA:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> ***
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1), (3); *see also Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) ("[A] violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1)." (citations omitted)).

forth the conditions necessary to avoid a lockout. *Macy's, Inc.*, 372 N.L.R.B. No. 42 (Jan. 17, 2023) ("Decision and Order"). The Board amended the ALJ's recommended Order with respect to remedial provisions, modifying the "make-whole remedy" to include direct or foreseeable pecuniary harms incurred due to the lockout.

Before us are three prayers for relief: (1) the Union petitions for remand for the Board to reconsider its requested additional remedies; (2) Macy's petitions for dismissal of the Union's petition and transfer of the proceedings elsewhere, or alternatively, either remand or reversal on the merits in its favor; and (3) the Board applies for enforcement of its final Order. We have jurisdiction under 29 U.S.C. § 160(e)-(f). We deny the Union's and the Company's Petitions for Review and grant the Board's Cross-Application for Enforcement.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

Macy's is a retail business with more than 700 stores and 75,000 employees nationwide. The Union represents building engineers and craftsmen who perform carpentry, painting, as well as maintenance and repair work, especially on heating, ventilation, and air conditioning (HVAC) and electrical systems, at two Macy's stores in Reno, Nevada, and approximately forty other stores across Northern California and the

[2] Only the factual assertions pertinent to resolving the matter before us are presented here, and they are primarily drawn from the findings within the April 6, 2022 ALJ's Decision ("ALJ's Decision"), which the Board affirmed in its January 17, 2023 Decision and Order.

San Francisco Bay Area. On April 1, 2020, Macy's laid off about sixty Union engineers, after closing its stores and furloughing most of its employees in response to the COVID-19 pandemic. Later that year, Macy's started to reopen its stores, and by mid-August, it recalled forty-three Union engineers back to work.

For over twenty years, Macy's and the Union maintained a collective-bargaining relationship. In July 2020, Macy's and the Union began bargaining for a successor CBA since the CBA then in place, covering between sixty to seventy Union employees, was set to expire on August 31, 2020. After nearly a dozen bargaining sessions, they had yet to reach an agreement. On August 31, 2020—the day the CBA would expire—Macy's presented its Final Offer proposing terms relating to wages and pensions. On September 2, 2020, the Union members overwhelmingly voted to reject the Final Offer and the Union decided it would begin its strike in two days. From September 4, 2020, to December 4, 2020, the Union staged its strike, picketing every day during business hours at Macy's Union Square store in San Francisco. Macy's argued before the ALJ that during the strike, the Union employees engaged in a variety of misconduct and sabotage.

On October 8, 2020, Rose Ashmore ("Ashmore"), the Company's lead negotiator, told Jay Vega ("Vega"), the Union's lead negotiator, over the phone that the Final Offer would expire in a week; Ashmore confirmed this once more in an email to Vega four days later. On October 15, 2020, the Final Offer expired. Vega called Ashmore on November 9, 2020, and asked if Macy's would present another offer. Ashmore said

no, but asked whether the Union would like to resume bargaining; Vega said he would get back to her. On November 25, 2020, the day before Thanksgiving, Vega sent an email to Ashmore including the Union's proposal on wages and pensions. Ashmore replied to Vega over text, notifying her receipt of the email and her inability to speak with her team at Macy's about the offer until after the holiday.

On December 4, 2020, Ashmore emailed Vega rejecting the Union's wage proposal. That same day, Vega replied that the Union no longer wished the dispute to continue, so it was making "an unconditional offer to return our members to work immediately." After Vega sent this email, the Union ended its strike and stopped picketing. Later that evening, Ashmore replied to Vega, stating that she would respond to the Union's unconditional offer by the end of business on Monday, December 7, 2020, because she needed to discuss the offer "with all necessary partners." In the reply, Ashmore told Vega "please do not have the members report to work yet." Vega asked her over email, "[d]oes this mean you are locking them out till Monday?" On December 5, 2020, Ashmore answered that Macy's would need to fully evaluate "several administrative, logistical, and economic issues" implicated by the Union's "unexpected offer," and requested "the courtesy of giving us until the close of business Monday to assess." On December 6, 2020, Vega responded that "[u]nfortunately, we cannot accommodate your request. Unless you are locking them out, they will [be] showing up to work Monday morning." Ashmore replied, repeating that "the team should not return to

work on Monday," as well as stating that "[t]his is not a lockout but we won't be ready for them."

On Monday, December 7, 2020, some Union engineers started returning to work but were turned away. That same day, Ashmore emailed Vega, asserting "[w]e are not willing to reinstate bargaining [Union] employees until there is an agreement in place; this decision is being made in support of our bargaining position."

On December 10, 2020, Macy's and the Union engaged in subsequent negotiations. Ashmore emailed Vega the Company's new bargaining proposal, which includes wage increases that were reduced from those within the Final Offer. The Union countered with an offer to cap wages at the rates originally proposed in the Final Offer. No deal was made. The next day, Macy's presented another proposal, which was still worse than the Final Offer. The Union gave its additional proposal, deleting certain provisions from the contract. Once again, Macy's and the Union failed to reach an agreement.

On December 9, 2020, and February 4, 2021, the Union respectively filed its original and first amended Charge forms with the NLRB, alleging that Macy's committed an unfair labor practice by locking out the Union engineers after they gave their unconditional offer to return to work. On February 11, 2021, the NLRB issued its Complaint and Notice of Hearing ("Complaint"), which alleges that Macy's violated Section 8(a)(1) and (3) of the Act. In June 2021, the ALJ conducted a six-day hearing, and at that time, Macy's and the Union "had still not reached an

agreement on a new contract, and [the Company's] lockout of the engineers continued."

In the ALJ's Decision issued on April 6, 2022, the ALJ concluded that Macy's violated Section 8(a)(1) and (3) of the NLRA, "[b]y locking out its employees on December 7, 2020, without providing them with a timely, clear, or complete offer, which sets forth the conditions necessary to avoid the lockout[.]" The ALJ recommended that Macy's "offer reinstatement to all employees who were unlawfully locked out and make them whole for any losses of pay and benefits that they may have suffered by reason of the lockout," including "search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings." With respect to the ALJ's Decision, Macy's filed its Exceptions and the Union filed its Cross-Exceptions.

On January 17, 2023, the Board in its Decision and Order affirmed the ALJ's rulings, findings, and conclusions, and adopted the ALJ's recommended Order, making two modifications. The Board modified the ALJ's recommended Order, first, "to conform to the violations found and to the Board's standard remedial language, and in accordance with" prior NLRB decisions, and second, to amend the "make-whole remedy" to provide that Macy's "*shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout*, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings."

Macy's petitioned for review over the Board's Decision and Order in the Fifth Circuit, and the Union

filed its petition in this Court. Pursuant to 28 U.S.C. § 2112, the Judicial Panel on Multidistrict Litigation transferred their Petitions for Review here, after this Court was randomly selected. The NLRB filed a Cross-Application for Enforcement of its final Order. These three petitions were consolidated here.

II. STANDARD OF REVIEW

We "must uphold a Board decision when substantial evidence supports its findings of fact and when the agency applies the law correctly." *United Nurses Ass'ns of Cal. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017) (internal quotation marks and citation omitted). "We review de novo whether the Board applied the correct legal standard." *NLRB v. Bingham-Willamette Co.*, 857 F.2d 661, 663 (9th Cir. 1988) (citing *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 (1971)). The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole . . . ." 29 U.S.C. § 160(e)-(f). "The Board has special expertise in drawing" inferences of unlawful motive and credibility, so "its determinations are entitled to judicial deference." *Kallmann v. NLRB*, 640 F.2d 1094, 1099 (9th Cir. 1981) (citation omitted); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) ("We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.").

Moreover, the Board's "discretion in selecting remedies is 'exceedingly broad,' and we will enforce a remedy 'unless it represents a clear abuse of discretion.'" *NLRB v. Ampersand Publ'g, LLC*, 43 F.4th 1233, 1236 (9th Cir. 2022) (quoting *NLRB v. C.E. Wylie Constr. Co.*, 934 F.2d 234, 236 (9th Cir. 1991)). "Such an abuse of discretion is present if it is shown that the order is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act." *Id.* at 1236-37 (quoting *Wylie*, 934 F.2d at 236).

"Because the Board adopted the ALJ's analysis" by affirming the ALJ's rulings, findings, and conclusions, "we treat the Board's order and the adopted ALJ analysis as one order." *Kava Holdings, LLC v. NLRB*, 85 F.4th 479, 491 n.5 (9th Cir. 2023) (citation omitted).

III. DISCUSSION

To address the inherent "inequality of bargaining power" between employers and "employees who do not possess full freedom of association or actual liberty of contract," 29 U.S.C. § 151, the NLRA "'encourag[es] the practice and procedure of collective bargaining,' between labor and management to resolve 'industrial disputes arising out of differences as to wages, hours, or other working conditions,'" *Glacier Northwest, Inc. v. Teamsters*, 598 U.S. 771, 775 (2023) (alteration in original) (quoting 29 U.S.C. § 151). "The NLRA makes it unlawful for an employer to engage in unfair labor practices[.]" *Hooks ex rel. NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022) (citing 29 U.S.C. § 158). The NLRA also "grants the Board broad discretion to impose remedies for unfair labor

practices." *Ampersand*, 43 F.4th at 1238 (cleaned up). "The Board may take any 'affirmative action' that 'will effectuate the policies' of the Act." *Id.* (first quoting 29 U.S.C. § 160(c); then citing *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539-40 (1943)). "Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." *Va. Elec.*, 319 U.S. at 539 (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187, 189 (1941)). "The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.'" *Id.* (quoting *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940)).

The Board here found that the Company's lockout constituted unfair labor practices under Section 8(a)(1) and (3) of the Act. We deny both the Union's and the Company's Petitions for Review, and we grant the Board's Cross-Application for Enforcement for the following reasons: (1) we have jurisdiction over this consolidated appeal; (2) substantial evidence supports the Board's factual findings regarding the Company's unlawful lockout; (3) the Board's selection of remedies here is not a clear abuse of discretion; and (4) the Board's final Order is enforceable under the circumstances here disclosed.

A. Jurisdiction

"A federal court of appeals may review the Board's final order, if an aggrieved party seeks judicial review or if the Board seeks enforcement of its order." *Starbucks Corp. v. McKinney*, 602 U.S. 339, 343 (2024) (citing 29 U.S.C. § 160(e)-(f)). Macy's argues that the

Union lacks standing as a "person aggrieved" by the Board's Decision and Order within the meaning of § 160(f), because the Union "does not deny that the Board granted it all of the relief that it had specifically sought in the [C]harge form[s] and [C]omplaint."[3] *Int'l Union of Operating Eng'r Loc. 501 v. NLRB*, 949 F.3d 477, 482 (9th Cir. 2020). We review this jurisdictional question de novo, *see Advanced Integrative Med. Sci. Inst., PLLC v. Garland*, 24 F.4th 1249, 1256 (9th Cir. 2022), and conclude that we have jurisdiction because the Union is a "person aggrieved."[4]

After Macy's filed its Exceptions to the ALJ's Decision, the Union properly requested additional remedies not granted by the ALJ in its Cross-Exceptions. *See* 29 C.F.R. § 101.11(b) ("Whenever any party files exceptions, any other party . . . may file

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[3] The NLRB's "'authority kicks in when a person files a charge with the agency alleging that' an employer or labor union has engaged in an unfair labor practice." *McKinney*, 602 U.S. at 342-43 (first quoting *Glacier*, 598 U.S. at 775; then citing 29 C.F.R. § 101.2 (2021)). Next, a Regional Director investigates the charge. *Id.* at 343 (citing 29 C.F.R. § 101.4 (2023)). "If the charge appears to have merit," 29 C.F.R. § 101.8, then the Regional Director "institutes a formal action against the offending party by issuing an administrative complaint," *McKinney*, 602 U.S. at 343 (citing 29 C.F.R. § 101.8). The NLRB General Counsel "prosecutes the government's case." *Ampersand*, 43 F.4th at 1235 (citing 29 U.S.C. § 153(d)).

[4] Although Macy's does not challenge our "jurisdiction to resolve the Board's application for enforcement under 29 U.S.C. § 160(e)," we must assure ourselves of our own jurisdiction over the Board's Cross-Application for Enforcement. *NLRB v. Siren Retail Corp.*, 99 F.4th 1118, 1122, 1124 (9th Cir. 2024). Because we have jurisdiction under § 160(e) also, we may "proceed to the merits of the Board's application for enforcement." *Id.* at 1124.

cross-exceptions relating to *any portion* of the administrative law judge's decision." (emphasis added)). Among other things, the ALJ's recommended Order required that Macy's, at "all locations in Northern California and Reno, Nevada," physically maintain and post the Board's notice "for 60 consecutive days in conspicuous places," as well as distribute the same notice electronically to employees, or if Macy's "has gone out of business or closed the facilit[ies] involved in these proceedings, . . . duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the [Company] at any time since December 7, 2020." According to the Board, the Union requested "several extraordinary remedies, including multiple notice readings by upper-level managers involved in the lockout, notice posting on the [Company's] public website, notice mailing to all of the [Company's] employees who had worked at locations where employees were locked out, and notice posting for at least three years."

The Board then denied "in part the relief sought," 29 U.S.C. § 160(f), by expressly denying the Union's request for "several extraordinary remedies . . . because the Board's traditional remedies are sufficient to effectuate the policies of the Act in this matter." *See Textile Workers Union of Am., AFL-CIO v. NLRB*, 475 F.2d 973, 974 & n.2 (D.C. Cir. 1973) (per curiam) (noting that the union was a "party aggrieved," as it "petitioned for review of the Board's refusal to order

more stringent remedies"). Thus, jurisdiction over this consolidated appeal is proper.[5]

B. The Lockout

Under *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), an employer may lawfully lock out employees under Section 8(a)(1) and (3) of the Act "after a bargaining impasse has been reached," if the lockout is "for the sole purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position." Macy's insists that this is exactly what it did. We disagree.

Two years after *American Ship*, the Supreme Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), found that when, "after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike," *id.* at 378 (citing 29 U.S.C. §§ 157, 163). The Supreme Court determined that such interference with these rights by an employer constitutes an unfair labor practice under Section 8(a)(1) and (3) of the Act. *Id.* (citing 29 U.S.C. § 158(a)(1), (3)). Accordingly, as "the employer who refuses to reinstate strikers," Macy's "is guilty of an

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[5] By random selection for multidistrict litigation, *see* 28 U.S.C. § 2112(a)(1), (3), the Union's and the Company's Petitions for Review were first transferred and then consolidated here. As the alleged "*truly* aggrieved party," Macy's asserts that any remaining proceedings should be transferred to the Fifth Circuit, "wherein" Macy's "resides or transacts business[.]" 29 U.S.C. § 160(f). However, the Union as a "person aggrieved," could also file its petition with "the circuit wherein" the alleged unlawful lockout occurred. *Id.* Thus, we deny the Company's request, Case No. 23-188, Dkt. 16, for transfer.

unfair labor practice" unless it can show "legitimate and substantial business justifications" for its lockout. *Id.* (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)). Macy's does not make such a showing, and substantial evidence supports the Board's related findings.

Macy's first argues that the Board legally erred by failing to apply the so-called "*Great Dane* framework" to evaluate the alleged Section 8(a)(3) violation. We have previously acknowledged that:

> The Supreme Court has established a framework for determining whether employer conduct is unlawfully discriminatory. Some employer conduct is so "inherently discriminatory or destructive" of employee rights that anti-union motivation is inferred. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-28, 83 S. Ct. 1139, 10 L. Ed. 2d 308 (1963). If employer conduct is "inherently destructive," the Board may find an improper motive regardless of evidence of a legitimate business justification. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33, 87 S. Ct. 1792, 18 L. Ed. 2d 1027 (1967). If, on the other hand, "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,'" and the employer establishes a legitimate and substantial business justification for its actions, there is no violation of the Act without a finding of an actual anti-union motivation. *Id.* at 34, 87 S. Ct. 1792[.]

Fresh Fruit & Vegetable Workers Loc. 1096 v. NLRB, 539 F.3d 1089, 1096 (9th Cir. 2008); *see also id.* ("In determining whether or not a company has violated the NLRA, the relevant inquiry is whether or not the employer's action likely discouraged union membership and was motivated by anti-union animus." (citing *Metro. Edison*, 460 U.S. at 700)). "The Supreme Court has defined 'inherently destructive' conduct as conduct that 'carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose.'" *Id.* at 1096-97 (quoting *Am. Ship*, 380 U.S. at 311-12). Under this framework, the "burden of proving justification is on the employer." *Fleetwood Trailer*, 389 U.S. at 378 (citing *Great Dane*, 388 U.S. at 34).

Upon de novo review, we conclude that the Board applied the correct legal standard when it considered *Dayton Newspapers, Inc.*, 339 N.L.R.B. 650 (2003), *enforced in relevant part*, 402 F.3d 651 (6th Cir. 2005), a prior NLRB decision in which the Board applied the *Great Dane* framework. *See, e.g.*, *Dayton Newspapers*, 339 N.L.R.B. at 664 ("An employer's unlawful refusal to reinstate economic strikers is conduct so inherently destructive of employee rights that evidence of specific antiunion motivation is not necessary to establish a violation of the Act." (citing *Great Dane*, 388 U.S. 26)). "[T]he Board is not obligated to justify its interpretation anew with every application if it has done so adequately in a previous decision." *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 70 (D.C. Cir. 2005) (citation omitted). The Board therefore did not legally err on this ground.

For a lockout to be deemed lawful, "the union must be informed on a timely basis of the employer's demands so that the union can evaluate whether to accept them and prevent the lockout." *Alden Leeds, Inc.*, 357 N.L.R.B. 84, 93 (2011) (collecting cases), *enforced*, 812 F.3d 159 (D.C. Cir. 2016). "[I]n order for employees to 'knowingly [re]evaluate their position' . . . , the employees must not only be informed that they are locked out, but they must be clearly and fully informed of the conditions they must meet to be reinstated." *Dayton Newspapers*, 339 N.L.R.B. at 656 (quoting *Eads Transfer, Inc.*, 304 N.L.R.B. 711, 712 (1991), *enforced*, 989 F.2d 373 (9th Cir. 1993)). Relying on *Alden Leeds* and *Dayton Newspapers*, the Board concluded that Macy's violated Section 8(a)(1) and (3) of the NLRA "by locking out employees, while at the same time never clearly and fully informing them of the conditions that must be met in order to be reinstated."

Reviewing the record as a whole, we find that substantial evidence supports the Board's conclusion that Union employees were not clearly and fully informed of conditions they need to satisfy to be reinstated. As the ALJ found,

> [a]t the time Macy's locked out the [Union] engineers on December 7, neither the Union nor the strikers knew [the Company's] bargaining position. All they knew was that Macy's was refusing to allow the engineers to return to work until there was a contract in place. However, because the Final Offer had expired, and Macy's had not presented *any other bargaining proposals* to the Union, at

> the time of the lockout, neither the Union nor the employees were "clearly and fully informed of the *conditions* they must meet to be reinstated," *Dayton Newspapers*, 339 [N.L.R.B.] at 656, nor did they have "a clear statement of the *conditions* that [the] employees must accept to avert the lockout." *Alden Leeds, Inc.*, 357 [N.L.R.B.] at 95.

Nevertheless, Macy's counters that its lockout was justified. "An employer must reinstate an economic striker who offers unconditionally to return to work, unless the employer has a substantial and legitimate business reason for refusing to do so." *Zapex Corp. v. NLRB*, 621 F.2d 328, 333 (9th Cir. 1980) (citations omitted); *see also Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 662 (6th Cir. 2005) ("An employer violates NLRA § 8(a)(3) and (1) if it fails to reinstate striking workers without showing a legitimate and substantial business justification." (first citing *Fleetwood Trailer*, 389 U.S. at 378; then citing *Great Dane*, 388 U.S. at 34)). Macy's asserts that the lockout was justified because it was imposed in support of its bargaining position. Macy's further argues that it "followed *Eads Transfer*'s guidance by promptly informing the Union of its lockout on December 7, the first business day after the Union offered to return to work after a three-month strike." Considering *Dayton Newspapers*, we conclude that the lockout was not justified.

In *Dayton Newspapers*, 339 N.L.R.B. 650, the Board found an unlawful lockout where union workers, after a six-month strike, gave their unconditional offer to return to work during the

holiday season on Thursday, December 23, 1999, and the company refused their request for reinstatement four days later, on Monday, December 27, 1999. *See, e.g.*, *Dayton Newspapers*, 402 F.3d at 662 ("As a consequence of this refusal, the NLRB found that as of December 27, 1999, [the company] was engaged in an illegal lockout."). Before the Board in *Dayton Newspapers*, the company complained that the union's offer to return to work "came before the holidays and in the midst of [the company's] attempt to solve problems with Y2K adjustments," and that the company's "representatives involved in decision-making were not available at a moment's notice at that time of year[.]" 339 N.L.R.B. at 667. Recognizing that the Board "has the primary responsibility for balancing management's business needs with the workers' right to be reinstated," *Dayton Newspapers*, 402 F.3d at 663 (citing *Fleetwood Trailer*, 389 U.S. at 378), the Sixth Circuit concluded that the Board "did not err in finding that after December 27, [the employer's] demands became a 'moving target' that made it ever more difficult for the [u]nion to knowingly evaluate its position and end the lockout," *id.* Simply put, "employees must know at any point in the lockout what they can do to end it." *Id.* at 662.

As the NLRB, Macy's, and the Union all agree here, at the time of the lockout there was *no* offer at all on the table—not a confusing or uncertain one or even a moving target. *See Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 164-66 (D.C. Cir. 2016) (concluding that the Board's finding that the employer violated the NLRA is supported by substantial evidence, where the employer communicated an "unclear" proposal, "failing to provide the [u]nion with a timely, clear, and

complete offer setting forth the conditions necessary to avoid the lockout"). Macy's did not inform the Union of its demands or conditions in a timely, clear, and complete manner, preventing the Union members from having a fair opportunity to evaluate any bargaining proposals for either lockout or reinstatement purposes. *See id.* at 165. Worse than a "moving target" is not knowing where to aim at all. *See Dayton Newspapers*, 339 N.L.R.B. at 656.

Macy's concedes that it withdrew its Final Offer, and substantial evidence supports the Board's finding that Macy's rejected the Union's wage proposal without proffering any other bargaining proposals before the lockout. Although Macy's argues that its condition was that it required an agreement in place to end the lockout, we conclude that substantial evidence supports the Board's finding that such an indeterminate condition did not satisfy its obligations.

The Union ended its strike and gave Macy's its unconditional offer to return to work on December 4, 2020. Two days later, on December 6, 2020, Vega sent an email to Ashmore, stating that the employees would show up to work the next morning unless they were being locked out. That afternoon, Ashmore replied that:

> [The Union's] unexpected offer, coming on a Friday afternoon after a contentious strike of over three months, implicates several administrative, logistical, and economic issues that need to be fully evaluated on our end with the input of several company employees. For that reason, the team should

> not return to work on Monday. *This is not a lockout* . . . .

The next morning, on Monday, December 7, 2020, at least some of the Union members reported to work. On that day, Ashmore wrote to Vega:

> We have carefully evaluated your offer to have bargaining [Union] members return to work. *We are not willing to reinstate bargaining [Union] employees until there is an agreement in place; this decision is being made in support of our bargaining position.*

Macy's was "obligated to declare the lockout *before or in immediate response* to the strikers' unconditional offer[] to return to work." *Eads Transfer*, 304 N.L.R.B. at 713 (emphasis added). It was further required to inform the Union fully and clearly on the conditions necessary for employees to be reinstated. *See Dayton Newspapers*, 339 N.L.R.B. at 656. Macy's failed to satisfy either of these requirements, and instead it declared its lockout three days after the Union gave its unconditional offer to return to work *and* a day after Ashmore told Vega, "This is *not* a lockout . . . ." With such misdirection, the Union engineers would not be able to "knowingly reevaluate their position and decide whether to accept the employer's terms and . . . take other appropriate action." *Eads Transfer, Inc. v. NLRB*, 989 F.2d 373, 376 (9th Cir. 1993). Thus, we are unpersuaded that Macy's met the "guidance" set forth by *Eads Transfer*, when *Dayton Newspapers* applied just that and found that a similarly situated employer there failed to set forth its conditions clearly and fully, so "the [u]nion could not intelligently

evaluate its position and obtain reinstatement." *Dayton Newspapers*, 339 N.L.R.B. at 656.

Macy's alternatively argues that its lockout was not only offensive, but also defensive. "[T]he Supreme Court's *American Ship* decision has obliterated, as a matter of law, the line previously drawn by the Board between offensive and defensive lockouts." *Evening News Ass'n*, 166 N.L.R.B. 219, 221 (1967). Accordingly, "a fundamental principle underlying a *lawful lockout* is that the Union must be informed of the employer's demands, so that the Union can evaluate whether to accept them and obtain reinstatement," *Boehringer Ingelheim Vetmedica, Inc.*, 350 N.L.R.B. 678, 679 (2007) (emphasis added) (quoting *Dayton Newspapers*, 339 N.L.R.B. at 656), regardless of whether we characterize the lockout as offensive or defensive. Moreover, a lockout that is "defensive" in nature must be justified by an intent "to avoid severe and unusual hardships." *Id.*

Before the ALJ, Macy's argued that it had "good-faith concerns" over misconduct and sabotage by the Union, especially during the holiday shopping season, which it claims justified the "defensive" lockout. The ALJ systematically reviewed the Company's submitted evidence, including witness testimony, and ultimately concluded that Macy's provided those "post-hoc excuses" to bolster its defense and that the Company's true "motive" in locking out its employees was to "gain economic leverage so the Union would accept" its new wage proposal that it submitted to the Union on December 10, 2020. Because the Board "carefully examined the record and [found] no basis for reversing" the ALJ's credibility findings, we conclude

that the Board's "determinations are entitled to judicial deference[,]" based on its "'special expertise in drawing' inferences of credibility and unlawful motive[.]" *Kava Holdings*, 85 F.4th at 486 (quoting *Kallmann*, 640 F.2d at 1099). "We may not reject the ALJ's credibility determinations unless a clear preponderance of the evidence shows they are incorrect." *Lippincott Indus., Inc. v. NLRB*, 661 F.2d 112, 114 (9th Cir. 1981) (citations omitted). Here, the record as a whole shows that the ALJ's conclusions and the Board's reasoning about the Company's misconduct and sabotage arguments and evidence were well-supported by the articulated and admissible facts.

In sum, on this record, substantial evidence supports the Board's finding that Macy's violated the Act at the time of the lockout, where Macy's failed to inform the Union fully and clearly on the conditions necessary for employees either to be reinstated, *see Dayton Newspapers*, 339 N.L.R.B. at 656, or to avoid a lockout before one even occurred, *see Alden Leeds*, 357 N.L.R.B. at 95. Macy's failed to timely, clearly, and fully inform the Union of the conditions necessary (e.g., new contract offers or other bargaining proposals) to prevent a lockout or to be reinstated, when the Final Offer expired on October 15, 2020, and Macy's rejected the Union's November 25, 2020 wage proposal without providing "*any type* of counter offer" before the lockout on December 7, 2020. In other words, Macy's failed to meet its "burden of showing such a legitimate justification." *Eads Transfer*, 989 F.2d at 375 (citing *Fleetwood Trailer*, 389 U.S. at 378).

C. Remedies

"The function of the remedy in unfair labor cases is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Kallmann*, 640 F.2d at 1103 (citing *Phelps Dodge*, 313 U.S. at 194). The Board's selected remedies are challenged on two fronts. The Union argues that its requested additional remedies were improperly denied, but Macy's contends that the traditional ones were awarded in error. The NLRB counters that its selection of remedies strikes the proper balance under its broad discretion. The Board's "discretion in selecting remedies is 'exceedingly broad,' and we will enforce a remedy 'unless it represents a clear abuse of discretion.'" *Ampersand*, 43 F.4th at 1236 (quoting *Wylie*, 934 F.2d at 236). Finding no clear abuse of discretion, we enforce the Board's remedial order.

1. The Union's Requested Additional Remedies

The Board denied the Union's request for "several extraordinary remedies" because it concluded that "traditional remedies are sufficient to effectuate the policies of the Act" here. The Union petitions for review of that determination, requesting four additional remedies: (1) a notice reading in the presence of members of management responsible for the lockout decision; (2) an extended notice posting more than the standard sixty-day period; (3) a notice mailing to all Union members, including those who were locked out; and (4) a notice expressly explaining

how Macy's violated the Act.[6] We conclude that the Board did not clearly abuse its discretion in declining to award these remedies. *See Wylie*, 934 F.2d at 236.

With respect to the first three additional remedies (a notice reading with management's presence, an extended notice posting, and a notice mailing), we observe that they are typically reserved for "cases involving respondents who have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct." *Noah's Ark Processors, LLC*, 372 N.L.R.B. No. 80, slip op. at 4 (Apr. 20, 2023) (finding "egregious or widespread" misconduct, where the respondent's "violations seriously affected the entire unit by undermining their chosen bargaining representative, violating their right to have the [u]nion negotiate on their behalf, and demonstrating to them in no uncertain terms that the [r]espondent was willing to ignore a court order in order to violate their rights"), *enforced*, 98 F.4th 896 (8th Cir. 2024); *see also Whitesell Corp.*, 357 N.L.R.B. 1119, 1124 (2011); *HTH Corp.*, 361 N.L.R.B. 709, 714 (2014), *enforced in relevant part*, 823 F.3d 668 (D.C. Cir. 2016). Based on the record before us, we conclude that the Board did not clearly abuse its discretion, where the record does not contain evidence that Macy's is a repeat offender of the Act or engaged in such egregious or widespread misconduct that warrants these extraordinary remedies.

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[6] On appeal, the Union challenges the Board's Decision and Order only to the extent its extraordinary remedies were denied; it does not take issue with the traditional remedies that were granted and the Board's conclusion that Macy's violated the Act by unlawfully locking out employees.

As to the fourth additional remedy, the Union argues that the Board's notice does not "contain affirmative language expressly explaining how Macy's violated the Act." For example, the Board's notice that is required to be physically posted at the Company's facilities and electronically distributed to employees, includes the statement, "WE WILL NOT lock you out without providing you with a timely, clear, and complete offer, that sets forth the conditions necessary to avoid the lockout." Specifically, the Union requests that the Board either substitute or supplement "We will not" statements with those stating "[w]e have done or committed . . . ."[7] We agree with the NLRB that the Union fails to show how it clearly abused its discretion by applying its "decades-old practice of

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[7] The Board's notice also includes the following "We will" statements:

> WE WILL make the locked-out employees whole for any loss of earnings and other benefits resulting from the unlawful lockout, less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses, plus interest.

To further clarify the Company's actions to employees, however, the Union proposes the following amended language to the Board's notice:

> We were found by the National Labor Relations Board to have violated federal law by refusing to allow members of [the Union] to return to work and unlawfully locked them out. We have agreed to remedy this violation by reinstating all locked out employees who wish to return and by making them whole for our conduct.

including only 'WE WILL' and 'WE WILL NOT' phrases in its notices . . . ." *See, e.g.*, *HTH Corp. v. NLRB*, 823 F.3d 668, 672 (D.C. Cir. 2016) ("In the 'notice' the officials are . . . to state 15 specific assurances in the form, 'We will' adhere to specified NLRA obligations and remedy various breaches, or 'We will not' violate the Act in a wide range of specified ways."). Accordingly, we do not find a "clear abuse of discretion," *Ampersand*, 43 F.4th at 1236 (quoting *Wylie*, 934 F.2d at 236), when the Board denied the Union's "several extraordinary remedies" because traditional ones sufficed here. Thus, we deny the Union's Petition for Review.

2. The Company's Challenges to the Board's Make-Whole Relief

Macy's argues that the Board erred in finding that it was liable throughout the lockout and in awarding the Union's make-whole relief pursuant to *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 1 (Dec. 13, 2022) (clarifying that "make-whole relief" includes compensation "for all direct or foreseeable pecuniary harms" to affected employees), *order vacated in part on other grounds*, 102 F.4th 727 (5th Cir. 2024).[8] On

[8] Macy's also argues that the Board erred by retroactively applying *Thryv* to award the Union's make-whole remedy. On appeal, this argument is barred because Macy's neither raised it first in a motion for reconsideration before the Board nor showed any extraordinary circumstances here. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *see also NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1127 (9th Cir. 2011) ("Section 10(e) . . . bars judicial review of a newly minted

June 4, 2024, the NLRB filed its Rule 28(j) letter, apprising this Court of the Fifth Circuit's May 24, 2024 opinion in *Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024), which did not address the merits of the Board's revised make-whole relief. We note that, "[a]s far as we can tell, this is a question of first impression for the Ninth Circuit . . . ." *United Steel Workers of Am. AFL-CIO-CLC v. NLRB*, 482 F.3d 1112, 1115 n.4 (9th Cir. 2007). We conclude that the Board did not clearly abuse its discretion in ordering make-whole relief. *Thryv*'s make-whole framework is valid when the remedies are equitable and "only actual losses [are] made good." *Phelps Dodge*, 313 U.S., at 194. In other words, *Thryv* remedies must be "sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (describing this principle as "cardinal").

i. The Company's Liability During the Entirety of the Lockout

Macy's insists that it cured the taint of its lockout by tendering its December 10, 2020 wage proposal to the Union, three days after the lockout began. We disagree. "We review the Board's finding of taint for substantial evidence." *Denton Cnty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 168 (5th Cir. 2020) (citations omitted). "[T]o cure a lockout, the employer must restore the status quo ante as well as end the lockout." *Alden Leeds*, 812 F.3d at 166 (citing *Greensburg Coca-Cola Bottling Co.*, 311 N.L.R.B. 1022, 1029 (1993),

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objection to a remedial order when a party fails to move for reconsideration of the Board's *sua sponte* modification." (citations omitted)).

enforcement denied on other grounds, 40 F.3d 669 (3d Cir. 1994)). "[A] lockout unlawful at its inception retains its initial taint of illegality until it is terminated *and* the affected employees are made whole." *Movers & Warehousemen's Ass'n of Metro. Wash., D.C., Inc.*, 224 N.L.R.B. 356, 357 (1976) (emphasis added), *enforced*, 550 F.2d 962, 966 (4th Cir. 1977) ("We think it dispositive of the issue that the employers here failed to dissipate the effects of their unlawful lockout."), *cert. denied*, 434 U.S. 826 (1977). Substantial evidence supports the Board's finding that the lockout's taint "was not cured when Macy's presented the Union with its new wage proposal on December 10," because that offer neither terminated the lockout nor made the affected employees whole.

We recognize, however, that Macy's may "avoid further liability if it is able to *show affirmatively* that a failure to restore the status quo ante did not adversely affect subsequent bargaining." *Alden Leeds*, 812 F.3d at 166 (emphasis added) (quoting *Greensburg Coca-Cola*, 311 N.L.R.B. at 1029). It is the Company's burden—not the Union's or the NLRB General Counsel's—"to show that its failure to restore the *status quo ante* had no adverse impact on the subsequent collective bargaining." *Movers*, 224 N.L.R.B. at 358. This burden requires Macy's "to disentangle the consequences for which it was chargeable from those from which it [was] immune." *Id.* (quoting *NLRB v. Remington Rand*, 94 F.2d 862, 872 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938)). The ALJ found that Macy's failed to carry its burden to make this affirmative showing. Indeed, the ALJ

observed that, at the hearing, "[n]o such evidence was presented" by Macy's.

Macy's counters that these erroneous findings "ignore[] substantial evidence that the parties negotiated in good faith after the lockout." According to Macy's, "[i]f the lockout had adversely impacted the parties' ongoing bargaining, then the [r]ecord would show . . . the Union was *forced to accept a substandard proposal* because of the lockout." However, Macy's misunderstands the standard. The fact that the record does not show the Union's acceptance of a substandard proposal does not on its own satisfy the Company's burden of showing "*no* adverse impact on the subsequent collective bargaining." *Alden Leeds*, 357 N.L.R.B. at 84 n.3 (emphasis added) (quoting *Movers*, 224 N.L.R.B. at 358). The ALJ found that even the "limited evidence in the record" relating to the subsequent bargaining indicated that the Union made concessions, which were indicative of its weakened position because of the Company's unlawful lockout. Those concessions included an offer to cap wage rates at the levels proposed in the Final Offer as well as proposals to "delete two engineer classifications from the contract, and further delete a section from the agreement that required Macy's to contribute over $500 per engineer to a training fund." Instead of addressing these concessions, Macy's maintains that no inferior offer was accepted by the Union. These concessions represent substantial evidence in support of the ALJ's finding. "In these circumstances, without a cessation of the lockout *and* a restoration of the *status quo ante*, it is difficult to conclude that any *bargaining* which ensued was not adversely

affected[.]"[9] *Movers*, 224 N.L.R.B. at 358 (first and third emphases added). We conclude that substantial evidence supports the ALJ's findings, as adopted by the Board, that Macy's unlawful lockout placed the Union in a weakened bargaining position, and that Macy's failed to satisfy its burden of showing otherwise.

ii. The Board's Revised Make-Whole Remedial Framework

In *Thryv*, the Board "standardiz[ed] [its] make-whole relief to expressly include the direct or foreseeable pecuniary harms suffered by affected employees . . . ."[10] 372 N.L.R.B. No. 22, slip op. at 7. The Board noted that "'direct harms' are those in which an employee's 'loss was the direct result of the [employer's] illegal conduct,'" *id.* at 13 (quoting *BRC Injected Rubber Prods., Inc.*, 311 N.L.R.B. 66, 66 n.3 (1993)), and that "foreseeable harms" are "those which the [employer] knew or should have known would be

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[9] Under the NLRA, when negotiations fail, there is no "compulsion to reach agreement." *Amax*, 453 U.S. at 336 (citations omitted). Macy's needed to demonstrate that the lockout "did not adversely affect subsequent *bargaining*[,]" not subsequent *contracting*. *Alden Leeds*, 812 F.3d at 166 (emphasis added) (quoting *Greensburg Coca-Cola*, 311 N.L.R.B. at 1029).

[10] In response to the Court's order requesting supplemental briefing, Macy's argues that under the Supreme Court's recent opinion in *SEC v. Jarkesy*, 603 U.S. 109 (2024), it is entitled to a jury trial on the so-called "*Thryv* remedies." Macy's failed to raise a Seventh Amendment objection to the Board, *see* 29 U.S.C. § 160(e), and it similarly failed to raise any Seventh Amendment arguments in this Court until prompted to do so by the Court's order. We therefore decline to entertain this argument. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

likely to result from its violation of the Act, regardless of its intentions," *id.* Macy's argues that the compensation for "direct or foreseeable pecuniary harms" as contemplated by *Thryv* would be improper "compensatory damages," "consequential damages," or "make-whole relief."

"[V]esting in the Board the primary responsibility and broad discretion to devise remedies . . . , subject only to limited judicial review," *Sure-Tan*, 467 U.S at 898-99 (collecting cases), Section 10(c) of the NLRA empowers the Board to "take any 'affirmative action' that 'will effectuate the policies' of the Act," *Ampersand*, 43 F.4th at 1238 (first quoting 29 U.S.C. § 160(c); then citing *Va. Elec.*, 319 U.S. at 539-40). We will not disturb the Board's remedial order, "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Va. Elec.*, 319 U.S. at 540. Macy's makes no such showing here.

After "careful consideration" of both its "remedial authority" and "history of addressing the effects of unfair labor practices," the Board in *Thryv* clarified and standardized its definition of "make-whole relief" to "expressly include the direct or foreseeable pecuniary harms suffered by affected employees" to "more fully effectuate the make-whole purposes of the Act." 372 N.L.R.B. No. 22, slip op. at 7. We agree that make-whole relief, as a general matter, furthers the policy of the NLRA because it is "directly targeted" at the Company's unlawful lockout and aimed at "restor[ing] the economic strength that is necessary to ensure a return to the status quo ante at the

bargaining table." *Ampersand*, 43 F.4th at 1238 (alteration in original) (citation omitted).

According to Macy's (and the partial dissent), the Board's decision in *Thryv* improperly authorizes itself to award full compensatory damages. Macy's contends that "the Board lacks the authority to award damages for purportedly foreseeable financial harms." *See, e.g.*, *UAW-CIO v. Russell*, 356 U.S. 634, 642-43 (1958) ("The power to order affirmative relief under [Section] 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." (citation omitted)).

We agree that the NLRB is not authorized to award "consequential damages." *See* Partial Dissent at 52. The NLRB "does not pursue the 'adjudication of private rights.' Rather, it 'acts in a public capacity to give effect to the declared public policy of the Act . . . .'" *EEOC v. Occidental Life Ins. Co. of Cal.*, 535 F.2d 533, 538 (9th Cir. 1976) (alteration in original) (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940)), *aff'd*, 432 U.S. 355 (1977). The broad "grant of remedial power" under the Act also "does not authorize punitive measures, but making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."[11] *NLRB v. Strong*, 393 U.S. 357, 359 (1969) (cleaned up).

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[11] Significantly, the Board remains within its orbit here because its make-whole relief is designed "solely to 'restore the status quo[,]'" so it is equitable in nature. *Jarkesy*, 603 U.S. at

But the NLRB has not awarded such damages here. We therefore conclude that the Board's invocation of *Thryv*'s make-whole relief framework in this case vindicates a public right. *See Va. Elec.*, 319 U.S. at 543 ("The instant reimbursement order is not a redress for a private wrong. Like a back pay order it does *restore to the employees in some measure what was taken from them* because of the [c]ompany's unfair

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123 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.")).

The Board specifically states that its "make-whole remedies do not punish bad actors, but rather implement the statutory principles of rectifying the harms actually incurred by the victims of unfair labor practices and restoring them to where they would have been but for the unlawful conduct." *Thryv*, 372 N.L.R.B. No. 22, slip op. at 11. We agree because "[t]he instant case"—where no actual remedies or monetary relief have been ordered—"is not a suit at common law or in the nature of such a suit." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

That any make-whole remedy must be "sufficiently tailored to the actual, compensable injuries suffered," *Sure-Tan*, 467 U.S. at 901, contrary to the partial dissent's view, also does not equate to the improper "adjudication or vindication of private rights," *Haleston Drug Stores v. NLRB*, 187 F.2d 418, 420 (9th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951); *see also Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 269-70 (1940) ("It is the Board's right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'. Both the order and the decree are aimed at the prevention of the unfair labor practice."). Instead, it merely underscores how the remedy is "an incident to [permissible] equitable relief," *Jones & Laughlin*, 301 U.S. at 48, which "eschews mechanical rules and depends on flexibility," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (cleaned up).

labor practices." (emphasis added)). "The fact that these proceedings (may) operate to confer an incidental benefit on private persons does not detract from this public purpose." *Occidental Life*, 535 F.2d at 538 (citation omitted). To the extent that the Board's make-whole relief "somewhat resemble[s] compensation for private injury," that compensation is merely incidental to "the effectuation of the policies of the Act" because the remedy is primarily "designed to aid in achieving the elimination of industrial conflict[,]" vindicating "public, not private rights."[12]

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[12] On December 27, 2024, the Third Circuit issued its opinion in *NLRB v. Starbucks Corp.*, --- F.4th ----, No. 23-1953, 2024 WL 5231549 (3d Cir. Dec. 27, 2024), granting the Board's petition to enforce its order, yet vacating the *Thryv* remedies for exceeding the Board's authority under the NLRA. Unlike the partial dissent, we do not view *Starbucks* as wholly in conflict with today's opinion. Like the Third Circuit, we agree and recognize that the NLRB has long ordered, and still may order, monetary relief akin to backpay. *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *11-12. We also agree, as we have emphasized, that any make-whole relief must be equitable in nature. *Id.* As the Third Circuit acknowledges, any monetary relief ordered by the NLRB must be a form of restitution addressing the result of the employer's violation of the NLRA. *See, e.g.*, *id.* at *11 ("The Board can still award monetary relief based on what the employer withheld as a result of an unfair labor practice." (emphasis added)); *accord* Partial Dissent at 52; *see also Phelps Dodge*, 313 U.S. at 198 ("[O]nly actual losses should be made good[.]").

However, to the extent that the Third Circuit's opinion could be read to invalidate *any* form of monetary relief because it "*resembles* an order to pay damages," we disagree. *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *12 (emphasis added) (citing *Damages*, Black's Law Dictionary (12th ed. 2024) (defining "damages" as "[m]oney . . . ordered to be paid to[] a person as compensation for loss or injury")). Resemblance alone cannot be dispositive, where Congress's express grant of broad authority to

Va. Elec., 319 U.S. at 543 (first citing *Agwilines*, 87 F.2d at 150-51; then citing *Phelps Dodge*, 313 U.S.

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the NLRB to fashion appropriate remedies, *see* 29 U.S.C. § 160(c), and those remedies' nature and purpose, indicate that make-whole relief can operate "[l]ike a back pay order" that

> does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this both these types of monetary awards *somewhat resemble compensation for private injury*, but it must be constantly remembered that both are *remedies created by statute*—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are *designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights*.

Va. Elec., 319 U.S. at 543 (emphases added) (first citing *Agwilines*, 87 F.2d at 150-51; then citing *Phelps Dodge*, 313 U.S. 177); *see also Russell*, 356 U.S. at 643 (quoting the same). Any permissible *Thryv* remedy must therefore operate like like a backpay order, serving to effectuate the policies of the Act by eliminating industrial conflict and giving something akin to restitution—in other words, it must be equitable. *See Curtis*, 415 U.S. at 197 ("[C]ourts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution."); *see also Restitution*, Black's Law Dictionary (12th ed. 2024) (defining "restitution" as "[r]eturn or restoration of some specific thing to its rightful owner or status"). Such remedies only incidentally compensate employees to "insure meaningful bargaining," *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964), and to "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table," *Ampersand*, 43 F.4th at 1238 (cleaned up) (citation and alteration omitted); *see also supra* note 11. "For this reason it is erroneous to characterize" equitable *Thryv* remedies "as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning" the make-whole relief here. *Va. Elec.*, 319 U.S. at 543.

177). After all, the NLRA's overriding policy is "industrial peace." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (quoting *Brooks v. NLRB*, 348 U.S. 96, 103 (1954)).

Accordingly, compensation for "direct or foreseeable pecuniary harms," so long as it is equitable, would allow for "a restoration of the situation, as nearly as possible, to that which would have obtained but for" the unlawful lockout here. *Phelps Dodge*, 313 U.S. at 194. As such, the Board's remedial order is not "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[13] *Va. Elec.*, 319 U.S.

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[13] To the extent that Macy's argues that "*Thryv* grants the Board unfettered discretion to determine whether a pecuniary loss is direct or foreseeable," we disagree because the Supreme Court has previously acknowledged that "Section 10(c) . . . was *intended* to give the National Labor Relations Board broad authority to formulate appropriate remedies[,]" *Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 446 n.26 (1986) (emphasis added), and that:

> [I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an *infinite variety of specific situations*. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.

Phelps Dodge, 313 U.S. at 194 (emphasis added); *see also Va. Elec.*, 319 U.S. at 539 (emphasizing that the Board's remedial power "is not limited to the illustrative example of one type of permissible affirmative order," such as backpay, and cautioning that the "particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine'" (first citing *Phelps Dodge*, 313 U.S. at 187, 189; then quoting *Machinists*, 311 U.S. at 82)).

at 540. We will not disturb the Board's remedial order here, where "both the terms of the Act and the case law construing the Act support the Board's action in this case," and there has been no showing of any actual, issued remedy that is inequitable. *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 38 (D.C. Cir. 2017) (collecting cases); *see also id.* at 37 ("The Board is entitled to considerable deference in crafting remedies for unfair labor practices, and the reasons given by the Board to justify the new make-whole remedial framework pass muster.").[14]

Macy's also contends that the "pecuniary damages that [the Board] seeks to award are the wolf of consequential damages in the sheep's clothing of 'make-whole' relief." Macy's asserts that this kind of relief here would be prohibited consequential damages under *United States v. Burke*, 504 U.S. 229 (1992), which is a tax consequence case relating to an action under Title VII of the Civil Rights Act of 1964 for sex-based discrimination in the payment of salaries. Although not controlling in the NLRA context, *Burke* demonstrates how the Board's make-whole relief under *Thryv* is appropriate here, contrary to the

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[14] This is not *Chevron* deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Rather, it is a reflection of the discretion afforded by Congress to allow the Board to award remedies it deems fit to effectuate policies of the Act. *See Phelps Dodge*, 313 U.S. at 194 ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.").

Company's assertion. For the below reasons, we find no reason to disturb the Board's remedy, when it serves to "more fully effectuate the make-whole purposes of the Act." *Thryv*, 372 N.L.R.B. No. 22, slip op. at 7.

The Supreme Court in *Burke* distinguished between make-whole relief and damages recoverable under tort law. It considered this distinction in the context of determining whether a settlement payment relating to a backpay claim arising under Title VII would be excludable from gross income under the federal Internal Revenue Code ("IRC"), as "damages received . . . on account of personal injuries." *Burke*, 504 U.S. at 230 (alteration in original) (quoting 26 U.S.C. § 104(a)(2)). To qualify for exclusion from gross income under the IRC, the respondents had to show that Title VII redressed a tort-like personal injury. *Id.* at 237. The Supreme Court observed "one of the hallmarks of traditional tort liability is the availability of a broad range of damages" that are unavailable in both Title VII and NLRA contexts. *Id.* at 235. Under tort law, one may be awarded sums "*larger than the amount necessary* to reimburse actual monetary loss sustained or even anticipated by the plaintiff," as well as those amounts redressing "intangible elements of injury that are 'deemed important, even though *not pecuniary* in [their] immediate consequence[s].'" *Id.* (alterations in original) (emphases added) (quoting D. Dobbs, Law of Remedies 136 (1973)). *Thryv* does not provide such relief. After all, relief under either the NLRA or "Title VII focuses on 'legal injuries of an economic character[.]'" *Id.* at 239 (quoting *Albemarle Paper*, 422 U.S. at 418); *see also Golden State Bottling Co. v.*

NLRB, 414 U.S. 168, 188 (1973) ("[A]n order requiring reinstatement and backpay is aimed at 'restoring the economic status quo that would have obtained but for the company's wrongful refusal to reinstate . . . .'" (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969))).

As the partial dissent points out, the Supreme Court in *Burke* also observed that Title VII "restor[es] victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination[,]" but not for *nonpecuniary* harms, including "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 239 (emphasis added) (citation omitted). Macy's argues that these "express limitations in *Burke* apply with equal force to Section 10(c) of the Act," because Title VII's backpay provision was expressly modeled on the NLRA's. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848-49 (2001) (noting that Title VII's backpay provision, 42 U.S.C. § 2000e-5(g)(1), "closely tracked the language" of the Act's backpay provision, 29 U.S.C. § 160(c), which gives courts "guidance as to the proper meaning of the same language"). Even if we accept this comparison, the Board's make-whole relief is consistent with both Title VII's, which it need not follow in this context, and the NLRA's, which it must. For example, "Congress directed the thrust of [Title VII] to the *consequences* of employment practices," *Albemarle Paper*, 422 U.S. at 422 (emphasis added) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)), with a "clear purpose . . . to bring an end to

the proscribed discriminatory practices and to *make whole*, in a *pecuniary fashion*, those who have suffered by it," *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969) (emphases added), *as amended on denial of reh'g* (Oct. 29, 1969). Similarly, under the NLRA, the Board's "power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of *removing or avoiding the consequences of violation* where those consequences are of a kind to thwart the purposes of the Act." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 236 (1938) (emphasis added); *see also Albemarle Paper*, 422 U.S. at 417-18 ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . ." (cleaned up)); *Thryv*, 372 N.L.R.B. No. 22, slip op. at 11 (articulating similar principles).

Moreover, the Board acknowledged that it "will *not* issue remedial orders for harms which are unquantifiable, speculative, or nonspecific." *Thryv*, 372 N.L.R.B. No. 22, slip op. at 12 (emphasis added) (citing *Nortech Waste*, 336 N.L.R.B. 554, 554 n.2 (2001)). In *Thryv*, the Board addressed that any make-whole relief comprised of direct or foreseeable pecuniary harms will be fully litigated in a later compliance proceeding. *See id.* at 11-12. The NLRB General Counsel will have to prove whether any such relief is "not speculative," and that it is "specific and easily ascertained." *Nortech Waste*, 336 N.L.R.B. at

554 n.2. We conclude that a remedial framework that "specifically leav[es] to the compliance stage of the proceeding the question of whether the employees incurred" direct or foreseeable pecuniary harms "attributable" to the Company's unlawful lockout, *id.*, is not a clear abuse of discretion here. In other words, any later pecuniary order "must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." *Sure-Tan*, 467 U.S. at 900 (citation omitted)); *Phelps Dodge*, 313 U.S. at 198 ("[O]nly actual losses should be made good[.]").

Under the NLRA, Congress's grant of remedial power entrusts the Board to make "workers whole for losses suffered on account of an unfair labor practice . . . ." *Strong*, 393 U.S. at 359 (quoting *Phelps Dodge*, 313 U.S. at 197); *see also id.* ("Back pay is one of the *simpler and more explicitly authorized* remedies utilized to attain this end." (emphasis added)). We conclude that the Board's framework for compensation "for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses," is within the Board's broad discretion of what "can fairly be said to effectuate the policies of the Act," *Va. Elec.*, 319 U.S. at 540, by restoring "the situation, as nearly as possible, to that which would have occurred but for the violation," *Kallmann*, 640 F.2d at 1103 (citing *Phelps Dodge*, 313 U.S. at 194). The Board's "order clearly falls within the general purpose of making the employees whole, and thus restoring the economic status quo that would have obtained but for" the Company's unlawful lockout. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. "Imposing such

remedies, designed to respond directly to an unfair labor practice, falls squarely within the heartland of the NLRB's delegated powers." *Ampersand*, 43 F.4th at 1238 (cleaned up). Accordingly, on the record as a whole, "we have no reason to find that the Board's decision to change its remedial framework is 'a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *King Soopers*, 859 F.3d at 39 (quoting *Fibreboard Paper*, 379 U.S. at 216).

Therefore, to the extent that Macy's challenges the Board's revised make-whole remedial framework,[15] we deny its Petition for Review.

D. The Circumstances Here Disclosed

The partial dissent contends that the Board's "actions were arbitrary and capricious and unsupported by the record." Partial Dissent at 55. However, applying the law as it is, not as what the partial dissent wishes it to be, reveals that they were simply not. *See Danielson v. Inslee*, 945 F.3d 1096, 1103 (9th Cir. 2019); *see also Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984). Our task is to "evaluate the entire record and uphold the NLRB if a reasonable jury could have reached the same conclusion, even if we would justifiably have made a different choice under de novo review." *Int'l All. of Theatrical Stage Emps., Loc. 15 v. NLRB*, 957 F.3d 1006, 1013 (9th Cir. 2020) (emphasizing the standard

[15] As discussed, any remedies it does order must be equitable, specific, and only make "actual losses … good." *Phelps Dodge*, 313 U.S. at 198. Macy's can also raise its forfeited or waived arguments in the subsequent compliance proceeding.

of review) (cleaned up). For example, while it is possible to infer that the Company's lockout could have been informed by "enormous logistical difficulties," Partial Dissent at 83, the weighing of such evidence belongs to the Board, which "has special expertise in drawing inferences of credibility and unlawful motive, and [whose] determinations are entitled to judicial deference," *Kava Holdings*, 85 F.4th at 486 (cleaned up). Here, substantial evidence supports the Board's consideration and conclusion of the credibility and value of such evidence. *See Int'l All. of Theatrical Stage Emps.*, 957 F.3d at 1013 ("Evidence is substantial when a reasonable mind might accept it as adequate to support a conclusion—even if it is possible to draw a contrary conclusion from the evidence." (cleaned up)); *see also* 29 U.S.C. § 160(e) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole *shall be conclusive*." (emphasis added)); *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *6 n.2 (noting that a judge on the panel doubted the NLRB's factual conclusions, but he recognized that because there is "more than a scintilla" of evidence to support the NLRB's "contrary conclusions," the court is "bound by the substantial evidence standard of review," so it is barred from "explor[ing] the other ways of reading [the] record" (citation omitted)).

Similarly, while the partial dissent raises potentially significant points about the scope of make-whole relief under *Thryv*, Macy's neither properly challenged *Thryv*'s retroactivity or the Seventh Amendment's application to this case nor showed "extraordinary circumstances" to warrant

consideration of these issues. *See supra* notes 8, 10; *see also* 29 U.S.C. § 160(e); *Legacy Health Sys.*, 662 F.3d at 1127; *cf. Starbucks*, --- F.4th ----, 2024 WL 5231549, at *12 (holding that the employer's "statutory interpretation and Seventh Amendment challenges were not forfeited"). More critically, the Board has yet to order specific forms of relief, including those the partial dissent lambasts as "virtually unlimited." *See* Partial Dissent at 61. Such costs could be beyond the Board's remedial authority. *See id.* (listing examples including "day care costs, specialty tool costs, utility disconnection/reconnection fees, relocation/moving costs, legal representation costs in eviction proceedings, and expenses resulting from a change in immigration status"). Only actual "losses suffered on account of an unfair labor practice . . . should be made good." *Phelps Dodge*, 313 U.S. at 197-98. And, indeed, the Board must still establish, in a later proceeding, how any make-whole relief it seeks is equitable or "sufficiently tailored to the actual, compensable injuries suffered" by the employees in this case. *Sure-Tan*, 467 U.S. at 901.

It also bears repeating that "[i]n fashioning an appropriate remedy to address the substantial unfair labor practices in this case, the Board was acting at the 'zenith' of its discretion." *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015) (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *accord* 29 U.S.C. § 160(c) (authorizing the NLRB "to take such affirmative action . . . as will effectuate the policies" of the Act). Additionally, there has simply been "no showing that the Board's order restoring the status quo ante to insure meaningful bargaining is not well

designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company." *Fibreboard Paper*, 379 U.S. at 216. There has also been no meaningful showing that as a result of an unfair labor practice any make-whole relief in this case "exceed[s] what the employer unlawfully withheld[,]" or is not "closely tied to the equitable remedy of backpay." *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *11-12; *see also supra* note 13; *accord* Partial Dissent at 52.

One final note: the amended dissent claims that our original opinion "accepted" the Board's supposed "power grab wholesale" and that we now attempt to "narrow the Board's authority to order relief in [this] amended opinion." Partial Dissent at 49. But nowhere in the plain text of our original, or even amended, opinion did we provide such maximalist language, and the dissent is unable to point to any. Our amendments merely reiterate, perhaps to the point of redundancy, that we are unable to permit or prohibit any specific forms of relief at this stage. Such determinations must await the forthcoming compliance proceeding, where Macy's can raise the arguments the dissent urges us to consider now, despite strict procedural bars that preclude us from doing so. We only applied the law as it is, compelled by decades of precedent, not as what we wish, predict, or think it to be.

In sum, we "decide[d] only the case before us and sustain[ed] the power of the Board" to tailor remedies that "effectuate the statutory purpose" behind the National Labor Relations Act "*under the circumstances here disclosed*." *Va. Elec.*, 319 U.S. at

543, 545 (emphasis added); *see also Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36, 42 n.17 (9th Cir. 1969) (acknowledging that in *Virginia Electric*, the Supreme Court found that it "need not examine the various situations in those cases 'or consider hypothetical possibilities'" (quoting *Va. Elec.*, 319 U.S. at 545)); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 891 (1st Cir. 1941) ("We therefore think that *under the circumstances here disclosed* the broader prohibition as appears in . . . the Board's order is within the discretion of the Board and should be enforced." (emphasis added)), *cert. denied*, 313 U.S. 595 (1941).

IV. CONCLUSION

We have considered the Union's and the Company's remaining arguments and find them unpersuasive. For the foregoing reasons, we **DENY** both the Union's and the Company's Petitions for Review, and we **GRANT** the Board's Cross-Application for Enforcement of its final Order.

PETITIONS FOR REVIEW DENIED; CROSS-APPLICATION FOR ENFORCEMENT GRANTED; ORDER ENFORCED.

BUMATAY, Circuit Judge, dissenting in part:

This case involves the fallout from a lengthy labor dispute between Macy's and the International Union of Operating Engineers, Local 39 ("Union"), which represents some of the retailer's engineers and craftsmen. After extensive negotiations over a new collective bargaining agreement, Macy's gave the Union its best and final offer. The Union rejected that offer and went on strike. During the three-month strike, Macy's accused Union members of harassing its customers and employees and sabotaging its facilities. The Union then made a surprise unconditional offer to return to work—shortly before the close of business on a Friday evening. Macy's pleaded for time to respond to the offer, but the Union refused. So when the Union members showed up for work on Monday—the next workday—Macy's did not let them start working and locked them out. Two days later, Macy's gave the Union a new proposal to end the dispute and lockout. The Union again rejected Macy's offer, and the two sides never reached an agreement.

Enter the National Labor Relations Board. The Board's in-house prosecutor charged Macy's with an "unfair labor practice." After a hearing, a Board Administrative Law Judge ("ALJ") systematically rejected each of Macy's defenses and found that Macy's violated the National Labor Relations Act ("Act") because it waited a whole *two days* before it gave a new offer to the Union. As punishment, the ALJ ordered Macy's to make the Union members whole for any losses of pay and benefits that they may have suffered because of the lockout. *Macy's, Inc.*, 372 NLRB No. 42, at 21 (2023). On review, the Board

agreed with the ALJ that Macy's violated the Act. But it rejected the ALJ's remedy *because it didn't go far enough*. Instead, the Board ordered Macy's to "also compensate the employees for any other direct *or* foreseeable pecuniary harms incurred as a result of the unlawful lockout . . . regardless of whether these expenses exceed interim earnings." *Id.* at 1 n.2 (emphasis added). And because the Union and Macy's still haven't come to an agreement, Macy's must compensate the Union's members for ongoing harms accumulating to this day—more than four years since the lockout.

But the Board has no authority to order this type of monetary relief. Until three years ago, the Board had never claimed the authority to award consequential damages, like the ones ordered against Macy's. *See Thryv, Inc.*, 372 NLRB No. 22 (2022), *overruled on different grounds*, *Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024). Indeed, the Act restricts the Board to ordering only "back pay" and "affirmative action . . . as will effectuate the policies of" the Act. *See* 29 U.S.C. § 160(c). Somehow, the Board has transformed this limited statutory grant into something that covers credit card debt, withdrawals from retirement accounts, car loans, mortgage payments, childcare, immigration expenses, and medical expenses. *See, e.g.*, *Thryv, Inc.*, 372 NLRB No. 22, at 9. Never mind that granting the Board this authority would violate the Seventh Amendment. We create a needless circuit split in affirming the Board's power grab. *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 97 (3d. Cir. 2024) ("While the Board can certainly award some monetary relief to the employees, that

relief cannot exceed what the employer unlawfully withheld.").

At first, the majority accepted this power grab wholesale. *See Int'l Union of Operating Engineers, Stationary Engineers, Local 39 v. NLRB*, 127 F.4th 58, 67 (9th Cir. 2025). Now, even the majority recognizes that the Board's assertion of power is too sweeping and seeks to narrow the Board's authority to order relief in its amended opinion. Unfortunately, the majority doesn't go far enough. While the majority now tries to limit the Board to remedies that are "equitable," Am. Maj. Op. at 40**,** it still leaves the door open for the Board to order foreseeable damages that are untethered from the law. The Board has already ordered that Macy's "shall . . . compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings." *See Macy's, Inc.*, 372 NLRB No. 42 at 1 n.2. And the majority offers no guidance on how to fashion "equitable" foreseeable damages. Sure, the majority takes some of the most egregious costs that the Board seeks to impose off the table, such as "day care costs, specialty tool costs, utility disconnection/reconnection fees, relocation/moving costs, legal representation costs in eviction proceedings, and expenses resulting from a change in immigration status." *See* Am. Maj. Op. 48 (simplified). But that leaves the Board with a wide array of costs it may impose under *Thryv*, such as "out-of-pocket medical expenses," "credit card debt," "other costs . . . to make ends meet," "interest and late fees on credit cards," "early withdrawal[penalties]

from . . . retirement account[s]," "[car] loan or mortgage payments," and "transportation or childcare costs." 372 NLRB No. at *15. And slapping the label that those foreseeable damages be "equitable" doesn't cure the statutory violation here. That's because foreseeable or consequential damages are fundamentally at odds with "equitable relief." S*ee Mertens v. Hewitt Associates*, 508 U.S. 248, 256-57 (1993) ("'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus and restitution, *but not compensatory damages*)") (second emphasis added). Simply, under this statute, the equitable relief available to employees is limited to back pay and reinstatement.

And given the legal nature of foreseeable or consequential damages, blessing the Board's authority to impose these remedies would implicate the Seventh Amendment's right to a jury trial. U.S. Const. amend. VII. This concern is heightened by the similarity between the injury the Board seeks to remedy and the common-law tort of wrongful termination. *See SEC v. Jarkesy*, 603 U.S. 109, 125 (2024). The majority would dispense with any concerns about the legal nature of the Board's remedial scheme by declaring that the Board's foreseeable-damages regime "vindicates a public right." *See* Am. Maj. Op. at 38. As an alarming result—despite "declin[ing] to entertain" Macy's Seventh Amendment objection, *see* Am. Maj. Op. at 35 n.10—the majority's dicta would seemingly foreclose any Seventh Amendment challenge to the Board's authority to impose consequential or foreseeable pecuniary damages. The majority just asserts that, so long as imposing foreseeable damages would further

"industrial peace," we apparently need not worry the relief takes a legal—not an equitable—form. *See id.* at 40 (simplified). But the majority's vision of the public rights exception is much too broad. The Court has reminded us that this exception is *only* an exception. *Jarkesy*, 603 U.S. at 131. So "[e]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Id.* at 132 (simplified). The limited "public rights" exceptions recognized by the Court are based on "centuries-old," "background legal principles." *Id.* at 131. And in *Jarkesy*, the Court refused to expand the list to include administrative adjudications over conduct that resembles "common law fraud." *Id.* at 134. Thus, courts should be reluctant to expand the exception beyond the enumerated historical categories, especially those claims with common law analogues and involving legal remedies. *See id.* at 136.

The better course would have been to follow the Third Circuit's lead and nip this claim of expansive authority in the bud.

And we never should have gotten this far. The Board's actions were arbitrary and capricious and unsupported by the record. *See Valley Hosp. Med. Ctr., Inc. v. NLRB*, 100 F.4th 994, 1002 (9th Cir. 2024) (noting the standard of review under 5 U.S.C. § 706(2)(A)). The Board wrongly concluded that Macy's needed to have a detailed proposal on the table within one working day of the Union's offer of return to justify its lockout. This rule is as novel as it is unrealistic. It contradicts both Ninth Circuit precedent and the Board's own precedent. The Board

also ignored evidence that the lockout could have been justified as defensive given Macy's reasonable concerns of sabotage and misconduct.

While I agree with denying the Union's petition for review, I respectfully dissent from the denial of Macy's petition for review and from the grant of the Board's application for enforcement.

I.

The Board Lacks Authority to Order Foreseeable or Consequential Damages

A.

The Board is a limited-authority agency with a limited purpose and limited enforcement mechanisms. "The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws." *Shepard v. NLRB*, 459 U.S. 344, 351 (1983). Simply, the Board is not in the business of the "adjudication of private rights." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (simplified). Its only function is to "safeguard[] and encourage[] the right of self-organization." *Id.* Thus, the Board was not established to award "full compensatory damages for injuries caused by wrongful conduct." *Int'l Union, United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 642-43 (1958). Instead, its authority to order relief is "merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Shepard*, 459 U.S. at 352. Given this, the Board can't award consequential or foreseeable damages, which go beyond compensatory damages and include damages for harms that do not flow directly from an unfair

labor practice. *See* Black's Law Dictionary (12th ed. 2024) (defining "consequential damages" as those that "do not flow directly and immediately from an injurious act but that result indirectly from the act").

Despite its limited authority, the Board has assumed powers to award not only compensatory damages but all *foreseeable* damages—a species of consequential damages. In *Thryv*, the Board concluded that a company violated the Act by unilaterally laying off six union employees and refusing to comply with the union's information requests. 372 NLRB No. 22, at 3-4. Rather than apply its standard remedy to the case, the Board expanded its authority to award monetary relief. The Board concluded "that in all cases in which [its] standard remedy would include an order for make-whole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice." *Id.* at 13 (emphasis added). The Board then defined "direct harms" as monetary losses that are the direct result of an unfair labor practice. *Id.* In contrast, it defined "foreseeable harms" as "those which the [employer] knew or should have known would be likely to result from its violation of the Act, regardless of its intentions." *Id.* The Board has *never* included such broad, indirect harm as part of its make-whole remedy. *See id.* at 18 (Kaplan & Ring, dissenting in part).

So what's covered by "direct or foreseeable harm"? Quite a lot, it turns out. While the Board declined "to enumerate all the pecuniary harms that may be

considered direct or foreseeable in the myriad of unfair labor practices that come before us[,]" they made clear it's very expansive. *Id.* at 12. The Board explained that foreseeable harms include indirect costs, "such as out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet." *Id.* at 9. The Board also made clear that "penalties" related to "early withdrawals from [a] retirement account," "loan or mortgage payments," and "transportation or childcare costs" could all be fair game. *Id.* And this list didn't even represent the "limits of the Board's statutory remedial authority," it's only the "*minimum*" for make-whole relief. *Id.* at 7 n.10 (emphasis added). The Board's

General Counsel added even more costs to the list: unreimbursed tuition payments, job search costs, day care costs, specialty tool costs, utility disconnection/reconnection fees, relocation/moving costs, legal representation costs in eviction proceedings, and expenses resulting from a change in immigration status. Office of the General Counsel Memorandum GC 24-04, Securing Full Remedies for All Victims of Unlawful Conduct (Apr. 8, 2024).[1] So now everything is on the table under the Board's newly claimed authority—the only limit is the Board's imagination.

Of course, the Board denied that these broad remedies make up "consequential damages." But that's hard to believe given that the Board specifically invited briefing on whether it should adopt consequential damages as part of its make-whole

[1] Available at https://perma.cc/P8CN-HZBS.

remedy in that very case. *Thryv, Inc.*, 372 NLRB No. 22, at 6 n.8, 8. Indeed, the Board's Chairman has labeled as "consequential damages" harms such as late fees on credit cards, penalties for early withdrawals from retirement accounts, and the loss of a vehicle or home if an employee is unable to make loan or mortgage payments. *See Voorhees Care & Rehab. Ctr.*, 371 NLRB No. 22, 4 n.14 (2021). Perhaps recognizing its overreach, the Board pretends its adoption of a "foreseeable damages" standard is something different than consequential damages. Yet the only distinction the Board draws between the two is observing 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." *Thryv, Inc.*, 372 NLRB No.22, at 8. Yes, it's a term of art for tort and contracts law, but the Board can't simply put lipstick on the pig and call it "foreseeable damages." That doesn't change its legal nature—it's still consequential damages no matter how it's spun. And, as the Board admits, consequential damages are a remedy for private rights—not the sort of thing that the Board may vindicate.

The Board's remedy proved to be too much for its entire membership to stomach. Two members dissented. They explained that the Board's new remedial 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." *Id.* at 16 (Kaplan & Ring, dissenting in part). They warned that "this standard opens the door to awards of speculative damages that go beyond the Board's remedial

authority." *Id.* First, they noted that "'foreseeability' is a central element of tort law" and that "[a]ny attempt to address tort claims in a Board proceeding obviously runs headlong into the Seventh Amendment's guarantee of the right to have such claims tried before a jury." *Id.* at 18-19. Second, the dissent observed that the Board's foreseeable damages remedy "go[es] well beyond tort law," because the remedy wasn't even limited by proximate cause. *Id.* at 19. So, to the dissenting members, the Board's newly minted power is *even greater* than the power to award consequential damages.

B.

The Board exceeded its authority in ordering Macy's to pay foreseeable or consequential damages. First, nothing in the text of the Act authorizes such expansive authority for the Board. Second, reading the Act to grant these broad remedies, as the dissenting Board members noted, puts the Board in conflict with the Seventh Amendment.

1.

Let's start with the Board's statutory authority to fashion remedies for unfair labor practices. To remedy an unfair labor practice, Congress granted the Board authority to:

> [I]ssue and cause to be served on . . . [a] person [who committed the unfair labor practice] 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 this subchapter.

29 U.S.C. § 160(c). Thus, in all cases, the Board's remedial authority must further the policies of the Act, which are to:

> [E]liminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

While an admittedly broad policy statement, it only provides for vindication of public rights—not of private rights, which consequential damages are designed to remedy. Consistent with that understanding, the Supreme Court recognized long ago that the Board's functions are "narrowly restricted to the protection and enforcement of public rights" and that it thus has no role to play in the "adjudication of private rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362-63 (1940). So even with the Board's power to fashion affirmative acts to carry out federal labor policies, it can't order relief that is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). For example, the Board isn't vested with "a virtually unlimited discretion to devise punitive measures" and

it can't "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). As Judge Learned Hand said long ago, "[t]he 'affirmative action' which the section contemplates must be remedial, and not punitive or disciplinary . . . and the order, qua payments, must therefore be confined to restitution for the wrong done, however widely that should be conceived." *NLRB v. Leviton Mfg. Co.*, 111 F.2d 619, 621 (2d Cir. 1940). Thus, the Board's authority begins and ends with the enforcement of public rights—its role is not to vindicate the private rights of aggrieved employees.

Even so, the Board expressly sought to vindicate private rights in its *Thryv* decision. In adopting its consequential damages or foreseeable harm regime, its goal was to "rectify[] the harms actually incurred by the victims of unfair labor practices." *Thryv, Inc.*, 372 NLRB No. 22, at 11. In justifying the broad remedy, the Board noted the need to assist "*wrongfully-terminated employees* [who] may incur 'expenses for transportation, room, and board'" related to their termination. *Id.* at 7 (simplified) (emphasis added). This is no different than vindicating the private right against wrongful termination, which falls outside the Act's statutory policies.

The Board also acknowledged its new remedy has a compensatory—rather than restitutionary—purpose: "making employees whole should include, at least, *compensating* them for direct or foreseeable pecuniary harms resulting from the [employer's] unfair labor practice." *Id.* at 8 (emphasis added). And the Board reads "foreseeable harms" as broadly as

possible—it includes medical expenses, credit card debts and fees, car payments, mortgage payments, childcare costs, and transportation costs. *See id.* at 9. These rectify *individualized* private harms at law. As the Court has said, "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" *United States v. Burke*, 504 U.S. 229, 235 (1992) (simplified). All this shows that the Board's make-whole remedy goes far beyond "effectuat[ing] the policies" of the Act. *See* 29 U.S.C. § 160(c). Instead, it vindicates private rights. And the Act "limits the Board's remedial authority to equitable, not legal, relief." *Starbucks Corp.*, 125 F.4th at 95.

Besides violating the policies of the Act, the Board's new remedy also violates the text of the Act. The Board can issue a "cease and desist" order and instruct the "reinstatement of employees with or without back pay." 29 U.S.C. § 160(c). None of these express grants of power encompass the award of foreseeable or consequential damages. Under the Board's "cease and desist" authority, it may enjoin "future conduct" that would violate the Act. *See NLRB v. C.E. Wylie Const. Co.*, 934 F.2d 234, 237 (9th Cir. 1991). Yet injunctive power doesn't authorize the award of the damages it seeks now. And the power to authorize "back pay" doesn't provide the Board with the ability to award consequential damages. In this context, "back pay" means pay that is unpaid but due. *See* A Dictionary of Modern American Usage at 17 (1935) (defining "back pay" as an "arrears of a pay"); Webster's Collegiate Dictionary at 59 (1936) (defining "arrears" as "that which is unpaid but due"). Together,

the Act authorizes the Board to remedy violations of unfair labor practices by restoring wages and employment positions that employees would have otherwise received in the absence of unfair labor practices. But such injunctive relief and back pay awards don't provide the textual hook for the expansive remedy sought here.

However broadly it's possible to read the Board's remedial authority, Congress confirmed its narrow powers through its Taft-Hartley amendments. *See* Labor Management Relations Act of 1947, Pub. L. No. 80-101, 101, 61 Stat. 136, 147. In 1947, Congress amended § 160(c) and precluded the Board from awarding remedies to an employee "who had been discharged because of misconduct." *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964). After the amendment, § 160(c) then said,

> No 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.

29 U.S.C. § 160(c) (emphasis added). Through this amendment, Congress expressly set the universe of the Board's remedial power to grant monetary relief for aggrieved employees—it's limited to reinstatement and back pay. If Congress intended the Board to have broader power to direct monetary relief, such as ordering foreseeable or consequential damages, it would have said so in this provision. Otherwise, the Board would be precluded from awarding back pay when the employee commits misconduct, but it may

still grant the same employee foreseeable or consequential damages. This reading makes little sense. Our duty is to interpret the law "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (simplified). The best reading of § 160(c) then cabins the Board's remedial measures over employees and forecloses the Board from ordering consequential or foreseeable damages. So while the Board may have discretion to devise remedies to further the Act, when ordering relief for individual employees, it's limited to reinstatement and back pay. This flows from the Board's narrow design to remedy only public rights.

The Board dismisses this textual restraint on its powers. It does so by misreading *Fibreboard Paper Products*. In that case, the Board ordered a company to resume certain business operations, to reinstate terminated employees with back pay, and to bargain with the union. 379 U.S. at 209. It was argued in that case that the Board's order violated § 160(c)'s prohibition against reinstatement and back pay for employees "discharged for cause." *Id.* at 217. As mentioned earlier, the Court determined that the provision precluded the Board from "reinstating an individual who had been discharged *because of misconduct*." *Id.* (emphasis added). But the Court observed that the provision did not "curtail the Board's power in fashioning remedies when the loss of employment *stems directly* from an unfair labor practice as in the case at hand." *Id.* (emphasis added). The Board takes this language to green-light the award of consequential damages. But it did nothing of

the sort. Instead, with these sentences, the Court distinguished between employees fired *because of* misconduct and employees fired *because of* unfair labor practices. The Court simply reinforced the straightforward reading of the text—while the Taft-Hartley amendment implicated the former, it had nothing to do with the latter. Nowhere did the Court say that the Board could disregard the obvious textual limitations on remediating employees.

If there were any doubts as to the limits of the Board's authority, the Court laid them to rest in *Burke*. In that case, the Supreme Court analyzed the remedies available under Title VII—an employee anti-discrimination statute. *See Burke*, 504 U.S. at 237-38 (analyzing 42 U.S.C. § 2000e-2(a)(1)). Title VII is important here because its "remedial scheme was expressly modeled on the backpay provision of the National Labor Relations Act." *Id.* at 240 n.10. Indeed, Title VII's remedial provision will look familiar. It's nearly identical to the Act's:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1).

Given their ties and similar language, we should follow the Court's reading of Title VII. The Court said, "Title VII does not allow awards for compensatory or punitive damages; instead, it limits available

remedies to backpay, injunctions, and other equitable relief." *Burke*, 504 U.S. at 238. We should also follow how the Court defined the scope of Title VII's remedy: it "consists of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination." *Id.* at 239. Title VII doesn't permit the compensation of a "plaintiff for 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)." *Id.* Indeed, "[n]othing in this remedial scheme purports to" do so. *Id.* In the Court's view, Title VII's limited remedies stood in contrast "to those available under traditional tort law." *Id.* at 240.

So let's recap. Title VII and the Act have similar purposes (the protection of employees), a similar remedial design, and similar textual language. And the Supreme Court has definitively established the remedies available under Title VII. The obvious response is to give the Act a similar reading. It's baffling that the Board argues otherwise.

But there's more evidence of this commonsense reading. In the Civil Rights Act of 1991, Congress amended Title VII to expressly add "compensatory and punitive damages" to its remedial scheme. *See* Pub. L. No. 102-166, 105 Stat. 1071; 42 U.S.C. § 1981a. If such damages were already available under the Title VII's original language, then Congress wouldn't have needed to act. Given their similarities, if Title VII required amendment to allow compensatory and punitive damages, logic dictates that the Act likewise

would need amendment before granting the Board authority to order consequential or foreseeable damages.

* * *

Thus, the Board exceeded its authority under § 160(c) in devising its newfound foreseeable-damages remedy.

2.

Even though § 160(c) is clear on its face, the Seventh Amendment commands that we resolve any ambiguity by rejecting the Board's claim of broad authority to order consequential or foreseeable damages. The Seventh Amendment guarantees the right to trial by jury "[i]n Suits at common law." U.S. Const. amend. VII. If administrative agencies, like the Board, seek to impose damages on a party that resemble those available in "Suits at common law," then the party must receive a jury trial. Issuing broad consequential damages—a tort remedy—thus implicates the Seventh Amendment. The dissenting Board members saw this danger clearly in opposing the Board's power grab. *See Thryv, Inc.*, 372 NLRB No. 22, at 16 ("We further observe that the Board faces potential Seventh Amendment issues if it strays into areas more akin to tort remedies.") (Kaplan and Ring, dissenting in part). So even if the Board's statutory authorities here are "susceptible of multiple interpretations," we should "shun an interpretation that raises serious constitutional doubts and instead . . . adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018).

The Supreme Court recently explained the scope of the Seventh Amendment. *See Jarkesy*, 603 U.S. 109. The Court first reiterated that the right to a jury trial is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care." *Id.* at 121 (simplified). The Court then concluded that the term, "Suits at common law," contrasted with cases in equity and admiralty. *Id.* at 122. The right to jury trial, then, applies to *all suits* "which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id.* (simplified). And it doesn't matter whether the claim is born of statute. The constitutional guarantee also encompasses statutory claims that are "legal in nature." *Id.* (simplified). And to determine whether a claim is "legal in nature," the Court directed that we consider both "the cause of action and the remedy it provides." *Id.* at 122-23. In the end, however, the *remedy* is the "more important consideration" in determining whether the Seventh Amendment applies. *Id.* at 123 (simplified). Indeed, in many cases, consideration of the *remedy* should be "all but dispositive." *Id.* But even when the Seventh Amendment applies, an exception exists. *Id.* at 127. Under the "public rights" exception, "Congress may assign [a] matter for decision to an agency without a jury, consistent with the Seventh Amendment." *Id.*

Jarkesy gives us some takeaways. First, it doesn't matter who brings the claims or how they are labeled. The Seventh Amendment applies even to administrative agencies and even if they call the claim something other than a "legal claim." *See id.* at 121-

24. Second, we look at both the *nature* of the claim and the *remedies* the agency seeks. And the remedy *alone* may be enough to invoke the Seventh Amendment. *See id.* at 123-24. Third, we must consider if the public rights exception would still allow the administrative adjudication to go forward. *See id.* at 127.

Given these principles, reading § 160(c) to authorize the Board to award consequential or foreseeable damages would raise serious constitutional doubt under the Seventh Amendment.

First, consider the remedies the Board seeks to impose—arguably the most important concern. Recall, under its make-whole authority, the Board believes that it may make employers pay for *any* foreseeable pecuniary harm that employees experience because of an unfair labor practice. This includes such attenuated harms as babysitting fees, credit card late fees, car payments, and attorneys' fees to sue landlords. But all this exceeds the purely equitable remedies that the Board may order.

Without question, the Board has the equitable powers to restore employees to the status quo through monetary relief. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (the Board may order a monetary recovery as "an incident to equitable relief"). But the Board's authority to order payments "must . . . be confined to restitution for the wrong done." *Leviton Mfg. Co.*, 111 F.2d at 621. It has no authority to award money damages as a tort remedy. *See Jarkesy*, 603 U.S. at 123 ("[M]oney damages are the prototypical common law remedy"); *Teamsters v. Terry*, 494 U.S. 558, 570 (1990) ("Generally, an action

for money damages was 'the traditional form of relief offered in the courts of law.'") (simplified).

To be sure, sometimes equitable restitution and money damages can look the same. In some cases, they can even lead to the same dollar award against a party. *See* Dan B. Dobbs, 1 Dobbs Law of Remedies 280 (2d. ed. 1993). Even so, they are distinct. And this distinction is significant:

> [T]hey are often triggered by different situations and always measured by a different yardstick. Damages always begins with the aim of compensation for the plaintiff . . . . Restitution, in contrast, begins with the aim of preventing unjust enrichment of the defendant. To measure damages, courts look at the plaintiff's loss or injury. To measure restitution, courts look at the defendant's gain or benefit.

Id. In other words, what distinguishes ordinary money damages at law from "equitable restitution and other monetary remedies available in equity" is that for money damages "the question is what has the owner lost, not what has the taker gained." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (simplified). And so, as a corollary, the question for equitable remedies is only the unjust gain of the taker or employer—not the loss to the owner or employee.

Explaining the difference between equitable monetary relief and monetary damages should illuminate the problem here. The Board wants to measure monetary relief from the perspective of the employee's loss—not the employer's gain. The Board's

foreseeable-damages regime asks: What did the *employee* lose? What fees did the *employee* incur because of the unfair labor practice? What opportunities did the *employee* forgo because of the proscribed conduct? But this would be inappropriate under equity. Equitable relief should ask only what the employer has unjustly gained. When employers withhold pay from employees based on unlawful employment actions, employers unjustly keep the employees' wages and so equitable relief equates to back pay—exactly as contemplated by § 160(c). On the other hand, the award of broad foreseeable damages goes beyond equitable restitution and crosses into the tort remedy of money damages.

Indeed, given how far-reaching the Board views foreseeable damages—encompassing any *indirect* harm no matter how remote from the unfair labor practice—these awards are nearly indistinguishable from punitive damages, which only courts of law may impose. *See Jarkesy*, 603 U.S. at 123-25. As the dissenting members noted, the Board's new consequential-damages regime isn't even limited by the requirement of "proximate cause"—which makes the Board's remedy "go well beyond tort law." *Thryv, Inc.*, 372 NLRB No. 22, at 19 (Kaplan and Ring, dissenting in part). By awarding damages for harms that are not directly or proximately caused by unfair labor practices, we move from mere compensation to granting a windfall to aggrieved employees. And when "compensatory damages exceed pure compensation," they may become "punitive." *See* Dobbs, Law of Remedies 455.

True, the Board tries to get around this conclusion by denying any punitive motive for its new remedy. But let's look at what the Board said. The Board claimed the remedy wouldn't be punitive because it applied to all cases, rather than just to extraordinary ones. *Thryv, Inc.*, 372 NLRB No. 22, at 17. Yet the Board conceded that "if we were to issue this make-whole relief only to address the most deplorable or flagrant violations of the Act, these remedies run the risk of becoming punitive rather than restorative." *Id.* In other words, the Board acknowledges the punitive nature of its expansive foreseeable-harm remedy but understands that applying it selectively would make it blatantly punitive, which it knows it can't do. But a punitive measure is still punitive even if it applies across the board.

Thus, based on the remedies *alone*, the Board's imposition of foreseeable damages would implicate the Seventh Amendment—giving us every reason to avoid reading § 160(c) so broadly.

Second, the "close relationship" between the Board's efforts to block unfair labor practices and the common-law tort of wrongful termination supports reading the Board's remedial powers narrowly. *See Jarkesy*, 603 U.S. at 125. Take this case. The Board asserts that Macy's violated the Act by locking out employees without clearly and fully informing them of the conditions for their reinstatement—effectively terminating them. *See Macy's, Inc.*, 372 NLRB No. 42, at 20. But California, where most of the Macy's stores were located, recognizes a tort cause of action for wrongful terminations that violate public policy. *See Freund v. Nycomed Amersham*, 347 F.3d 752, 758 (9th

Cir. 2003) (requiring that the public policy "inures to the benefit of the public rather than serving merely the interests of the individual" (simplified)); *see also* American Law of Torts § 34:83 (2024) (observing that the tort of wrongful termination exists 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."). And the wrongful-termination tort has a historical pedigree tracing back to the English common law. *See* American Law of Torts § 34.85; *see also* 1 William Blackstone, Commentaries *413 ("[N]o master can put away his servant, or servant leave his master, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace[.]").

Consider the individualized assessments necessary to prove the foreseeable harms for each employee. As the Board admitted, "aggrieved employees will . . . have to submit evidence to substantiate pecuniary harms for which they seek reimbursement" before the Board's ALJs. *Thryv, Inc.*, 372 NLRB No. 22, at 11. What then distinguishes these Board proceedings from individualized tort claims in federal or state court? Not much.

Thus, both the Board's actions and wrongful-termination tort "target the same basic conduct," *Jarkesy* 603 U.S. at 125,—preventing wrongdoing in the employment context. *See also Lewis v. Whirlpool Corp.*, 630 F.3d 484, 487-89 (6th Cir. 2011) (noting the overlap between wrongful-termination claims and the Board's jurisdiction). Indeed, the Board's jurisdiction so overlaps with the wrongful-termination tort that it

may preempt federal or state tort actions. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *Platt v. Jack Cooper Transp., Co.*, 959 F.2d 91, 94 (8th Cir. 1992); *Lewis*, 630 F.3d at 487. While not necessarily a perfect overlap, no "precise[] analog[ue]" is necessary under the Seventh Amendment. *Tull v. United States*, 481 U.S. 412, 421 (1987). Rather, the jury right "extends to statutory claims unknown to the common law, so long as the claims can be said to sound basically in tort, and [they] seek legal relief." *Monterey*, 526 U.S. at 709 (simplified). So the basic "legal" nature of the claim here supports rejecting the Board's expansive remedial powers.

Finally, the public rights exception doesn't justify the Board's broad assertion of remedial powers. The Court has reminded us that this exception is *only* an exception. *Jarkesy*, 603 U.S. at 131. After all, "[i]t has no textual basis in the Constitution." *Id.* So "[e]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Id.* at 132 (simplified). Thus, we don't focus on whether an action "originate[s] in a newly fashioned regulatory scheme." *Id.* at 133 (simplified). Rather, "what matters is the substance of the action, not where Congress has assigned it." *Id.* at 134.

And the Court has made clear that the public rights exception must remain a narrow one. When the Court has recognized a "public rights" exception, it is based on "centuries-old," "background legal principles." *Id.* at 131. Indeed, the Court has only recognized a few categories of administrative

adjudications that fall within the exception: the collection of revenue; customs law; immigration law; relations with Indian tribes; the administration of public lands; and the granting of public benefits, such as payments to veterans, pensions, and patent rights. *Id.* at 129-30. On their face, these categories have little resemblance to traditional legal claims—they all involve interests that would not exist without the federal government. In contrast, in *Jarkesy*, the Court refused to expand the list to include administrative adjudications over conduct that resembles "common law fraud." *Id.* at 134. Thus, courts should be reluctant to expand the exception beyond the enumerated historical categories.

The Board's new make-whole remedy is identical to traditional legal-claim remedies vindicating private rights and doesn't fit within the public-rights exception. The Board's remedy goes beyond defending the public interest in federal labor policy and instead targets "the wrong done the individual employee," which falls outside the Board's authority when fashioning unfair labor practice remedies. *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967). So the award of consequential or foreseeable damages bears little relation to public rights, and the Board cannot escape this conclusion by merely calling it a "make-whole" or "equitable" remedy. *See Jarkesy v. SEC*, 34 F.4th 446, 457 (5th Cir. 2022) ("Congress cannot change the nature of a right, thereby circumventing the Seventh Amendment, by simply giving the keys to the SEC to do the vindicating."). However appropriate a consequential-damages regime may be in the labor context, when an administrative agency strays into

the realm of legal remedies, that's a matter for Article III courts not administrative tribunals.

And the Board is wrong to contend that the Court settled the Seventh Amendment question back in the 1930s. In *Jones & Laughlin Steel Corporation*, the Court concluded that the Seventh Amendment didn't preclude the Board from ordering the "payment of wages for the time lost by the discharge"—in other words, back pay. 301 U.S. at 48. The Amendment wasn't implicated, the Court said, because the ordered back pay was "incident to equitable relief," even though the same "damages might have been recovered in an action at law." *Id.* Key to the Court's opinion, then, was that back pay was a form of equitable relief. Indeed, the Court has emphasized the equitable nature of the back-pay remedy. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-418 (1975) (characterizing back pay awarded against employers under Title VII as equitable). Here, however, the Board seeks far greater remedial authorities. It doesn't just seek damages "incident to equitable relief," but it seeks consequential or foreseeable damages associated with a "[s]uit at common law." So *Jones & Laughlin* isn't the end of the analysis when the Board imposes remedies far beyond back pay. Based on precedent since the 1930s, the Board's award of consequential damages would contravene the Seventh Amendment's right to a jury trial.

To be clear, the Seventh Amendment doesn't invalidate all Board remedial authorities to direct monetary relief. As limited by § 160(c)'s express authority to order "back pay," the Board may act consistently with the Seventh Amendment. But when

the Board strays from the text and seeks extra-statutory authorities, like the power to direct consequential or foreseeable damages, then the Seventh Amendment has something to say. We thus must read § 160(c) as precluding the type of monetary relief the Board seeks here. *See Jennings*, 583 U.S. at 286.

II.

The Board's Merits Decision Was Wrong

Even worse, we didn't need to reach the remedy issue at all. Instead, the Board's decision to conclude that Macy's committed an unfair labor practice was arbitrary and capricious and unsupported by the evidence. The Board concluded that Macy's committed an unfair labor practice under § 8(a)(1) and (3) of the Act by not reinstating the Union members after their offer to return to work and by locking them out without informing them of the terms to end the lockout. *Macy's, Inc.*, 372 NLRB No. 42, at 20. But this conflicts with the Act for two reasons. First, the Board was wrong to conclude that Macy's offensive lockout was "inherently destructive" because it took two-business days to communicate its offer to end the lockout. Second, the Board overlooked some key facts in deciding that Macy's actions were not a proper defensive lockout.

Section 8(a)(1) and (3) of the Act "make it an unfair labor practice for an employer 'by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.'" *Fresh Fruit & Vegetable Workers Loc. 1096 v. NLRB*, 539 F.3d 1089, 1096 (9th Cir. 2008)

(quoting 29 U.S.C. § 158(a)(1), (3)). To find a violation of these provisions, "the relevant inquiry is whether or not the employer's action likely discouraged union membership and was motivated by anti-union animus." *Id.* So usually, evidence of discriminatory conduct *and* discriminatory intent are necessary. But this isn't always the case. Sometimes conduct is so "inherently destructive," that "improper motive" can be inferred. *Id.*

We've described the framework for analyzing "inherently destructive" conduct as this:

> If employer conduct is "inherently destructive," the Board may find an improper motive regardless of evidence of a legitimate business justification . . . . If, on the other hand, "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,'" and the employer establishes a legitimate and substantial business justification for its actions, there is no violation of the Act without a finding of an actual anti-union motivation.

Id. (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967)). Both the Board and Macy's agree that this *Great Dane* framework governs this case.

Establishing "inherently destructive" conduct is a high bar. It requires conduct that "carries with it an inference of unlawful intention *so compelling* that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311-12 (1965) (emphasis added). The conduct must have "*far reaching* effects which would hinder future bargaining" and "creat[e] visible and

continuing obstacles to the future exercise of employee rights." *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976) (emphasis added). In other words, the conduct must have "the natural tendency . . . to *severely* 'discourage union membership while serving no significant employer interest.'" *Fresh Fruit & Vegetable Workers Loc.*, 539 F.3d at 1097 (quoting *Am. Ship Building*, 380 U.S. at 312) (emphasis added). Thus, the effect of the conduct must be more than temporary or slight. It must *significantly* alter the bargaining relationship. In sum, there must be "*no question* that the employees were being punished for their union activities." *Id.* (emphasis added).

The Board hasn't met that standard here.

A.

There's nothing inherently problematic with the use of lockouts. *Am. Ship Bldg.,* 380 U.S. at 308-313. Proper offensive lockouts may occur when an employer locks out employees "in support of legitimate bargaining demands." *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 679 (2007). The Board never found that Macy's had anti-union animus in initiating its lockout and so the Board must show that Macy's actions were "inherently destructive" to support its charge. But all the facts reveal that the delay in providing a new proposal at the time of the lockout had no "far reaching," "continuing," or "sever[e]" effect on collective bargaining. To the contrary, the lockout served a legitimate economic purpose.

Let's recap the facts from 2020:

- On August 31, Macy's gives its best and final offer to the Union.
- On September 4, the Union's members begin to strike.
- On October 8, Macy's informs the Union that its best and final offer will expire on October 15.
- On October 15, Macy's best and final offer expires.
- On November 25, the Union presents a counter proposal to Macy's.
- On December 4, Macy's rejects the Union's counter proposal. That Friday evening, the Union unconditionally offers to return to work "immediately" in an email sent after hours on the East Coast. Macy's asks the Union to hold off on returning to work and promises to respond by the close of business on Monday. The Union asks if "this mean[s] you are locking them out till Monday?"
- On December 5-6, Macy's reiterates its request for time to respond, noting the "administrative, logistical, and economic" challenges of reinstating employees on short notice. The Union refuses to accommodate Macy's and declares that its members will return to work unless they're locked out. Macy's again asks for time because "[t]hey have been out for 90+ days, and to think you can just flip a switch and have them back is not possible."

- On December 7, Macy's notifies the Union it will not reinstate its members "until there is an agreement in place," which is "in support of [its] bargaining position." Macy's proposes dates for new bargaining sessions, including a date of December 10.
- On December 10, Macy's presents a new collective bargaining agreement proposal to the Union.

So the Union demanded to return to work within one business day on a Friday evening. Macy's reasonably asked the Union to hold off on returning to work while it figured out its position over the weekend. On Monday, Macy's told the Union that it was locking out the Union members in support of its bargaining position and notes that a new bargaining agreement must be reached before reinstatement. Two days later, Macy's and the Union were back at the bargaining table with Macy's presenting a new proposal. The Board decided that this *two-day delay* in informing the Union of its latest offer was an unfair labor practice. Indeed, the Board held that Macy's failure to communicate a new offer by Monday morning (one business day) was an unfair labor practice. *See Macy's, Inc.*, 372 NLRB No. 42, at 20 ("the lockout was unlawful at its inception, on December 7"). But this is not even close to meeting the exacting standard of "inherently destructive" conduct.

We've already been skeptical of the need to *immediately* reinstate employees after an offer to return to work. In *Fresh Fruit & Vegetable Workers Local*, after a strike and 14-year long lockout, an employer offered to reinstate striking Union workers

but delayed reinstatement for one month. 539 F.3d at 1093-94. The employer justified the delay by the need for the employees to give notice to their existing employers and to allow for a particular manager to train the returning employees. *Id.* at 1094. The Board thought that this delay was inherently destructive and ordered back pay. *Id.* at 1094-95. We rejected the Board's conclusion. *Id.* at 1096. We explained that the one-month delay after a 14-year lockout did not meet the high bar for "inherently destructive" conduct. *Id.* at 1097. Given the "short" reinstatement delay "relative to the lockout period," we concluded the delay couldn't be viewed as "punishment for a protected activity." *Id.* "After a fourteen-year lockout," we said, "a delay of a few more weeks prior to reinstatement does not *necessarily express anti-union animus* beyond that expressed by the lockout itself." *Id.* (emphasis added). Rather, the delay would be understood as the time "necessary and normal to accomplish reinstatement," not as an attempt to "obstruct or discourage employees from exercising their statutory rights." *Id.* Thus, we reversed the Board's conclusion of a violation of the Act. *See id.* at 1100.

As in *Fresh Fruit*, the Board didn't consider the totality of the circumstances before concluding that Macy's committed an unfair labor practice. The Board ruled that the lack of an immediate, clear, and complete proposal to the Union within one business day of the offer to return constituted "inherently destructive" conduct. But that's wrong. After the Union engaged in a three-month strike, rejected Macy's final offer, and then sought to jam Macy's with a Friday night return-to-work offer, Macy's taking a mere two business days to formulate and

communicate a new, detailed offer can't be viewed as anti-union animus. Given the relatively short period in which Macy's developed a new offer after the months-long strike, nothing shows that the minor delay in communicating its latest offer after the lockout was *necessarily* made to punish the Union for its protected activity or was *necessarily* an attempt to obstruct or discourage the employees' union activity. Instead, the 48-hour delay could be viewed as the "necessary and normal" time to figure out Macy's response to the Union's unexpected return-to-work offer and to draw up a new proposal. *See id.* at 1097. Without any evidence of anti-union animus, the Board hasn't shown how the short delay here had more than a "comparatively slight" impact on the Union under *Great Dane Trailers*, 388 U.S. at 33. Establishing a hard-and-fast rule that an employer *must* provide a "timely, clear, and complete offer" before engaging in an offensive lockout within one-business day was arbitrary and capricious. *See Macy's, Inc.*, 372 NLRB No. 42, at 1.

Indeed, labor disputes often involve complex circumstances that can't be resolved on the short fuse that the Board requires here. Under the Board's arbitrary rule, Macy's could have only responded two ways to the Union's Friday-night offer: (1) immediately reinstate the workers and lose its bargaining position after the three-month strike, or (2) institute the offensive lockout but come up with a new offer essentially *overnight*. Nothing in the Act requires these grim choices.

Well, couldn't Macy's have immediately revived its final offer to comply with these rules? Yes, but that

would defeat the purpose of the "best and final" offer as a bargaining tactic. Now, a union can decide whether an offer is a best and final one or not. All a union must do to resurrect an expired offer is make an unconditional offer to return to work on short notice before a weekend.

But, what's wrong with forcing Macy's to reinstate the employees by Monday morning? First, this ignores the enormous logistical difficulties with returning dozens of striking employees to work over a weekend. Second, this would also weaken Macy's bargaining position by decreasing the need for an agreement. Unless an employer shows anti-union animus, the Act doesn't permit the Board to force a one-sided solution in a labor dispute.

And nothing in the Board's precedent supports its draconian ruling here. Start with *Dayton Newspapers*. In that case, an employer locked out several delivery drivers after a one-day strike. *In re Dayton Newspapers, Inc.*, 339 NLRB 650, 650 (2003). Negotiations and the lockout continued for months. But, on December 23, the union made an unconditional offer to return to work. *Id.* at 651. Four days later, the employer rejected the offer and communicated that the union had to accept several "changed circumstances," including unspecified "operational changes." *Id.* The next day, the union agreed to the "changed circumstances," although it noted that the "operational changes" condition may need further negotiations. *Id.* More than a month later, on February 4, the employer nonetheless rejected the union's offer, suggesting that the union hadn't accepted all the conditions of reinstatement. *Id.*

at 652. The Board concluded that the employer engaged in an unfair labor practice in not reinstating the locked-out drivers because the employer failed to "clearly and fully set forth" the conditions of reinstatement. *Id.* at 656. In particular, the demand for acceptance of "operational changes" was "unclear and changing" and became a "moving target." *Id.* Under these conditions, the union couldn't "intelligently evaluate its position and obtain reinstatement." *Id.*

The differences between *Dayton Newspapers* and this case are glaring. First off, notice that the negotiations over reinstating the drivers took place over weeks—not days or hours, as here. The Board never criticized the employer for taking *too long* to communicate its condition of reinstatement—it criticized the employer for not being clear on the conditions themselves. *See id.* at 656-58. In contrast, the Board here held that Macy's failure to communicate a new offer by Monday morning—one business day later—was an unfair labor practice. *See Macy's, Inc.*, 372 NLRB No. 42, at 20. So the Board is punishing Macy's for taking a total of 48 hours more to communicate its newest offer to end the lockout.

Indeed, Board precedent requires parties to afford each other fair time to evaluate and respond to offers. In *Alden Leeds,* the Board concluded that giving a union "only one working day's notice, in which to evaluate and understand [employer's] uncertain, ambiguous, and confusing offer, vote on it and accept it, is clearly insufficient and not the 'timely' notice required by Board precedent." 357 NLRB 84, 95 (2011). So the Board violates its own precedent to

reach its desired outcome. If that's not arbitrary and capricious, nothing is. We then just give the Board a blank check to do what it wants in the labor context.

B.

As if it weren't enough, the Board gives us one final reason to deny the Board's petition. Macy's argues that it had good-faith concerns about the Union's actions during the strike that justified a defensive lockout. According to Macy's, strikers orally abused its employees, attacked its customers, flouted COVID safety protocols, caused a sewage backup by blocking a drain outside its San Francisco store, and sabotaged its facilities. It was especially concerned about having the employees return to work given the upcoming holiday season, which accounts for much of the company's profits. *See Macy's, Inc.*, 372 NLRB No. 42, at 20. The Board rejected Macy's defensive lockout justification because it believed that the defensive lockout concern was simply a pretext to pressure the Union to accept the company's offer. But that conclusion was arbitrary and capricious and unsupported by the record.

To justify a defensive lockout, an employer need only be "*reasonably concerned*" about the employees' actions. *See Sociedad Espanola de Auxilio Mutuo y Beneficiencia*, 342 NLRB 458, 462 (2004). This is a relatively low bar. While we must defer to the Board's factual findings if they are supported by substantial evidence, we have a duty to correct when the "administrative agency has made an error of law." *NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. and Gen. Pipefitters of N.Y.*, 429 U.S. 507, 522 n.9 (1977). Here,

neither the ALJ nor the Board cited the "reasonably concerned" standard and only looked at whether Macy's *proved* the incidents of misconduct by Union members. But that's not the legal standard to justify a defensive lockout. All that's necessary is that Macy's show that it was "reasonably concerned" about the misconducted. Thus, we should have remanded on this basis alone. *See id.*

Moreover, as Macy's raised to the Board, the ALJ glossed over all the evidence of Macy's "good faith" belief that the striking employees engaged in misconduct or sabotage. Despite our deference to factual findings, the ALJ and the Board can't ignore significant evidence contrary to its position. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1335 (11th Cir. 2012) (noting the Board "cannot ignore relevant evidence that detracts from its findings" (simplified)).

Neither the ALJ nor the Board considered the fact that, before the lockout, Macy's *twice* sought injunctive relief in state court against the Union. On November 20, Macy's filed a motion for a preliminary injunction alleging causes of action against the Union for nuisance, trespass, false imprisonment, assault, battery, and intentional interference with prospective economic relations. Before the lockout, the state court denied the request without prejudice because Macy's had not yet proven irreparable harm. But the state court did not appear to rule on the facts of Macy's allegation. By going to state court on the very same

concerns as raised for the defensive lockout, Macy's showed it was "reasonably concerned" with the Union members' actions. Indeed, filing for a false or bad-faith injunction would have subjected Macy's to judicial sanctions. Yet the ALJ and the Board never said why this evidence wasn't sufficient to prove Macy's defensive reasons. By not accounting for these significant facts, the ALJ and the Board acted arbitrarily, capriciously, and without support.

III.

Let's recap the Board's extraordinary actions here. After a lengthy and acrimonious strike, the Union made an unconditional offer to return to work—expecting to be accommodated within one business day. On the next workday, Macy's responded that it was locking out the striking employees in support of its bargaining position. True, Macy's didn't have an offer on the table then, but that's not unexpected given that the Union had rejected its best and final offer. In any case, Macy's put together a new offer two days later. Despite these efforts, the Board determined that Macy's committed an unfair labor practice. If this wasn't unusual enough, the Board then imposed extraordinary damages—making Macy's pay for "all direct or foreseeable harms" that occurred to the employees since the lockout. Until recently, the Board never claimed the authority to order consequential damages as here. And the Board ignores the obvious statutory and constitutional roadblocks to this newly claimed authority. The majority largely ignores these concerns and just proclaims that we must defer to the Board because it is at the "zenith" of its discretion. That's incorrect. The law and the Constitution are

supreme here—not the bureaucrats of the Board. We should not have condoned this government overreach.

I respectfully dissent.

R. NELSON, Circuit Judge, with whom CALLAHAN, IKUTA, LEE, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel majority erred in affirming the NLRB's unprecedented award of consequential *Thryv* damages, which are unauthorized by statute and forbidden by the Seventh Amendment. Their decision conflicts with every other circuit court and judge to have considered this question. Because these errors will have serious long-term implications, we should have reheard this case en banc to correct them. I respectfully dissent.

I

A

This case arose from a lengthy labor dispute between Macy's Inc. and the International Union of Operating Engineers, Local 39 (Union), which represents some of Macy's engineers and craftsmen. Macy's and the Union had a collective bargaining agreement which covered sixty to seventy employees. The most recent bargaining agreement ended on August 31, 2020. After two months and twelve bargaining sessions, Macy's presented the Union with its final offer on August 31. The Union rejected the offer and went on a three-month strike accompanied by a picketing offensive at Macy's flagship San Francisco location.

The day before Thanksgiving, a month after the final offer expired, the Union sent a new proposal. Macy's rejected this proposal on Friday, December 4. That same afternoon, just before the close of business, the Union made "an unconditional offer to return our

members to work immediately." On Sunday, December 6, the Union refused to give Macy's an extension until Monday to reassess before reinstating the employees. On Monday, Union members showed up to work and were turned away (as Macy's had conveyed would happen). The parties agreed to meet three days later, when Macy's presented the Union with a new offer. The parties negotiated but could not agree to terms. Five years later, the Union members remain locked out.

The Administrative Law Judge (ALJ) found that Macy's committed an unfair business practice by locking out Union members after the Union sent its Friday afternoon offer to return to work and refused to wait until Monday for a response. The ALJ ordered Macy's to make the Union members whole. *Macys, Inc.*, 372 NLRB No. 42, at 23 (2023). Macy's appealed the ALJ's determination to the National Labor Relations Board (NLRB).

The NLRB affirmed the ALJ's decision on the merits but rejected the ALJ's remedy because it didn't go far enough. The Board "amended the make-whole remedy and modified the judge's recommended order to provide" consequential damages called a *Thryv* remedy. *Id.* at 1 n.2. This remedy extends to all foreseeable pecuniary harms of an unfair labor practice, including, but not limited to, search-for-work expenses, out-of-pocket medical expenses, credit card debt, transportation, childcare costs, "other costs simply in order to make ends meet," and anything else the Board can think of. *Thryv, Inc.*, 372 NLRB No. 22, at 15 (2022), *order vacated in part*, 102 F.4th 727 (5th Cir. 2024). So Macy's became liable for any

inconvenience Union members faced from being unemployed for five years and counting.

B

The panel majority affirmed the NLRB. *Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB*, 127 F.4th 58, 68 (9th Cir. 2025); Amended Opinion at 9.[1] It created a novel and legally dubious rule to uphold the merits of the NLRB's unfair labor practice finding. And it split with the Third Circuit to uphold the *Thryv* remedy.

The panel majority acknowledged that to succeed on the merits, the Union had to show that Macy's actions were "inherently destructive." Am. Op. at 20 (discussing the framework laid out in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)). But rather than apply that framework, the majority adopted a per se rule that any lockout unaccompanied by a concrete bargaining proposal is inherently destructive. *Id.* at 21.

The panel majority also erred in its analysis of *Thryv* remedies. Macy's challenged the remedies on several grounds, including that they were not statutorily authorized and violated the Seventh Amendment right to a jury trial. The majority held that the statutory and constitutional challenges had not been administratively exhausted, and that the constitutional challenge had been forfeited. *See id.* at 35 n.10. But the majority then addressed the merits of

[1] After an en banc vote was requested, the panel majority amended its opinion, filed concurrently with the Order Denying Rehearing En Banc.

both these issues, making incorrect legal conclusions on issues it should not have reached.

The panel majority held that the NLRB was statutorily authorized to grant *Thryv* remedies.[2] This conflicts with *NLRB v. Starbucks Corp.*, 125 F.4th 78 (3d Cir. 2024). *See* Am. Op. at 39 n.12. Unlike the Third Circuit, the panel majority held that the NLRB's order of compensation for "foreseeable pecuniary harms incurred as a result of the unlawful lockout" does not exceed the Board's authority under the National Labor Relations Act (NLRA). *Id.* at 46. The panel majority also concluded that Thryv remedies "vindicate[] a public right," *id.* at 38, functionally deciding the key Seventh Amendment issue that was forfeited. *See Stern v. Marshall*, 564 U.S. 462, 488-89 (2011) ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States" (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)).

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[2] The panel majority held that Macy's "neither properly challenged *Thryv*'s retroactivity or the Seventh Amendment's application to this case." Am. Op. at 48. In a nearly identical posture, the Tenth Circuit refused to address the merits of the same statutory challenge. *See 3484, Inc. v. NLRB*, 137 F.4th 1093, 1115-16 (10th Cir. 2025) (finding challenge to *Thryv* remedy unexhausted and not addressing statutory argument because "the Board ha[d] merely stated a general proposition" when it ordered *Thryv* remedies and employer could later challenge "any remedy ultimately imposed").

Judge Bumatay dissented. On the unfair labor practice claim, he explained that the facts did not support an inherently destructive finding, the cases the NLRB relied on were materially distinguishable, and the NLRB ignored our precedent in *Fresh Fruit & Vegetable Workers Loc. 1096 v. NLRB*, 539 F.3d 1089, 1097 (9th Cir. 2008). Amended Dissent at 80-84. He also highlighted that the majority created a circuit split when it found *Thryv* remedies within the NLRB's statutory authority. *Id.* at 52-53. He posited that these remedies are consequential damages, meaning they constitute legal relief outside the Board's remedial discretion. *Id.* at 54-55. He noted that *Thryv* remedies diverge from Supreme Court precedent interpreting nearly identical statutory language addressing a remedial scheme modeled after the NLRA. *Id.* at 65-66 (discussing *United States v. Burke*, 504 U.S. 229, 237-40, 240 n.10 (1992)).

Judge Bumatay also explained that under *SEC v. Jarkesy*, 603 U.S. 109 (2024), Macy's was entitled to a Seventh Amendment jury trial because *Thryv* remedies are a punitive or consequential legal remedy. Am. Dissent at 67-76. And an unfair labor practice claim is closely related to the common-law tort of wrongful termination. *See Jarkesy*, 603 U.S. at 125. Judge Bumatay also concluded that *Thryv* remedies do not vindicate a public right. Am. Dissent at 61-62.

II

The panel majority erred on three crucial questions. First, the NLRB's finding of unfair labor practices conflicts with Supreme Court and circuit precedent. Moreover, contrary to the panel majority's conclusion, the NLRB's imposition of consequential

Thryv damages is neither authorized under the NLRA nor permissible under the Seventh Amendment. Every Court of Appeals judge to consider the *Thryv* remedies—other than the panel majority—has reached the correct conclusion. We created a circuit split for no reason.

A

The NLRB's merits decision summarily affirming the ALJ on the unfair labor practice claim conflicts with *Great Dane*, 388 U.S. at 34, and our precedent in *Fresh Fruit*, 539 F.3d at 1097. The panel majority overlooked the case-by-case assessment an inherently destructive finding requires. *See Fresh Fruit*, 539 F.3d at 1097; *see also Loc. 15, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB,* 429 F.3d 651, 656-61 (7th Cir. 2005); *Loc. 702, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 215 F.3d 11, 16-17 (D.C. Cir. 2000); *see also In re Dayton Newspapers, Inc.*, 339 NLRB 650, 664 (2003), *aff'd in part, rev'd in part*, *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651 (6th Cir. 2005). Consider the facts. Macy's offered a counterproposal three workdays after an unexpected offer to return to work and two days after announcing a lockout after a three-month strike. This does not fit the "inherently destructive" standard. *See* Am. Dissent at 77-78. The panel majority's holding to the contrary departs from that analysis and should have been reversed en banc.

B

As to the remedies, the panel majority approved the NLRB's imposition of *Thryv* remedies to make the Union members whole. *Thryv* remedies represent an extraordinary power grab. The NLRA does not authorize the NLRB to issue them, they conflict with

the Seventh Amendment, and no judge but those on the panel majority have blessed them.

1

"The powers of the Board as well as the restrictions upon it must be drawn from § 10(c)" of the NLRA. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187-88 (1941). Section 10(c) confines the NLRB's remedial authority to "order[s] 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). The NLRB's remedial discretion "is expressly limited by the requirement that its orders 'effectuate the policies'" of the NLRA. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (quotation omitted). "Congress did not 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).

The NLRB lacks discretion to impose a remedy that "veers from remedial to punitive." *3484, Inc. v. NLRB*, 137 F.4th 1093, 1122 (10th Cir. 2025) (Eid, J., concurring in part and dissenting in part) (quotation omitted). Even back pay—relief directly authorized by the NLRA—must be "sufficiently tailored to expunge only the actual, and not merely the speculative, consequences of the unfair labor practice." *Sure-Tan*, 467 U.S. at 900. Remedies may only compensate employees for "actual losses." *Phelps Dodge*, 313 U.S. at 198.

And the Board's remedial authority is confined to equitable, not legal relief. Section 10(c) authorizes

only two forms of relief: (1) orders to "cease and desist" unfair labor practices and (2) "affirmative action including reinstatement of employees with or without back pay." 29 U.S.C. § 160(c).

Cease and desist authority and the authority to order affirmative action sound in equity (as shown by the examples of reinstatement and reinstatement with back pay). "[T]he right to restore to a man employment which was wrongfully denied [to] him" is a form of "equitable relief." *Phelps Dodge*, 313 U.S. at 188. And backpay is also "an equitable remedy, a form of restitution." *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) ("[P]ayment of wages for the time lost by the discharge . . . is an incident to equitable relief").

Section 10(c)'s remedies are all equitable in nature. That the NLRA "'empowers the Board to order entities to cease and desist and to take affirmative action'—without authorizing any other type of remedy—indicates that the statute only grants the Board the authority to order equitable remedies." *3484*, 137 F.4th at 1122 (Eid, J., concurring in part and dissenting in part) (cleaned up).

Until recently, the NLRB respected these boundaries. The NLRB held that it "does not award tort remedies," and that "[a]ny recompense awarded a discriminatee is not for [] injuries suffered, but rather a necessary remedy to vindicate the purposes of the Act." *Freeman Decorating Co.*, 288 NLRB No. 139, at 1 n.2 (1988). And where it granted monetary relief exceeding back pay, that relief was "closely tied to the equitable remedy of backpay" and was thus distinct

from consequential or compensatory relief. *Starbucks*, 125 F.4th at 96 (collecting examples of monetary relief that "fell under the umbrella of a backpay award"). These too were therefore "an incident to equitable relief." *Jones & Laughlin*, 301 U.S. at 48; *see Russell*, 356 U.S. at 645 (back pay "may incident[al]ly provide some compensatory relief" but does not "constitute an exclusive pattern of money damages for private injuries"). Thus, for decades, the NLRB only ordered equitable relief and monetary relief intertwined with back pay, not foreseeable consequential damages more appropriate in tort actions.

Things abruptly changed in 2022. *See generally Thryv*, 372 NLRB No. 22. In *Thryv*, the NLRB granted itself the power to issue compensatory or consequential damages.[3]

According to the NLRB, it is the Board's obligation to make sure employees are "fully compensated" for "pecuniary harms" that were "direct or foreseeable consequences of [an] unfair labor practice." *Id.* at 15. From now on, "in all cases in which [its] standard remedy would include an order for make-whole relief, the Board will expressly order that

[3] Implicitly recognizing that this is beyond its authority, the NLRB in *Thryv* goes to great lengths to deny that this is what it is doing. 372 NLRB No. 22, at 13-14 (distinguishing "foreseeable damages" from "consequential damages" because the latter is a "term of art."). But calling a *Thryv* remedy "foreseeable damages" "doesn't change its legal nature—it's still consequential damages no matter how it's spun." Am. Dissent at 58-59. And the Union recognized the NLRB's remedy for what it was, arguing below that "[t]he remedy should require the payment of *consequential damages* for all the employees who were locked out." (emphasis added).

the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice." *Id.* at 9 (emphasis in original).

The only limit to what falls under the NLRB's description is its imagination. The NLRB declined to "enumerate all the pecuniary harms that may be considered direct or foreseeable." *Id.* at 20. But these could extend to "significant financial costs, such as out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet." *Id.* at 15. So too "penalties" for "early withdrawals from [a] retirement account," "loan or mortgage payments," and "transportation or childcare costs." *Id.* And "[t]he Board's General Counsel added even more costs to the list: unreimbursed tuition payments, job search costs, day care costs, specialty tool costs, utility disconnection/reconnection fees, relocation/moving costs, legal representation costs in eviction proceedings, and expenses resulting from a change in immigration status." Am. Dissent at 57-58 (citation omitted).

Thryv remedies are not business as usual at the NLRB. Even the Union admits that *Thryv* is "one of the most controversial decisions of the Biden Board." The NLRB itself was split on the issue. Two Board members dissented when the Board sanctioned *Thryv* remedies. They correctly explained that *Thryv* remedies "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." *Thryv*, 372 NLRB

No. 22, at 25 (Kaplan & Ring, concurring in part and dissenting in part). Doing so, the dissenters noted, "opens the door to awards of speculative damages that go beyond the Board's remedial authority." *Id.*

Thryv remedies are legal, not equitable. They are money damages, "the prototypical common law remedy." *Jarkesy*, 603 U.S. at 123; Am. Dissent at 71 (explaining how *Thryv* remedies are punitive damages). While some equitable remedies—restitution, disgorgement, and back pay—require money to change hands, *Thryv* damages are uniquely legal. *See, e.g.*, *Starbucks*, 125 F.4th at 96 (discussing *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540-41 (1943)). *Thryv* damages measure "what has the owner lost, not what has the taker gained." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (quotation omitted) (distinguishing money damages at law from "equitable restitution and other monetary remedies available in equity"). *Thryv* remedies thus fall outside the NLRB's statutory authority. *See Starbucks*, 125 F.4th at 94.

The panel majority, by affirming *Thyrv* remedies, allows the NLRB to award quintessential tort remedies. *See Damages*, *Black's Law Dictionary* (12th ed. 2024) (defining "common-law damages" as "[a] court-ordered monetary award intended to return an injured party, as nearly as possible, to the position that party occupied before suffering harm"). Worse, as the dissenting NLRB members warned, *Thryv* remedies "go well beyond tort law" because they are not limited by proximate cause—just foreseeability. *Thryv*, 372 NLRB No. 22, at 27. Through *Thryv* remedies, the NLRB has granted itself power greater

than courts of law, effectively adjudicating private disputes, despite the statutory restrictions on its authority to do so.

2

Basic principles of statutory interpretation show that *Thryv* remedies exceed the NLRB's statutory authority. *Thryv* remedies make little textual sense. The purported textual hook for *Thryv*'s wide-ranging consequential damages is § 160(c), which allows the NLRB to order "such affirmative action including reinstatement of employees with or without back pay." 29 U.S.C. § 160(c). But "back pay" means pay unpaid but due. Am. Dissent at 63 (citing dictionary defining "back pay" at or near passage of the NLRA). The text does not support the NLRB's assertion that it can order consequential damages.

And through the Taft-Hartley amendments, Congress made clear that the monetary remuneration available was limited to back pay, and not consequential damages. *See* Labor Management Relations Act of 1947, Pub. L. No. 80-101, 101, 61 Stat. 136, 147. After the amendment, § 160(c) reads, "No 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." § 160(c) (emphasis added). Under the panel majority's reading, such an employee could still receive consequential damages, which were lurking in the background as an available remedy until *Thryv* brought them out of the shadows. That is an atextual and absurd result.

Congress did not give the NLRB such expansive remedial power. Congress knows how to grant agencies the power to impose legal remedies. *See* 42 U.S.C. § 3613(c)(1) (allowing courts to award "actual and punitive damages" for Fair Housing Act violations); 29 U.S.C. § 2617(a)(1)(A)(i)(II) (in some cases, allowing recovery for "any actual monetary losses sustained by the employee as a direct result of" a Family and Medical Leave Act violation, including "the cost of providing care"); *see also Burke*, 504 U.S. at 240 (comparing remedial schemes under Title VII and other acts to understand scope of remedy). And it declined to grant the NLRB this power.

Finally, Supreme Court precedent raises serious doubts about the legitimacy of *Thryv* remedies. In *Burke*, the Supreme Court addressed Title VII's nearly identical language, which empowered a court to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay." 504 U.S. at 238 (quoting 42 U.S.C. § 2000e-5(g)(1)). The Court noted that Title VII's "remedial scheme was expressly modeled on the backpay provision of the National Labor Relations Act." *Id.* at 240 n.10. Despite this scheme also having a "make whole" function, like the NLRA, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-20 (1975), the Court found that Title VII's remedial provision did not "recompense Title VII plaintiffs for anything beyond the wages properly due [to] them," including for "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 239-41.

The panel majority ignores what *Burke* represents—that the Supreme Court has construed nearly identical language to bar relief analogous to *Thryv* remedies. Under *Burke*, Title VII and the NLRA do not support consequential (personalized) damages, such as "a ruined credit rating." *Id.* at 239. The panel majority posits that both Title VII and the NLRA allow for "make whole" relief. Am. Op. at 43-45 (quoting *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969)). But just as in Title VII, the NLRA must be construed to be limited to "backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful" actions. *Burke*, 504 U.S. at 239.

And *Thryv* remedies have not fared well in the circuit courts. The Fifth Circuit vacated and remanded *Thryv* itself. 102 F.4th at 737. The Fifth Circuit disagreed with *Thryv* on the merits, so it didn't address the remedy. *Id.* But it described the remedy as "a novel, consequential-damages-like labor law remedy." *Id.*

The Tenth Circuit concluded similarly. *See 3484*, 137 F.4th 1093. While the Tenth Circuit found that an employer's challenge to the *Thryv* remedy was not administratively exhausted, one judge addressed the remedy. *See id.* at 1121-27 (Eid, J., concurring in part and dissenting in part). In her view, the *Thryv* remedy "exceeds the Board's statutory authority under the NLRA" for many reasons, including that the remedies "look[] like something out of a torts treatise" and "fit[] squarely within the bedrock definition of compensatory and consequential damages." *Id.* at 1125-27.

In *Starbucks*, the Third Circuit held that the NLRB's ordering of compensation for "foreseeable pecuniary harms incurred as a result of the unlawful adverse actions . . . exceeds the Board's authority under the NLRA." 125 F.4th at 94. On the other hand, the panel majority holds that the NLRB's ordering of compensation for "foreseeable pecuniary harms incurred as a result of the unlawful lockout" does not exceed the Board's authority under the NLRA. Am. Op. at 46. The panel majority's holding creates a circuit split with the Third Circuit.

The panel majority downplays the split, suggesting that any make-whole relief must be equitable in nature. *Id.* at 39 n.12. But it misses the mark as to the key difference causing the circuit split—whether compensation for foreseeable pecuniary harm is equitable. The Third Circuit, posed with the same question, correctly held that compensation for foreseeable pecuniary harm was not equitable. *Starbucks*, 125 F.4th at 97. The majority incorrectly held that it was. Am. Op. at 38-42.

Every circuit judge—other than the panel majority—to address the NLRB's authority to impose *Thryv* remedies has suggested or held that such remedies are beyond the NLRB's statutory authority. *See* Am. Op. at 48 (panel majority admitting that "the partial dissent raises potentially significant points about the scope of make-whole relief under *Thryv*"). *Thryv* remedies are legal damages outside the scope of the NLRB's statutory authority. *See Starbucks*, 125 F.4th at 94; *3484*, 137 F.4th at 1127 (Eid, J., concurring in part and dissenting in part) (finding

Thryv remedies outside scope of the NLRA "avoids the many untold constitutional concerns").

We should have reheard this case en banc and followed the Third Circuit's holding that the NLRB is not authorized to order compensation for foreseeable pecuniary harm untethered from the equitable relief of backpay. Instead, we are left with an opinion unsupported by the text of the NLRA.

C

Thryv and the panel majority also run roughshod over Macy's Seventh Amendment rights. If there was any doubt regarding the scope of the NLRB's remedial authority, the NLRA should be construed to avoid constitutional infirmity. The panel majority's authorization of *Thryv* remedies raises serious constitutional concerns.

Under the Seventh Amendment, "the right of trial by jury shall be preserved" "[i]n Suits at common law." U.S. Const. amend. VII. *Jarkesy* governs how we analyze the Seventh Amendment's command. 603 U.S. at 121-27. In *Jarkesy*, the Court held that the right to a jury trial applies to all suits "which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id.* at 122 (quotation omitted). If an action is legal in nature, the Seventh Amendment applies. There's one exception: if the claim vindicates a "public right." *Id.* at 120.

To determine whether the suit is legal in nature, we consider both "the cause of action and the remedy it provides." *Id.* at 123. The remedy is "the 'more important' consideration." *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)). Whether a claim "is statutory in nature is immaterial to this analysis." *Id.*

at 122 (citing *Tull*, 481 U.S. at 414-15). As shown above, *Thryv* remedies are legal in nature. *See supra* § II.B.1. They are consequential money damages and the Seventh Amendment guarantees Macy's the right to a jury trial before they may be awarded.

"The close relationship between" an unfair labor practice and common law causes of action "confirm[]" that suits for *Thyrv* remedies are suits at common law for purposes of the Seventh Amendment. *Jarkesy*, 603 U.S. at 125. The nature of the remedy is independently sufficient to implicate the Seventh Amendment. *See id.* at 123 (nature of remedy "the 'more important' consideration" and "all but dispositive" (quotation omitted)). But four things about unfair labor practice claims establish that this remedy is quintessentially legal: (1) California recognizes "a tort cause of action for wrongful terminations that violate public policy," (2) wrongful termination is itself a tort with "a historical pedigree tracing back to the English common law," (3) "the individualized assessments necessary to prove the foreseeable harm for each employee" reflect the tortious nature of the claim, and (4) wrongful termination and the NLRB's jurisdiction "so overlap[] . . . that it may preempt federal or state tort actions." Am. Dissent at 72-73 (quotations omitted). Thus, unless the public rights exception applies, the panel majority's *Thryv* remedy violates the Seventh Amendment.

And the public rights exception does not apply. Under *Jarkesy*, the public rights exception is just that—an exception. *See* 603 U.S. at 131. Courts must pay "close attention to the basis for each asserted application of the doctrine," otherwise "the exception

would swallow the rule." *Id.* In fact, "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." *Id.* at 132 (cleaned up and quotation omitted).

Nor does the NLRB's newfound power to levy consequential damages against individuals reflect any of the reasons why the Court found the public rights exception implicated in the past. *Id.* at 128-32 (discussing the reasons for past public rights exceptions). Those reasons included "unbroken tradition—long predating the founding," Congress's "plenary power over immigration," and areas of law where "political branches had traditionally held exclusive power." *Id.* at 128-30 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), and *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929)). Add to these "other historic categories of adjudications [that] fall within the exception, including relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights." *Id.* at 130 (citations omitted). The political branches have never held exclusive control over the adjudication of legal disputes. The panel majority's *Thryv* damages holding thus contravenes *Jarkesy* because these damages do not vindicate a public right.

Jarkesy confirms that a private right is implicated here. *Jarkesy* deemed it enough that the matter was "from [its] nature subject to 'a suit at common law'" and that the suits were not "inseparable" from the

relevant statutory regime. *Id.* at 133-34 (quotation omitted).

The same is true of the consequential damages that the panel majority blessed. As discussed, both the cause of action and remedy echo the common law. And the remedy allocates the cost of an allegedly wrongful act from the individual employees to Macy's, making the employees "whole." *Thryv* remedies, like the make-whole relief approved by the panel majority, fall outside the exception. That the remedy is severable from the merits proceeding emphasizes this conclusion. Determining whether one's personal pecuniary harms were foreseeable consequences of a defendant's actions and remedying those harms is historically rooted in law, not equity. *See Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854) (assessing foreseeability of damages for failing to deliver crank shaft to mill per contract); *see also Thryv*, 372 NLRB No. 22, at 27 (Kaplan & Ring, concurring in part and dissenting in part) ("'[F]oreseeability' is a central element of tort law" and "[a]ny attempt to address tort claims in a Board proceeding obviously runs headlong into the Seventh Amendment's guarantee of the right to have such claims tried before a jury."). This remedy is "made of 'the stuff of the traditional actions at common law tried by the courts at Westminster.'" *Jarkesy*, 603 U.S. at 128 (quotation omitted).

The panel majority did not need to reach this merits decision. On the one hand, they claim that because Macy's forfeited its Seventh Amendment claim, they decline "to entertain this argument." Am. Op. at 35 n.10. But on the other, they hold that *Thryv*

remedies "vindicate[] a public right," *id.* at 38, which necessarily implicates the merits of the Seventh Amendment argument. It is infirm to decide the merits of a forfeited argument and then decide the merits wrongly.

Nor are the NLRB's remedial proceedings inseparable from the NLRA's regulatory scheme. The compliance hearings over damages, *Thryv*, 372 NLRB No. 22, at 18, are neither "highly interdependent" nor "require coordination" with the merits proceeding, *Jarkesy*, 603 U.S. at 133. Liability for unfair labor practices can be found in one proceeding. Employers can "challenge . . . direct or foreseeable damages" and employees can "submit evidence to substantiate pecuniary harms for which they seek reimbursement" in "the compliance hearing." *Thryv*, 372 NLRB No. 22, at 18. The NLRB already splits merits and compliance proceedings, and the Seventh Amendment requires that Macy's have the option of trying the latter before a jury.

The panel majority deprives Macy's of its Seventh Amendment right to a jury trial. It found that any pecuniary damages seeking to make employees whole are an "incident" to equitable relief and therefore outside the scope of the Seventh Amendment. Am. Op. at 37 n.11 (quoting *Jones & Laughlin*, 301 U.S. at 48). By blessing the NLRB's actions, the panel majority undermines a right our Founders considered "the very palladium of free government." The Federalist No. 83 (Alexander Hamilton).

Jones & Laughlin cannot bear the weight the panel majority placed on it. *See* Am. Dissent at 75-76. There, the Court addressed an employer's challenge to

an NLRB order requiring reinstatement and back pay—a remedy directly authorized by the statute. That back pay was "incident to equitable relief[.]" *Jones & Laughlin*, 301 U.S. at 48. The Court has since emphasized the equitable nature of back pay, *supra* § II.B.1; *see also Albemarle Paper*, 422 U.S. at 416-17 ("district courts enjoy[] the 'historic power of equity' to award lost wages" under Fair Labor Standards Act (quotation omitted)). The panel majority erroneously extended *Jones & Laughlin* and held that any pecuniary renumeration the NLRB orders is outside the Seventh Amendment if aimed to make an employee whole.

Under *Jarkesy*, the panel majority's approval of a broad exemption from the Seventh Amendment cannot stand. The remedial proceedings are highly individualized and can sensibly proceed separately without depriving Macy's of its Seventh Amendment rights and without threatening the statutory framework within which the NLRB operates. *Thryv* remedies do not vindicate a public right; the panel majority wrongfully denied Macy's its Seventh Amendment right to a jury.

III

The majority opinion is wrong. It has created an unnecessary circuit split by blessing the NLRB with unprecedented power beyond its statutory authority. It also undermines the Seventh Amendment right to a jury. The jury trial is "the glory of the English Law" and "every encroachment upon it" should be "watched with great jealousy." *Jarkesy*, 603 U.S. at 121-22 (quotations omitted). Because I refuse to condone such an encroachment, I respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-124

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

MACY'S INC.,

Intervenor.

No. 23-150

MACY'S INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,

Intervenor.

No. 23-188

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MACY'S INC.,
Respondent,
INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,
Intervenor.

Argued and Submitted: Mar. 28, 2024
Filed: Jan. 21, 2025

Before: Evan J. Wallach,* Jacqueline H. Nguyen, and Patrick J. Bumatay, Circuit Judges.

OPINION

WALLACH, Circuit Judge:

When engaging in "collective bargaining" under the National Labor Relations Act ("NLRA" or the "Act"), "representatives of an employer and a union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences

* The Honorable Evan J. Wallach, United States Circuit Judge for the Federal Circuit, sitting by designation.

by resort to such economic weapons as strikes and lockouts, *without any compulsion to reach agreement*." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981) (emphasis added) (citations omitted); *see also* 29 U.S.C. § 158(a), (d) (listing certain prohibited unfair labor practices by an employer and imposing an obligation for collective bargaining). During negotiations over a successor collective bargaining agreement ("CBA"), communications between Macy's Inc. ("Macy's" or the "Company") and the International Union of Operating Engineers, Stationary Engineers, Local 39 (the "Union") set off a chain reaction. The Union members voted to reject the Company's last, best, and final offer (the "Final Offer") and began a strike. After the Final Offer expired, the Union offered its proposal on wages and pensions, which Macy's then rejected. After three months, the Union ended its strike and unconditionally offered to return to work. Three days later, Macy's locked out the Union members who reported for work.

The Union filed its Charge Against Employer ("Charge") with the National Labor Relations Board ("NLRB" or the "Board"), alleging that the Company's lockout was an unfair labor practice under the NLRA. An Administrative Law Judge ("ALJ") ultimately ruled in the Union's favor.

The Board adopted the conclusion of the ALJ, who found that Macy's violated Section 8(a)(1) and (3)[1] of

[1] Under Section 8(a)(1) and (3) of the NLRA:

It shall be an unfair labor practice for an employer—

the Act, 29 U.S.C. § 158(a)(1), (3), when on December 7, 2020, Macy's locked out its employees without presenting a timely, clear, and complete offer that set forth the conditions necessary to avoid a lockout. *Macy's, Inc.*, 372 N.L.R.B. No. 42 (Jan. 17, 2023) ("Decision and Order"). The Board amended the ALJ's recommended Order with respect to remedial provisions, modifying the "make-whole remedy" to include direct or foreseeable pecuniary harms incurred due to the lockout. Before us are three prayers for relief: (1) the Union petitions for remand for the Board to reconsider its requested additional remedies; (2) Macy's petitions for dismissal of the Union's petition and transfer of the proceedings elsewhere, or alternatively, either remand or reversal on the merits in its favor; and (3) the Board applies for enforcement of its final Order. We have jurisdiction under 29 U.S.C. § 160(e)-(f). We deny the Union's and the Company's Petition for Review and grant the Board's Cross-Application for Enforcement.

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> ***
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1), (3); *see also Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) ("[A] violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1)." (citations omitted)).

I. Factual and Procedural Background[2]

Macy's is a retail business with more than 700 stores and 75,000 employees nationwide. The Union represents building engineers and craftsmen who perform carpentry, painting, as well as maintenance and repair work, especially on heating, ventilation, and air conditioning (HVAC) and electrical systems, at two Macy's stores in Reno, Nevada, and approximately forty other stores across Northern California and the San Francisco Bay Area. On April 1, 2020, Macy's laid off about sixty Union engineers, after closing its stores and furloughing most of its employees in response to the COVID-19 pandemic. Later that year, Macy's started to reopen its stores, and by mid-August, it recalled forty-three Union engineers back to work.

For over twenty years, Macy's and the Union maintained a collective-bargaining relationship. In July 2020, Macy's and the Union began bargaining for a successor CBA since the CBA then in place, covering between sixty to seventy Union employees, was set to expire on August 31, 2020. After nearly a dozen bargaining sessions, they had yet to reach an agreement. On August 31, 2020—the day the CBA would expire—Macy's presented its Final Offer proposing terms relating to wages and pensions. On September 2, 2020, the Union members overwhelmingly voted to reject the Final Offer and the Union decided it would begin its strike in two days.

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[2] Only the factual assertions pertinent to resolving the matter before us are presented here, and they are primarily drawn from the findings within the April 6, 2022 ALJ's Decision ("ALJ's Decision"), which the Board affirmed in its January 17, 2023 Decision and Order.

From September 4, 2020, to December 4, 2020, the Union staged its strike, picketing every day during business hours at Macy's Union Square store in San Francisco. Macy's argued before the ALJ that during the strike, the Union employees engaged in a variety of misconduct and sabotage.

On October 8, 2020, Rose Ashmore ("Ashmore"), the Company's lead negotiator, told Jay Vega ("Vega"), the Union's lead negotiator, over the phone that the Final Offer would expire in a week; Ashmore confirmed this once more in an email to Vega four days later. On October 15, 2020, the Final Offer expired. Vega called Ashmore on November 9, 2020, and asked if Macy's would present another offer. Ashmore said no, but asked whether the Union would like to resume bargaining; Vega said he would get back to her. On November 25, 2020, the day before Thanksgiving, Vega sent an email to Ashmore including the Union's proposal on wages and pensions. Ashmore replied to Vega over text, notifying her receipt of the email and her inability to speak with her team at Macy's about the offer until after the holiday.

On December 4, 2020, Ashmore emailed Vega rejecting the Union's wage proposal. That same day, Vega replied that the Union no longer wished the dispute to continue, so it was making "an unconditional offer to return our members to work immediately." After Vega sent this email, the Union ended its strike and stopped picketing. Later that evening, Ashmore replied to Vega, stating that she would respond to the Union's unconditional offer by the end of business on Monday, December 7, 2020, because she needed to discuss the offer "with all

necessary partners." In the reply, Ashmore told Vega "please do not have the members report to work yet." Vega asked her over email, "[d]oes this mean you are locking them out till Monday?" On December 5, 2020, Ashmore answered that Macy's would need to fully evaluate "several administrative, logistical, and economic issues" implicated by the Union's "unexpected offer," and requested "the courtesy of giving us until the close of business Monday to assess." On December 6, 2020, Vega responded that "[u]nfortunately, we cannot accommodate your request. Unless you are locking them out, they will [be] showing up to work Monday morning." Ashmore replied, repeating that "the team should not return to work on Monday," as well as stating that "[t]his is not a lockout but we won't be ready for them."

On Monday, December 7, 2020, some Union engineers started returning to work but were turned away. That same day, Ashmore emailed Vega, asserting "[w]e are not willing to reinstate bargaining [Union] employees until there is an agreement in place; this decision is being made in support of our bargaining position."

On December 10, 2020, Macy's and the Union engaged in subsequent negotiations. Ashmore emailed Vega the Company's new bargaining proposal, which includes wage increases that were reduced from those within the Final Offer. The Union countered with an offer to cap wages at the rates originally proposed in the Final Offer. No deal was made. The next day, Macy's presented another proposal, which was still worse than the Final Offer. The Union gave its additional proposal, deleting certain provisions from

the contract. Once again, Macy's and the Union failed to reach an agreement.

On December 9, 2020, and February 4, 2021, the Union respectively filed its original and first amended Charge forms with the NLRB, alleging that Macy's committed an unfair labor practice by locking out the Union engineers after they gave their unconditional offer to return to work. On February 11, 2021, the NLRB issued its Complaint and Notice of Hearing ("Complaint"), which alleges that Macy's violated Section 8(a)(1) and (3) of the Act. In June 2021, the ALJ conducted a six-day hearing, and at that time, Macy's and the Union "had still not reached an agreement on a new contract, and [the Company's] lockout of the engineers continued."

In the ALJ's Decision issued on April 6, 2022, the ALJ concluded that Macy's violated Section 8(a)(1) and (3) of the NLRA, "[b]y locking out its employees on December 7, 2020, without providing them with a timely, clear, or complete offer, which sets forth the conditions necessary to avoid the lockout[.]" The ALJ recommended that Macy's "offer reinstatement to all employees who were unlawfully locked out and make them whole for any losses of pay and benefits that they may have suffered by reason of the lockout," including "search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings." With respect to the ALJ's Decision, Macy's filed its Exceptions and the Union filed its Cross-Exceptions.

On January 17, 2023, the Board in its Decision and Order affirmed the ALJ's rulings, findings, and conclusions, and adopted the ALJ's recommended

Order, making two modifications. The Board modified the ALJ's recommended Order, first, "to conform to the violations found and to the Board's standard remedial language, and in accordance with" prior NLRB decisions, and second, to amend the "make-whole remedy" to provide that Macy's "*shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout*, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings."

Macy's petitioned for review over the Board's Decision and Order in the Fifth Circuit, and the Union filed its petition in this Court. Pursuant to 28 U.S.C. § 2112, the Judicial Panel on Multidistrict Litigation transferred their Petitions for Review here, after this Court was randomly selected. The NLRB filed a Cross-Application for Enforcement of its final Order. These three petitions were consolidated here.

II. Standard of Review

We "must uphold a Board decision when substantial evidence supports its findings of fact and when the agency applies the law correctly." *United Nurses Ass'ns of Cal. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017) (internal quotation marks and citation omitted). "We review de novo whether the Board applied the correct legal standard." *NLRB v. Bingham-Willamette Co.*, 857 F.2d 661, 663 (9th Cir. 1988) (citing *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 (1971)). The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole . . . ." 29 U.S.C. § 160(e)-

(f). "The Board has special expertise in drawing" inferences of unlawful motive and credibility, so "its determinations are entitled to judicial deference." *Kallmann v. NLRB*, 640 F.2d 1094, 1099 (9th Cir. 1981) (citation omitted); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) ("We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.").

Moreover, the Board's "discretion in selecting remedies is 'exceedingly broad,' and we will enforce a remedy 'unless it represents a clear abuse of discretion.'" *NLRB v. Ampersand Publ'g, LLC*, 43 F.4th 1233, 1236 (9th Cir. 2022) (quoting *NLRB v. C.E. Wylie Constr. Co.*, 934 F.2d 234, 236 (9th Cir. 1991)). "Such an abuse of discretion is present if it is shown that the order is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act." *Id.* at 1236-37 (quoting *Wylie*, 934 F.2d at 236).

"Because the Board adopted the ALJ's analysis" by affirming the ALJ's rulings, findings, and conclusions, "we treat the Board's order and the adopted ALJ analysis as one order." *Kava Holdings, LLC v. NLRB*, 85 F.4th 479, 491 n.5 (9th Cir. 2023) (citation omitted).

III. Discussion

To address the inherent "inequality of bargaining power" between employers and "employees who do not possess full freedom of association or actual liberty of

contract," 29 U.S.C. § 151, the NLRA "'encourag[es] the practice and procedure of collective bargaining,' between labor and management to resolve 'industrial disputes arising out of differences as to wages, hours, or other working conditions,'" *Glacier Northwest, Inc. v. Teamsters*, 598 U.S. 771, 775 (2023) (alteration in original) (quoting 29 U.S.C. § 151). "The NLRA makes it unlawful for an employer to engage in unfair labor practices[.]" *Hooks ex rel. NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022) (citing 29 U.S.C. § 158). The NLRA also "grants the Board broad discretion to impose remedies for unfair labor practices." *Ampersand*, 43 F.4th at 1238 (cleaned up). "The Board may take any 'affirmative action' that 'will effectuate the policies' of the Act." *Id.* (first quoting 29 U.S.C. § 160(c); then citing *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539-40 (1943)). "Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." *Va. Elec.*, 319 U.S. at 539 (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187, 189 (1941)). "The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.'" *Id.* (quoting *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940)).

The Board here found that the Company's lockout constituted unfair labor practices under Section 8(a)(1) and (3) of the Act. We deny both the Union's and the Company's Petitions for Review, and we grant the Board's Cross-Application for Enforcement for the following reasons: (1) we have jurisdiction over this consolidated appeal; (2) substantial evidence supports

the Board's factual findings regarding the Company's unlawful lockout; (3) the Board's selection of remedies here is not a clear abuse of discretion; and (4) the Board's final Order is enforceable under the circumstances here disclosed.

A. Jurisdiction

"A federal court of appeals may review the Board's final order, if an aggrieved party seeks judicial review or if the Board seeks enforcement of its order." *Starbucks Corp. v. McKinney*, 602 U.S. 339, 343 (2024) (citing 29 U.S.C. § 160(e)-(f)). Macy's argues that the Union lacks standing as a "person aggrieved" by the Board's Decision and Order within the meaning of § 160(f), because the Union "does not deny that the Board granted it all of the relief that it had specifically sought in the [C]harge form[s] and [C]omplaint."[3] *Int'l Union of Operating Eng'r Loc. 501 v. NLRB*, 949 F.3d 477, 482 (9th Cir. 2020). We review this jurisdictional question de novo, *see Advanced Integrative Med. Sci. Inst., PLLC v. Garland*, 24 F.4th 1249, 1256 (9th Cir.

[3] The NLRB's "'authority kicks in when a person files a charge with the agency alleging that' an employer or labor union has engaged in an unfair labor practice." *McKinney*, 602 U.S. at 342-43 (first quoting *Glacier*, 598 U.S. at 775; then citing 29 C.F.R. § 101.2 (2021)). Next, a Regional Director investigates the charge. *Id.* at 343 (citing 29 C.F.R. § 101.4 (2023)). "If the charge appears to have merit," 29 C.F.R. § 101.8, then the Regional Director "institutes a formal action against the offending party by issuing an administrative complaint," *McKinney*, 602 U.S. at 343 (citing 29 C.F.R. § 101.8). The NLRB General Counsel "prosecutes the government's case." *Ampersand*, 43 F.4th at 1235 (citing 29 U.S.C. § 153(d)).

2022), and conclude that we have jurisdiction because the Union is a "person aggrieved."[4]

After Macy's filed its Exceptions to the ALJ's Decision, the Union properly requested additional remedies not granted by the ALJ in its Cross-Exceptions. *See* 29 C.F.R. § 101.11(b) ("Whenever any party files exceptions, any other party . . . may file cross-exceptions relating to *any portion* of the administrative law judge's decision." (emphasis added)). Among other things, the ALJ's recommended Order required that Macy's, at "all locations in Northern California and Reno, Nevada," physically maintain and post the Board's notice "for 60 consecutive days in conspicuous places," as well as distribute the same notice electronically to employees, or if Macy's "has gone out of business or closed the facilit[ies] involved in these proceedings, . . . duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the [Company] at any time since December 7, 2020." According to the Board, the Union requested "several extraordinary remedies, including multiple notice readings by upper-level managers involved in the lockout, notice posting on the [Company's] public website, notice mailing to all of the [Company's] employees who had worked at locations where

[4] Although Macy's does not challenge our "jurisdiction to resolve the Board's application for enforcement under 29 U.S.C. § 160(e)," we must assure ourselves of our own jurisdiction over the Board's Cross-Application for Enforcement. *NLRB v. Siren Retail Corp.*, 99 F.4th 1118, 1122, 1124 (9th Cir. 2024). Because we have jurisdiction under § 160(e) also, we may "proceed to the merits of the Board's application for enforcement." *Id.* at 1124.

employees were locked out, and notice posting for at least three years."

The Board then denied "in part the relief sought," 29 U.S.C. § 160(f), by expressly denying the Union's request for "several extraordinary remedies . . . because the Board's traditional remedies are sufficient to effectuate the policies of the Act in this matter." *See Textile Workers Union of Am., AFL-CIO v. NLRB*, 475 F.2d 973, 974 & n.2 (D.C. Cir. 1973) (per curiam) (noting that the union was a "party aggrieved," as it "petitioned for review of the Board's refusal to order more stringent remedies"). Thus, jurisdiction over this consolidated appeal is proper.[5]

B. The Lockout

Under *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), an employer may lawfully lock out employees under Section 8(a)(1) and (3) of the Act "after a bargaining impasse has been reached," if the lockout is "for the sole purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position." Macy's insists that this is exactly what it did. We disagree.

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[5] By random selection for multidistrict litigation, *see* 28 U.S.C. § 2112(a)(1), (3), the Union's and the Company's Petitions for Review were first transferred and then consolidated here. As the alleged "*truly* aggrieved party," Macy's asserts that any remaining proceedings should be transferred to the Fifth Circuit, "wherein" Macy's "resides or transacts business[.]" 29 U.S.C. § 160(f). However, the Union as a "person aggrieved," could also file its petition with "the circuit wherein" the alleged unlawful lockout occurred. *Id.* Thus, we deny the Company's request, Case No. 23-188, Dkt. 16, for transfer.

Two years after *American Ship*, the Supreme Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), found that when, "after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike," *id.* at 378 (citing 29 U.S.C. §§ 157, 163). The Supreme Court determined that such interference with these rights by an employer constitutes an unfair labor practice under Section 8(a)(1) and (3) of the Act. *Id.* (citing 29 U.S.C. § 158(a)(1), (3)). Accordingly, as "the employer who refuses to reinstate strikers," Macy's "is guilty of an unfair labor practice" unless it can show "legitimate and substantial business justifications" for its lockout. *Id.* (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)). Macy's does not make such a showing, and substantial evidence supports the Board's related findings.

Macy's first argues that the Board legally erred by failing to apply the so-called "*Great Dane* framework" to evaluate the alleged Section 8(a)(3) violation. We have previously acknowledged that:

> The Supreme Court has established a framework for determining whether employer conduct is unlawfully discriminatory. Some employer conduct is so "inherently discriminatory or destructive" of employee rights that anti-union motivation is inferred. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-28, 83 S. Ct. 1139, 10 L. Ed. 2d 308 (1963). If employer conduct is "inherently destructive," the Board may find an improper motive regardless of evidence of a legitimate

> business justification. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33, 87 S. Ct. 1792, 18 L. Ed. 2d 1027 (1967). If, on the other hand, "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,'" and the employer establishes a legitimate and substantial business justification for its actions, there is no violation of the Act without a finding of an actual anti-union motivation. *Id.* at 34, 87 S. Ct. 1792[.]

Fresh Fruit & Vegetable Workers Loc. 1096 v. NLRB, 539 F.3d 1089, 1096 (9th Cir. 2008); *see also id.* ("In determining whether or not a company has violated the NLRA, the relevant inquiry is whether or not the employer's action likely discouraged union membership and was motivated by anti-union animus." (citing *Metro. Edison*, 460 U.S. at 700)). "The Supreme Court has defined 'inherently destructive' conduct as conduct that 'carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose.'" *Id.* at 1096-97 (quoting *Am. Ship*, 380 U.S. at 311-12). Under this framework, the "burden of proving justification is on the employer." *Fleetwood Trailer*, 389 U.S. at 378 (citing *Great Dane*, 388 U.S. at 34).

Upon de novo review, we conclude that the Board applied the correct legal standard when it considered *Dayton Newspapers, Inc.*, 339 N.L.R.B. 650 (2003), *enforced in relevant part*, 402 F.3d 651 (6th Cir. 2005), a prior NLRB decision in which the Board applied the *Great Dane* framework. *See, e.g.*, *Dayton Newspapers*,

339 N.L.R.B. at 664 ("An employer's unlawful refusal to reinstate economic strikers is conduct so inherently destructive of employee rights that evidence of specific antiunion motivation is not necessary to establish a violation of the Act." (citing *Great Dane*, 388 U.S. 26)). "[T]he Board is not obligated to justify its interpretation anew with every application if it has done so adequately in a previous decision." *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 70 (D.C. Cir. 2005) (citation omitted). The Board therefore did not legally err on this ground.

For a lockout to be deemed lawful, "the union must be informed on a timely basis of the employer's demands so that the union can evaluate whether to accept them and prevent the lockout." *Alden Leeds, Inc.*, 357 N.L.R.B. 84, 93 (2011) (collecting cases), *enforced*, 812 F.3d 159 (D.C. Cir. 2016). "[I]n order for employees to 'knowingly [re]evaluate their position' . . . , the employees must not only be informed that they are locked out, but they must be clearly and fully informed of the conditions they must meet to be reinstated." *Dayton Newspapers*, 339 N.L.R.B. at 656 (quoting *Eads Transfer, Inc.*, 304 N.L.R.B. 711, 712 (1991), *enforced*, 989 F.2d 373 (9th Cir. 1993)). Relying on *Alden Leeds* and *Dayton Newspapers*, the Board concluded that Macy's violated Section 8(a)(1) and (3) of the NLRA "by locking out employees, while at the same time never clearly and fully informing them of the conditions that must be met in order to be reinstated."

Reviewing the record as a whole, we find that substantial evidence supports the Board's conclusion that Union employees were not clearly and fully

informed of conditions they need to satisfy to be reinstated. As the ALJ found,

> [a]t the time Macy's locked out the [Union] engineers on December 7, neither the Union nor the strikers knew [the Company's] bargaining position. All they knew was that Macy's was refusing to allow the engineers to return to work until there was a contract in place. However, because the Final Offer had expired, and Macy's had not presented *any other bargaining proposals* to the Union, at the time of the lockout, neither the Union nor the employees were "clearly and fully informed of the *conditions* they must meet to be reinstated," *Dayton Newspapers*, 339 [N.L.R.B.] at 656, nor did they have "a clear statement of the *conditions* that [the] employees must accept to avert the lockout." *Alden Leeds, Inc.*, 357 [N.L.R.B.] at 95.

Nevertheless, Macy's counters that its lockout was justified. "An employer must reinstate an economic striker who offers unconditionally to return to work, unless the employer has a substantial and legitimate business reason for refusing to do so." *Zapex Corp. v. NLRB*, 621 F.2d 328, 333 (9th Cir. 1980) (citations omitted); *see also Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 662 (6th Cir. 2005) ("An employer violates NLRA § 8(a)(3) and (1) if it fails to reinstate striking workers without showing a legitimate and substantial business justification." (first citing *Fleetwood Trailer*, 389 U.S. at 378; then citing *Great Dane*, 388 U.S. at 34)). Macy's asserts that the lockout was justified because it was imposed in

support of its bargaining position. Macy's further argues that it "followed *Eads Transfer*'s guidance by promptly informing the Union of its lockout on December 7, the first business day after the Union offered to return to work after a three-month strike." Considering *Dayton Newspapers*, we conclude that the lockout was not justified.

In *Dayton Newspapers*, 339 N.L.R.B. 650, the Board found an unlawful lockout where union workers, after a six-month strike, gave their unconditional offer to return to work during the holiday season on Thursday, December 23, 1999, and the company refused their request for reinstatement four days later, on Monday, December 27, 1999. *See, e.g.*, *Dayton Newspapers*, 402 F.3d at 662 ("As a consequence of this refusal, the NLRB found that as of December 27, 1999, [the company] was engaged in an illegal lockout."). Before the Board in *Dayton Newspapers*, the company complained that the union's offer to return to work "came before the holidays and in the midst of [the company's] attempt to solve problems with Y2K adjustments," and that the company's "representatives involved in decision-making were not available at a moment's notice at that time of year[.]" 339 N.L.R.B. at 667. Recognizing that the Board "has the primary responsibility for balancing management's business needs with the workers' right to be reinstated," *Dayton Newspapers*, 402 F.3d at 663 (citing *Fleetwood Trailer*, 389 U.S. at 378), the Sixth Circuit concluded that the Board "did not err in finding that after December 27, [the employer's] demands became a 'moving target' that made it ever more difficult for the [u]nion to knowingly evaluate its position and end the lockout," *id.* Simply

put, "employees must know at any point in the lockout what they can do to end it." *Id.* at 662.

As the NLRB, Macy's, and the Union all agree here, at the time of the lockout there was *no* offer at all on the table—not a confusing or uncertain one or even a moving target. *See Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 164-66 (D.C. Cir. 2016) (concluding that the Board's finding that the employer violated the NLRA is supported by substantial evidence, where the employer communicated an "unclear" proposal, "failing to provide the [u]nion with a timely, clear, and complete offer setting forth the conditions necessary to avoid the lockout"). Macy's did not inform the Union of its demands or conditions in a timely, clear, and complete manner, preventing the Union members from having a fair opportunity to evaluate any bargaining proposals for either lockout or reinstatement purposes. *See id.* at 165. Worse than a "moving target" is not knowing where to aim at all. *See Dayton Newspapers*, 339 N.L.R.B. at 656.

Macy's concedes that it withdrew its Final Offer, and substantial evidence supports the Board's finding that Macy's rejected the Union's wage proposal without proffering any other bargaining proposals before the lockout. Although Macy's argues that its condition was that it required an agreement in place to end the lockout, we conclude that substantial evidence supports the Board's finding that such an indeterminate condition did not satisfy its obligations.

The Union ended its strike and gave Macy's its unconditional offer to return to work on December 4, 2020. Two days later, on December 6, 2020, Vega sent an email to Ashmore, stating that the employees

would show up to work the next morning unless they were being locked out. That afternoon, Ashmore replied that:

> [The Union's] unexpected offer, coming on a Friday afternoon after a contentious strike of over three months, implicates several administrative, logistical, and economic issues that need to be fully evaluated on our end with the input of several company employees. For that reason, the team should not return to work on Monday. *This is not a lockout* . . . .

The next morning, on Monday, December 7, 2020, at least some of the Union members reported to work. On that day, Ashmore wrote to Vega:

> We have carefully evaluated your offer to have bargaining [Union] members return to work. *We are not willing to reinstate bargaining [Union] employees until there is an agreement in place; this decision is being made in support of our bargaining position.*

Macy's was "obligated to declare the lockout *before or in immediate response* to the strikers' unconditional offer[] to return to work." *Eads Transfer*, 304 N.L.R.B. at 713 (emphasis added). It was further required to inform the Union fully and clearly on the conditions necessary for employees to be reinstated. *See Dayton Newspapers*, 339 N.L.R.B. at 656. Macy's failed to satisfy either of these requirements, and instead it declared its lockout three days after the Union gave its unconditional offer to return to work *and* a day after Ashmore told Vega, "This is *not* a lockout . . . ." With such misdirection, the Union engineers would

not be able to "knowingly reevaluate their position and decide whether to accept the employer's terms and . . . take other appropriate action." *Eads Transfer, Inc. v. NLRB*, 989 F.2d 373, 376 (9th Cir. 1993). Thus, we are unpersuaded that Macy's met the "guidance" set forth by *Eads Transfer*, when *Dayton Newspapers* applied just that and found that a similarly situated employer there failed to set forth its conditions clearly and fully, so "the [u]nion could not intelligently evaluate its position and obtain reinstatement." *Dayton Newspapers*, 339 N.L.R.B. at 656.

Macy's alternatively argues that its lockout was not only offensive, but also defensive. "[T]he Supreme Court's *American Ship* decision has obliterated, as a matter of law, the line previously drawn by the Board between offensive and defensive lockouts." *Evening News Ass'n*, 166 N.L.R.B. 219, 221 (1967). Accordingly, "a fundamental principle underlying a *lawful lockout* is that the Union must be informed of the employer's demands, so that the Union can evaluate whether to accept them and obtain reinstatement," *Boehringer Ingelheim Vetmedica, Inc.*, 350 N.L.R.B. 678, 679 (2007) (emphasis added) (quoting *Dayton Newspapers*, 339 N.L.R.B. at 656), regardless of whether we characterize the lockout as offensive or defensive. Moreover, a lockout that is "defensive" in nature must be justified by an intent "to avoid severe and unusual hardships." *Id.*

Before the ALJ, Macy's argued that it had "good-faith concerns" over misconduct and sabotage by the Union, especially during the holiday shopping season, which it claims justified the "defensive" lockout. The ALJ systematically reviewed the Company's

submitted evidence, including witness testimony, and ultimately concluded that Macy's provided those "post-hoc excuses" to bolster its defense and that the Company's true "motive" in locking out its employees was to "gain economic leverage so the Union would accept" its new wage proposal that it submitted to the Union on December 10, 2020. Because the Board "carefully examined the record and [found] no basis for reversing" the ALJ's credibility findings, we conclude that the Board's "determinations are entitled to judicial deference[,]" based on its "'special expertise in drawing' inferences of credibility and unlawful motive[.]" *Kava Holdings*, 85 F.4th at 486 (quoting *Kallmann*, 640 F.2d at 1099). "We may not reject the ALJ's credibility determinations unless a clear preponderance of the evidence shows they are incorrect." *Lippincott Indus., Inc. v. NLRB*, 661 F.2d 112, 114 (9th Cir. 1981) (citations omitted). Here, the record as a whole shows that the ALJ's conclusions and the Board's reasoning about the Company's misconduct and sabotage arguments and evidence were well-supported by the articulated and admissible facts.

In sum, on this record, substantial evidence supports the Board's finding that Macy's violated the Act at the time of the lockout, where Macy's failed to inform the Union fully and clearly on the conditions necessary for employees either to be reinstated, *see Dayton Newspapers*, 339 N.L.R.B. at 656, or to avoid a lockout before one even occurred, *see Alden Leeds*, 357 N.L.R.B. at 95. Macy's failed to timely, clearly, and fully inform the Union of the conditions necessary (e.g., new contract offers or other bargaining proposals) to prevent a lockout or to be reinstated,

when the Final Offer expired on October 15, 2020, and Macy's rejected the Union's November 25, 2020 wage proposal without providing "*any type* of counter offer" before the lockout on December 7, 2020. In other words, Macy's failed to meet its "burden of showing such a legitimate justification." *Eads Transfer*, 989 F.2d at 375 (citing *Fleetwood Trailer*, 389 U.S. at 378).

C. Remedies

"The function of the remedy in unfair labor cases is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Kallmann*, 640 F.2d at 1103 (citing *Phelps Dodge*, 313 U.S. at 194). The Board's selected remedies are challenged on two fronts. The Union argues that its requested additional remedies were improperly denied, but Macy's contends that the traditional ones were awarded in error. The NLRB counters that its selection of remedies strikes the proper balance under its broad discretion. The Board's "discretion in selecting remedies is 'exceedingly broad,' and we will enforce a remedy 'unless it represents a clear abuse of discretion.'" *Ampersand*, 43 F.4th at 1236 (quoting *Wylie*, 934 F.2d at 236). Finding no clear abuse of discretion, we enforce the Board's remedial order.

1. The Union's Requested Additional Remedies

The Board denied the Union's request for "several extraordinary remedies" because it concluded that "traditional remedies are sufficient to effectuate the policies of the Act" here. The Union petitions for review of that determination, requesting four additional remedies: (1) a notice reading in the presence of members of management responsible for

the lockout decision; (2) an extended notice posting more than the standard sixty-day period; (3) a notice mailing to all Union members, including those who were locked out; and (4) a notice expressly explaining how Macy's violated the Act.[6] We conclude that the Board did not clearly abuse its discretion in declining to award these remedies. *See Wylie*, 934 F.2d at 236.

With respect to the first three additional remedies (a notice reading with management's presence, an extended notice posting, and a notice mailing), we observe that they are typically reserved for "cases involving respondents who have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct." *Noah's Ark Processors, LLC*, 372 N.L.R.B. No. 80, slip op. at 4 (Apr. 20, 2023) (finding "egregious or widespread" misconduct, where the respondent's "violations seriously affected the entire unit by undermining their chosen bargaining representative, violating their right to have the [u]nion negotiate on their behalf, and demonstrating to them in no uncertain terms that the [r]espondent was willing to ignore a court order in order to violate their rights"), *enforced*, 98 F.4th 896 (8th Cir. 2024); *see also Whitesell Corp.*, 357 N.L.R.B. 1119, 1124 (2011); *HTH Corp.*, 361 N.L.R.B. 709, 714 (2014), *enforced in relevant part*, 823 F.3d 668 (D.C. Cir. 2016). Based on the record before us, we conclude that the Board did not clearly abuse its discretion, where

[6] On appeal, the Union challenges the Board's Decision and Order only to the extent its extraordinary remedies were denied; it does not take issue with the traditional remedies that were granted and the Board's conclusion that Macy's violated the Act by unlawfully locking out employees.

the record does not contain evidence that Macy's is a repeat offender of the Act or engaged in such egregious or widespread misconduct that warrants these extraordinary remedies.

As to the fourth additional remedy, the Union argues that the Board's notice does not "contain affirmative language expressly explaining how Macy's violated the Act." For example, the Board's notice that is required to be physically posted at the Company's facilities and electronically distributed to employees, includes the statement, "WE WILL NOT lock you out without providing you with a timely, clear, and complete offer, that sets forth the conditions necessary to avoid the lockout." Specifically, the Union requests that the Board either substitute or supplement "We will not" statements with those stating "[w]e have done or committed . . . ."[7] We agree with the NLRB

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[7] The Board's notice also includes the following "We will" statements:

> WE WILL make the locked-out employees whole for any loss of earnings and other benefits resulting from the unlawful lockout, less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses, plus interest.

To further clarify the Company's actions to employees, however, the Union proposes the following amended language to the Board's notice:

> We were found by the National Labor Relations Board to have violated federal law by refusing to allow members of [the Union] to return to work and unlawfully locked them out. We have agreed to remedy this violation by reinstating all locked out employees

that the Union fails to show how it clearly abused its discretion by applying its "decades-old practice of including only 'WE WILL' and 'WE WILL NOT' phrases in its notices . . . ." *See, e.g.*, *HTH Corp. v. NLRB*, 823 F.3d 668, 672 (D.C. Cir. 2016) ("In the 'notice' the officials are . . . to state 15 specific assurances in the form, 'We will' adhere to specified NLRA obligations and remedy various breaches, or 'We will not' violate the Act in a wide range of specified ways."). Accordingly, we do not find a "clear abuse of discretion," *Ampersand*, 43 F.4th at 1236 (quoting *Wylie*, 934 F.2d at 236), when the Board denied the Union's "several extraordinary remedies" because traditional ones sufficed here. Thus, we deny the Union's Petition for Review.

2. The Company's Challenges to the Board's Make-Whole Relief

Macy's argues that the Board erred in finding that it was liable throughout the lockout and in awarding the Union's make-whole relief pursuant to *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 1 (Dec. 13, 2022) (clarifying that "make-whole relief" includes compensation "for all direct or foreseeable pecuniary harms" to affected employees), *order vacated in part on other grounds*, 102 F.4th 727 (5th Cir. 2024). On June 4, 2024, the NLRB filed its Rule 28(j) letter, apprising this Court of the Fifth Circuit's May 24, 2024 opinion in *Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024), which did not address the merits of the Board's revised make-whole relief. We do so here,

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who wish to return and by making them whole for our conduct.

because "[a]s far as we can tell, this is a question of first impression for the Ninth Circuit . . . ." *United Steel Workers of Am. AFL-CIO-CLC v. NLRB*, 482 F.3d 1112, 1115 n.4 (9th Cir. 2007). We conclude that the Board did not clearly abuse its discretion in ordering make-whole relief.

i. The Company's Liability During the Entirety of the Lockout

Macy's insists that it cured the taint of its lockout by tendering its December 10, 2020 wage proposal to the Union, three days after the lockout began. We disagree. "We review the Board's finding of taint for substantial evidence." *Denton Cnty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 168 (5th Cir. 2020) (citations omitted). "[T]o cure a lockout, the employer must restore the status quo ante as well as end the lockout." *Alden Leeds*, 812 F.3d at 166 (citing *Greensburg Coca-Cola Bottling Co.*, 311 N.L.R.B. 1022, 1029 (1993), *enforcement denied on other grounds*, 40 F.3d 669 (3d Cir. 1994)). "[A] lockout unlawful at its inception retains its initial taint of illegality until it is terminated *and* the affected employees are made whole." *Movers & Warehousemen's Ass'n of Metro. Wash., D.C., Inc.*, 224 N.L.R.B. 356, 357 (1976) (emphasis added), *enforced*, 550 F.2d 962, 966 (4th Cir. 1977) ("We think it dispositive of the issue that the employers here failed to dissipate the effects of their unlawful lockout."), *cert. denied*, 434 U.S. 826 (1977). Substantial evidence supports the Board's finding that the lockout's taint "was not cured when Macy's presented the Union with its new wage proposal on December 10," because that offer neither

terminated the lockout nor made the affected employees whole.

We recognize, however, that Macy's may "avoid further liability if it is able to *show affirmatively* that a failure to restore the status quo ante did not adversely affect subsequent bargaining." *Alden Leeds*, 812 F.3d at 166 (emphasis added) (quoting *Greensburg Coca-Cola*, 311 N.L.R.B. at 1029). It is the Company's burden—not the Union's or the NLRB General Counsel's—"to show that its failure to restore the *status quo ante* had no adverse impact on the subsequent collective bargaining." *Movers*, 224 N.L.R.B. at 358. This burden requires Macy's "to disentangle the consequences for which it was chargeable from those from which it [was] immune." *Id.* (quoting *NLRB v. Remington Rand*, 94 F.2d 862, 872 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938)). The ALJ found that Macy's failed to carry its burden to make this affirmative showing. Indeed, the ALJ observed that, at the hearing, "[n]o such evidence was presented" by Macy's.

Macy's counters that these erroneous findings "ignore[] substantial evidence that the parties negotiated in good faith after the lockout." According to Macy's, "[i]f the lockout had adversely impacted the parties' ongoing bargaining, then the [r]ecord would show . . . the Union was *forced to accept a substandard proposal* because of the lockout." However, Macy's misunderstands the standard. The fact that the record does not show the Union's acceptance of a substandard proposal does not on its own satisfy the Company's burden of showing "*no* adverse impact on the subsequent collective bargaining." *Alden Leeds*, 357

N.L.R.B. at 84 n.3 (emphasis added) (quoting *Movers*, 224 N.L.R.B. at 358). The ALJ found that even the "limited evidence in the record" relating to the subsequent bargaining indicated that the Union made concessions, which were indicative of its weakened position because of the Company's unlawful lockout. Those concessions included an offer to cap wage rates at the levels proposed in the Final Offer as well as proposals to "delete two engineer classifications from the contract, and further delete a section from the agreement that required Macy's to contribute over $500 per engineer to a training fund." Instead of addressing these concessions, Macy's maintains that no inferior offer was accepted by the Union. These concessions represent substantial evidence in support of the ALJ's finding. "In these circumstances, without a cessation of the lockout *and* a restoration of the *status quo ante*, it is difficult to conclude that any *bargaining* which ensued was not adversely affected[.]"[8] *Movers*, 224 N.L.R.B. at 358 (first and third emphases added). We conclude that substantial evidence supports the ALJ's findings, as adopted by the Board, that Macy's unlawful lockout placed the Union in a weakened bargaining position, and that Macy's failed to satisfy its burden of showing otherwise.

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[8] Under the NLRA, when negotiations fail, there is no "compulsion to reach agreement." *Amax*, 453 U.S. at 336 (citations omitted). Macy's needed to demonstrate that the lockout "did not adversely affect subsequent *bargaining*[,]" not subsequent *contracting*. *Alden Leeds*, 812 F.3d at 166 (emphasis added) (quoting *Greensburg Coca-Cola*, 311 N.L.R.B. at 1029).

ii. The Board's Revised Make-Whole Remedial Framework

In *Thryv*, the Board "standardiz[ed] [its] make-whole relief to expressly include the direct or foreseeable pecuniary harms suffered by affected employees . . . ."[9] 372 N.L.R.B. No. 22, slip op. at 7. The Board noted that "'direct harms' are those in which an employee's 'loss was the direct result of the [employer's] illegal conduct,'" *id.* at 13 (quoting *BRC Injected Rubber Prods., Inc.*, 311 N.L.R.B. 66, 66 n.3 (1993)), and that "foreseeable harms" are "those which the [employer] knew or should have known would be likely to result from its violation of the Act, regardless of its intentions," *id.* Macy's argues that the compensation for "direct or foreseeable pecuniary harms" as contemplated by *Thryv* would be improper "compensatory damages," "consequential damages," or "make-whole relief."[10]

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[9] In response to the Court's order requesting supplemental briefing, Macy's argues that under the Supreme Court's recent opinion in *SEC v. Jarkesy*, 603 U.S. 109 (2024), it is entitled to a jury trial on the so-called "*Thryv* remedies." Macy's failed to raise a Seventh Amendment objection to the Board, *see* 29 U.S.C. § 160(e), and it similarly failed to raise any Seventh Amendment arguments in this Court until prompted to do so by the Court's order. We therefore decline to entertain this argument. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

[10] Macy's also argues that the Board erred by retroactively applying *Thryv* to award the Union's make-whole remedy. On appeal, this argument is barred because Macy's neither raised it first in a motion for reconsideration before the Board nor showed any extraordinary circumstances here. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be

"[V]esting in the Board the primary responsibility and broad discretion to devise remedies . . . , subject only to limited judicial review," *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (collecting cases), Section 10(c) of the NLRA empowers the Board to "take any 'affirmative action' that 'will effectuate the policies' of the Act," *Ampersand*, 43 F.4th at 1238 (first quoting 29 U.S.C. § 160(c); then citing *Va. Elec.*, 319 U.S. at 539-40). We will not disturb the Board's remedial order, "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Va. Elec.*, 319 U.S. at 540. Macy's makes no such showing here.

After "careful consideration" of both its "remedial authority" and "history of addressing the effects of unfair labor practices," the Board in *Thryv* clarified and standardized its definition of "make-whole relief" to "expressly include the direct or foreseeable pecuniary harms suffered by affected employees" to "more fully effectuate the make-whole purposes of the Act." 372 N.L.R.B. No. 22, slip op. at 7. We agree that the make-whole relief provided for in *Thryv* furthers the policy of the NLRA because it is "directly targeted" at the Company's unlawful lockout and aimed at "restor[ing] the economic strength that is necessary to ensure a return to the status quo ante at the

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excused because of extraordinary circumstances."); *see also NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1127 (9th Cir. 2011) ("Section 10(e) . . . bars judicial review of a newly minted objection to a remedial order when a party fails to move for reconsideration of the Board's *sua sponte* modification." (citations omitted)).

bargaining table." *Ampersand*, 43 F.4th at 1238 (alteration in original) (citation omitted).

According to Macy's (and the partial dissent), the Board's decision in *Thryv* improperly authorizes itself to award full compensatory damages. Macy's contends that "the Board lacks the authority to award damages for purportedly foreseeable financial harms." *See, e.g.*, *UAW-CIO v. Russell*, 356 U.S. 634, 642-43 (1958) ("The power to order affirmative relief under [Section] 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." (citation omitted)). The NLRB "does not pursue the 'adjudication of private rights.' Rather, it 'acts in a public capacity to give effect to the declared public policy of the Act . . . .'" *EEOC v. Occidental Life Ins. Co. of Cal.*, 535 F.2d 533, 538 (9th Cir. 1976) (alteration in original) (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940)), *aff'd*, 432 U.S. 355 (1977). The broad "grant of remedial power" under the Act "does not authorize punitive measures, but making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."[11] *NLRB v. Strong*, 393 U.S. 357, 359 (1969) (cleaned up).

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[11] Even when 29 U.S.C. § 160(e) "bars our consideration of a party's objection . . . the Board is entitled to enforcement unless the Board has 'patently traveled outside the orbit of its authority.'" *Valley Hosp. Med. Ctr., Inc. v. NLRB*, 100 F.4th 994, 1000 (9th Cir. 2024) (alteration in original) (quoting *Int'l Union*

of Painter & Allied Trades v. J & R Flooring, Inc., 656 F.3d 860, 867 (9th Cir. 2011)). Significantly, the Board remains within its orbit here because its make-whole relief is designed "solely to 'restore the status quo[,]'" so it is equitable in nature. *Jarkesy*, 603 U.S. at 123 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.")).

The Board specifically states that its "make-whole remedies do not punish bad actors, but rather implement the statutory principles of rectifying the harms actually incurred by the victims of unfair labor practices and restoring them to where they would have been but for the unlawful conduct." *Thryv*, 372 N.L.R.B. No. 22, slip op. at 11. We agree because "[t]he instant case is not a suit at common law or in the nature of such a suit[,]" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *see also Agwilines, Inc. v. NLRB*, 87 F.2d 146, 151 (5th Cir. 1936) ("Pecuniary rights are established and denied upon Board findings without a jury. Such proceedings have been authoritatively declared to be not within the Seventh Amendment."), but more importantly Congress explicitly "entrust[ed] enforcement of statutory rights to an administrative process . . . free from the strictures of the Seventh Amendment," *Curtis v. Loether*, 415 U.S. 189, 195 (1974); *see, e.g.*, *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 461 (1977) ("[Congress] created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh Amendment is no bar . . . to their enforcement outside the regular courts of law."). As here, the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law." *Jones & Laughlin*, 301 U.S. at 48 (citations omitted); *see also Curtis*, 415 U.S. at 194 ("[J]ury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme."). That any make-whole remedy

We conclude that the Board's invocation of *Thryv*'s make-whole relief here vindicates a public right. *See Va. Elec.*, 319 U.S. at 543 ("The instant reimbursement order is not a redress for a private wrong. Like a back pay order it does *restore to the employees in some measure what was taken from them* because of the [c]ompany's unfair labor practices." (emphasis added)). "The fact that these proceedings (may) operate to confer an incidental benefit on private persons does not detract from this public purpose." *Occidental Life*, 535 F.2d at 538 (citation omitted). To the extent that the Board's make-whole relief "somewhat resemble[s] compensation for private injury," that compensation is merely incidental to "the effectuation of the policies of the Act" because the

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must be "sufficiently tailored to the actual, compensable injuries suffered," *Sure-Tan*, 467 U.S. at 901, contrary to the partial dissent's view, also does not equate to the improper "adjudication or vindication of private rights," *Haleston Drug Stores v. NLRB*, 187 F.2d 418, 420 (9th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951); *see also Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 269-70 (1940) ("It is the Board's right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'. Both the order and the decree are aimed at the prevention of the unfair labor practice."). Instead, it merely underscores how the remedy is "an incident to [permissible] equitable relief," *Jones & Laughlin*, 301 U.S. at 48, which "eschews mechanical rules and depends on flexibility," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (cleaned up). Accordingly, the Seventh Amendment is not implicated because "[i]n this case, the remedy is all but dispositive." *Jarkesy*, 603 U.S. at 123; *see also id.* at 120 ("The threshold issue is whether this action implicates the Seventh Amendment." (applying *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) and *Tull*, 481 U.S. 412)).

remedy is primarily "designed to aid in achieving the elimination of industrial conflict[,]" vindicating "public, not private rights."[12] *Va. Elec.*, 319 U.S. at 543

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[12] On December 27, 2024, the Third Circuit issued its opinion in *NLRB v. Starbucks Corp.*, --- F.4th ----, No. 23-1953, 2024 WL 5231549 (3d Cir. Dec. 27, 2024), granting the Board's petition to enforce its order, yet vacating the *Thryv* remedies for exceeding the Board's authority under the NLRA. Unlike the partial dissent, we do not view *Starbucks* as wholly in conflict with today's opinion. Like the Third Circuit, we agree and recognize that the NLRB has long ordered, and still may order, monetary relief akin to backpay. *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *11-12. We also agree that any make-whole relief must be equitable in nature. *Id*. As the Third Circuit acknowledges, any monetary relief ordered by the NLRB must be a form of restitution addressing the *result* of the employer's violation of the NLRA. *See, e.g.*, *id.* at *11 ("The Board can still award monetary relief based on what the employer withheld as a *result* of an unfair labor practice." (emphasis added)); *accord* Partial Dissent at 50; *see also Phelps Dodge*, 313 U.S. at 198 ("[O]nly actual losses should be made good[.]").

However, to the extent that the Third Circuit's opinion could be read to invalidate any form of monetary relief because it "*resembles* an order to pay damages," we disagree. *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *12 (emphasis added) (citing *Damages*, Black's Law Dictionary (12th ed. 2024) (defining "damages" as "[m]oney . . . ordered to be paid to[] a person as compensation for loss or injury")). Resemblance alone cannot be dispositive, where Congress's express grant of broad authority to the NLRB to fashion appropriate remedies, *see* 29 U.S.C. § 160(c), and those remedies' nature and purpose, indicate that the make-whole relief here operates "[l]ike a back pay order" that

> does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this both these types of monetary awards *somewhat resemble compensation for private injury*, but it must be constantly remembered that both are *remedies created by statute*—the one explicitly and

(first citing *Agwilines*, 87 F.2d at 150-51; then citing *Phelps Dodge*, 313 U.S. 177). After all, the NLRA's overriding policy is "industrial peace." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (quoting *Brooks v. NLRB*, 348 U.S. 96, 103 (1954)).

Accordingly, compensation for "direct or foreseeable pecuniary harms," as defined in *Thryv*, would allow for "a restoration of the situation, as nearly as possible, to that which would have obtained

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> the other implicitly in the concept of effectuation of the policies of the Act—which are *designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights*.

Va. Elec., 319 U.S. at 543 (emphases added) (first citing *Agwilines*, 87 F.2d at 150-51; then citing *Phelps Dodge*, 313 U.S. 177); *see also Russell*, 356 U.S. at 643 (quoting the same). The *Thryv* remedies are therefore like a backpay order, serving to effectuate the policies of the Act by eliminating industrial conflict and giving something akin to restitution. *See Curtis*, 415 U.S. at 197 ("[C]ourts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution."); *see also Restitution*, Black's Law Dictionary (12th ed. 2024) (defining "restitution" as "[r]eturn or restoration of some specific thing to its rightful owner or status"). Such remedies only incidentally compensate employees to "insure meaningful bargaining," *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964), and to "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table," *Ampersand*, 43 F.4th at 1238 (cleaned up) (citation and alteration omitted); *see also supra* note 11. "For this reason it is erroneous to characterize" the *Thryv* remedies "as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning" the make-whole relief here. *Va. Elec.*, 319 U.S. at 543.

but for" the unlawful lockout here. *Phelps Dodge*, 313 U.S. at 194. As such, the Board's remedial order is not "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[13] *Va. Elec.*, 319 U.S. at 540. We will not disturb the Board's remedial order here, where "both the terms of the Act and the case law construing the Act support the Board's action in this case." *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 38 (D.C. Cir. 2017) (collecting cases); *see also id.* at 37 ("The Board is entitled to considerable deference in crafting remedies for unfair labor practices, and the reasons given by the

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[13] To the extent that Macy's argues that "*Thryv* grants the Board unfettered discretion to determine whether a pecuniary loss is direct or foreseeable," we disagree because the Supreme Court has previously acknowledged that "Section 10(c) . . . was *intended* to give the National Labor Relations Board broad authority to formulate appropriate remedies[,]" *Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 446 n.26 (1986) (emphasis added), and that:

> [I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an *infinite variety of specific situations*. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.

Phelps Dodge, 313 U.S. at 194 (emphasis added); *see also Va. Elec.*, 319 U.S. at 539 (emphasizing that the Board's remedial power "is not limited to the illustrative example of one type of permissible affirmative order," such as backpay, and cautioning that the "particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine'" (first citing *Phelps Dodge*, 313 U.S. at 187, 189; then quoting *Machinists*, 311 U.S. at 82)).

Board to justify the new make-whole remedial framework pass muster.").[14]

Macy's also contends that the "pecuniary damages that [the Board] seeks to award are the wolf of consequential damages in the sheep's clothing of 'make-whole' relief." Macy's asserts that this kind of relief here would be prohibited consequential damages under *United States v. Burke*, 504 U.S. 229 (1992), which is a tax consequence case relating to an action under Title VII of the Civil Rights Act of 1964 for sex-based discrimination in the payment of salaries. Although not controlling in the NLRA context, *Burke* demonstrates how the Board's make-whole relief under *Thryv* is appropriate here, contrary to the Company's assertion. For the below reasons, we find no reason to disturb the Board's remedy, when it serves to "more fully effectuate the make-whole purposes of the Act." *Thryv*, 372 N.L.R.B. No. 22, slip op. at 7.

The Supreme Court in *Burke* distinguished between make-whole relief and damages recoverable under tort law. It considered this distinction in the context of determining whether a settlement payment

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[14] This is not *Chevron* deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Rather, it is a reflection of the discretion afforded by Congress to allow the Board to award remedies it deems fit to effectuate policies of the Act. *See Phelps Dodge*, 313 U.S. at 194 ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.").

relating to a backpay claim arising under Title VII would be excludable from gross income under the federal Internal Revenue Code ("IRC"), as "damages received . . . on account of personal injuries." *Burke*, 504 U.S. at 230 (alteration in original) (quoting 26 U.S.C. § 104(a)(2)). To qualify for exclusion from gross income under the IRC, the respondents had to show that Title VII redressed a tort-like personal injury. *Id.* at 237. The Supreme Court observed "one of the hallmarks of traditional tort liability is the availability of a broad range of damages" that are unavailable in both Title VII and NLRA contexts. *Id.* at 235. Under tort law, one may be awarded sums "*larger than the amount necessary* to reimburse actual monetary loss sustained or even anticipated by the plaintiff," as well as those amounts redressing "intangible elements of injury that are 'deemed important, even though *not pecuniary* in [their] immediate consequence[s].'" *Id.* (alterations in original) (emphases added) (quoting D. Dobbs, Law of Remedies 136 (1973)). *Thryv* does not provide such relief. After all, relief under either the NLRA or "Title VII focuses on 'legal injuries of an economic character[.]'" *Id.* at 239 (quoting *Albemarle Paper*, 422 U.S. at 418); *see also Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) ("[A]n order requiring reinstatement and backpay is aimed at 'restoring the economic status quo that would have obtained but for the company's wrongful refusal to reinstate . . . .'" (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969))).

As the partial dissent points out, the Supreme Court in *Burke* also observed that Title VII "restor[es] victims, through backpay awards and injunctive relief,

to the wage and employment positions they would have occupied absent the unlawful discrimination[,]" but not for *nonpecuniary* harms, including "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 239 (emphasis added) (citation omitted). Macy's argues that these "express limitations in *Burke* apply with equal force to Section 10(c) of the Act," because Title VII's backpay provision was expressly modeled on the NLRA's. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848-49 (2001) (noting that Title VII's backpay provision, 42 U.S.C. § 2000e-5(g)(1), "closely tracked the language" of the Act's backpay provision, 29 U.S.C. § 160(c), which gives courts "guidance as to the proper meaning of the same language"). Even if we accept this comparison, the Board's make-whole relief is consistent with both Title VII's, which it need not follow in this context, and the NLRA's, which it must. For example, "Congress directed the thrust of [Title VII] to the *consequences* of employment practices," *Albemarle Paper*, 422 U.S. at 422 (emphasis added) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)), with a "clear purpose . . . to bring an end to the proscribed discriminatory practices and to *make whole*, in a *pecuniary fashion*, those who have suffered by it," *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969) (emphases added), *as amended on denial of reh'g* (Oct. 29, 1969). Similarly, under the NLRA, the Board's "power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of *removing or avoiding the*

consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 236 (1938) (emphasis added); *see also Albemarle Paper*, 422 U.S. at 417-18 ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . ." (cleaned up)); *Thryv*, 372 N.L.R.B. No. 22, slip op. at 11 (articulating similar principles).

Moreover, the Board acknowledged that it "will *not* issue remedial orders for harms which are unquantifiable, speculative, or nonspecific." *Thryv*, 372 N.L.R.B. No. 22, slip op. at 12 (emphasis added) (citing *Nortech Waste*, 336 N.L.R.B. 554, 554 n.2 (2001)). In *Thryv*, the Board addressed that any make-whole relief comprised of direct or foreseeable pecuniary harms will be fully litigated in a later compliance proceeding. *See id.* at 11-12. The NLRB General Counsel will have to prove whether any such relief is "not speculative," and that it is "specific and easily ascertained." *Nortech Waste*, 336 N.L.R.B. at 554 n.2. We conclude that a remedial framework that "specifically leav[es] to the compliance stage of the proceeding the question of whether the employees incurred" direct or foreseeable pecuniary harms "attributable" to the Company's unlawful lockout, *id.*, is not a clear abuse of discretion here, *see, e.g.*, *Sure-Tan*, 467 U.S. at 900 ("[A] backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair

labor practices." (citation omitted)); *Phelps Dodge*, 313 U.S. at 198 ("[O]nly actual losses should be made good[.]").

Under the NLRA, Congress's grant of remedial power entrusts the Board to make "workers whole for losses suffered on account of an unfair labor practice . . . ." *Strong*, 393 U.S. at 359 (quoting *Phelps Dodge*, 313 U.S. at 197); *see also id.* ("Back pay is one of the *simpler and more explicitly authorized* remedies utilized to attain this end." (emphasis added)). We conclude that the Board's award of compensation "for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses," is within the Board's broad discretion of what "can fairly be said to effectuate the policies of the Act," *Va. Elec.*, 319 U.S. at 540, by restoring "the situation, as nearly as possible, to that which would have occurred but for the violation," *Kallmann*, 640 F.2d at 1103 (citing *Phelps Dodge*, 313 U.S. at 194). The Board's "order clearly falls within the general purpose of making the employees whole, and thus restoring the economic status quo that would have obtained but for" the Company's unlawful lockout. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. "Imposing such remedies, designed to respond directly to an unfair labor practice, falls squarely within the heartland of the NLRB's delegated powers." *Ampersand*, 43 F.4th at 1238 (cleaned up). Accordingly, on the record as a whole, "we have no reason to find that the Board's decision to change its remedial framework is 'a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'"

King Soopers, 859 F.3d at 39 (quoting *Fibreboard Paper*, 379 U.S. at 216).

Therefore, to the extent that Macy's challenges the Board's revised make-whole remedial framework, we deny its Petition for Review.

D. The Circumstances Here Disclosed

The partial dissent contends that the Board's "actions were arbitrary and capricious and unsupported by the record." Partial Dissent at 50. However, applying the law as it is, not as what the partial dissent wishes it to be, reveals that they were simply not. *See Danielson v. Inslee*, 945 F.3d 1096, 1103 (9th Cir. 2019); *see also Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984). Our task is to "evaluate the entire record and uphold the NLRB if a reasonable jury could have reached the same conclusion, even if we would justifiably have made a different choice under de novo review." *Int'l All. of Theatrical Stage Emps., Loc. 15 v. NLRB*, 957 F.3d 1006, 1013 (9th Cir. 2020) (emphasizing the standard of review) (cleaned up). For example, while it is possible to infer that the Company's lockout could have been informed by "enormous logistical difficulties," Partial Dissent at 77, the weighing of such evidence belongs to the Board, which "has special expertise in drawing inferences of credibility and unlawful motive, and [whose] determinations are entitled to judicial deference," *Kava Holdings*, 85 F.4th at 486 (cleaned up). Here, substantial evidence supports the Board's consideration and conclusion of the credibility and value of such evidence. *See Int'l All. of Theatrical Stage Emps.*, 957 F.3d at 1013 ("Evidence is substantial when a reasonable mind

might accept it as adequate to support a conclusion—even if it is possible to draw a contrary conclusion from the evidence." (cleaned up)); *see also* 29 U.S.C. § 160(e) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole *shall be conclusive*." (emphasis added)); *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *6 n.2 (noting that a judge on the panel doubted the NLRB's factual conclusions, but he recognized that because there is "more than a scintilla" of evidence to support the NLRB's "contrary conclusions," the court is "bound by the substantial evidence standard of review," so it is barred from "explor[ing] the other ways of reading [the] record" (citation omitted)).

Similarly, while the partial dissent raises potentially significant points about the scope of make-whole relief under *Thryv*, Macy's neither properly challenged the application of *Thryv* or the Seventh Amendment to this case nor showed "extraordinary circumstances" to warrant consideration of these issues. *See supra* notes 9-10; *see also* 29 U.S.C. § 160(e); *Legacy Health Sys.*, 662 F.3d at 1127; *cf. Starbucks*, --- F.4th ----, 2024 WL 5231549, at *12 (holding that the employer's "statutory interpretation and Seventh Amendment challenges were not forfeited"). More critically, the Board has yet to order specific forms of relief, including those the partial dissent lambasts as "virtually unlimited." *See* Partial Dissent at 56. Indeed, the Board must still establish, in a later proceeding, how any make-whole relief it seeks is "sufficiently tailored to the actual, *compensable* injuries suffered" by the employees in this case. *Sure-Tan*, 467 U.S. at 901 (emphasis added).

It also bears repeating that "[i]n fashioning an appropriate remedy to address the substantial unfair labor practices in this case, the Board was acting at the 'zenith' of its discretion." *Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015) (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *accord* 29 U.S.C. § 160(c) (authorizing the NLRB "to take such affirmative action . . . as will effectuate the policies" of the Act). Additionally, there has simply been "no showing that the Board's order restoring the status quo ante to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company." *Fibreboard Paper*, 379 U.S. at 216. There has also been no meaningful showing that as a result of an unfair labor practice any make-whole relief in this case "exceed[s] what the employer unlawfully withheld[,]" or is not "closely tied to the equitable remedy of backpay." *Starbucks*, --- F.4th ----, 2024 WL 5231549, at *11-12; *see also supra* note 13; *accord* Partial Dissent at 50.

In sum, we "decide[d] only the case before us and sustain[ed] the power of the Board" to tailor remedies that "effectuate the statutory purpose" behind the National Labor Relations Act "*under the circumstances here disclosed*." *Va. Elec.*, 319 U.S. at 543, 545 (emphasis added); *see also Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36, 42 n.17 (9th Cir. 1969) (acknowledging that in *Virginia Electric*, the Supreme Court found that it "need not examine the various situations in those cases 'or consider hypothetical possibilities'" (quoting *Va. Elec.*, 319 U.S. at 545));

NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 891 (1st Cir. 1941) ("We therefore think that *under the circumstances here disclosed* the broader prohibition as appears in . . . the Board's order is within the discretion of the Board and should be enforced." (emphasis added)), *cert. denied*, 313 U.S. 595 (1941).

IV. Conclusion

We have considered the Union's and the Company's remaining arguments and find them unpersuasive. For the foregoing reasons, we **DENY** both the Union's and the Company's Petitions for Review, and we **GRANT** the Board's Cross-Application for Enforcement of its final Order.

PETITIONS FOR REVIEW DENIED; CROSS-APPLICATION FOR ENFORCEMENT GRANTED; ORDER ENFORCED.

BUMATAY, Circuit Judge, dissenting in part:

This case involves the fallout from a lengthy labor dispute between Macy's and the International Union of Operating Engineers, Local 39 ("Union"), which represents some of the retailer's engineers and craftsmen. After extensive negotiations over a new collective bargaining agreement, Macy's gave the Union its best and final offer. The Union rejected that offer and went on strike. During the three-month strike, Macy's accused Union members of harassing its customers and employees and sabotaging its facilities. The Union then made a surprise unconditional offer to return to work—shortly before the close of business on a Friday evening. Macy's pleaded for time to respond to the offer, but the Union refused. So when the Union members showed up for work on Monday—the next workday—Macy's did not let them start working and locked them out. Two days later, Macy's gave the Union a new proposal to end the dispute and lockout. The Union again rejected Macy's offer, and the two sides never reached an agreement.

Enter the National Labor Relations Board. The Board's in-house prosecutor charged Macy's with an "unfair labor practice." After a hearing, a Board Administrative Law Judge ("ALJ") systematically rejected each of Macy's defenses and found that Macy's violated the National Labor Relations Act because it waited a whole *two days* before it gave a new offer to the Union. As punishment, the ALJ ordered Macy's to make the Union members whole for any losses of pay and benefits that they may have suffered because of the lockout. *Macy's, Inc.*, 372 NLRB No. 42, at 21 (2023). On review, the Board agreed with the ALJ that

Macy's violated the Act. But it rejected the ALJ's remedy *because it didn't go far enough*. Instead, the Board ordered Macy's to "also compensate the employees for any other direct *or* foreseeable pecuniary harms incurred as a result of the unlawful lockout . . . regardless of whether these expenses exceed interim earnings." *Id.* at 1 n.2 (emphasis added). And because the Union and Macy's still haven't come to an agreement, Macy's must compensate the Union's members for ongoing harms accumulating to this day—more than four years since the lockout.

But the Board has no authority to order this type of monetary relief. Until two years ago, the Board had never claimed the authority to award consequential damages, like the ones ordered against Macy's. *See Thryv, Inc.*, 372 NLRB No. 22 (2022), *overruled on different grounds*, *Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024). Indeed, the Act restricts the Board to ordering only "back pay" and "affirmative action . . . as will effectuate the policies of" the Act. *See* 29 U.S.C. § 160(c). Somehow, the Board has transformed this limited statutory grant into something that covers credit card debt, withdrawals from retirement accounts, car loans, mortgage payments, childcare, immigration expenses, and medical expenses. *See, e.g., Thryv, Inc.*, 372 NLRB No. 22, at 9. Never mind that granting the Board this authority would violate the Seventh Amendment. We create a needless circuit split in affirming the Board's power grab. *See NLRB v. Starbucks Corp.*, --- F.4th ---, 2024 WL 5231549, at *12 (3d. Cir. 2024) ("While the Board can certainly award some monetary relief to the employees, that

relief cannot exceed what the employer unlawfully withheld.").

And we never should have gotten this far. The Board's actions were arbitrary and capricious and unsupported by the record. *See Valley Hosp. Med. Ctr., Inc. v. NLRB*, 100 F.4th 994, 1002 (9th Cir. 2024) (noting the standard of review under 5 U.S.C. § 706(2)(A)). The Board wrongly concluded that Macy's needed to have a detailed proposal on the table within one working day of the Union's offer of return to justify its lockout. This rule is as novel as it is unrealistic. It contradicts both Ninth Circuit precedent and the Board's own precedent. The Board also ignored evidence that the lockout could have been justified as defensive given Macy's reasonable concerns of sabotage and misconduct.

While I agree with denying the Union's petition for review, I respectfully dissent from the denial of Macy's petition for review and from the grant of the Board's application for enforcement.

I.

The Board Lacks Authority to Order Foreseeable or Consequential Damages

A.

The Board is a limited-authority agency with a limited purpose and limited enforcement mechanisms. "The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws." *Shepard v. NLRB*, 459 U.S. 344, 351 (1983). Simply, the Board is not in the business of the "adjudication of private rights." *Phelps Dodge*

Corp. v. NLRB, 313 U.S. 177, 193 (1941) (simplified). It's only function is to "safeguard[] and encourage[] the right of self-organization." *Id.* Thus, the Board was not established to award "full compensatory damages for injuries caused by wrongful conduct." *Int'l Union, United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 642-43 (1958). Instead, its authority to order relief is "merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Shepard*, 459 U.S. at 352. Given this, the Board can't award consequential or foreseeable damages, which go beyond compensatory damages and include damages for harms that do not flow directly from an unfair labor practice. *See* Black's Law Dictionary (12th ed. 2024) (defining "consequential damages" as those that "do not flow directly and immediately from an injurious act but that result indirectly from the act").

Despite its limited authority, the Board has assumed powers to award not only compensatory damages but all *foreseeable* damages—a species of consequential damages. In *Thryv*, the Board concluded that a company violated the Act by unilaterally laying off six union employees and refusing to comply with the union's information requests. 372 NLRB No. 22, at 3-4. Rather than apply its standard remedy to the case, the Board expanded its authority to award monetary relief. The Board concluded "that in all cases in which [its] standard remedy would include an order for make-whole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice." *Id.* at 13

(emphasis added). The Board then defined "direct harms" as monetary losses that are the direct result of an unfair labor practice. *Id.* In contrast, it defined "foreseeable harms" as "those which the [employer] knew or should have known would be likely to result from its violation of the Act, regardless of its intentions." *Id.* The Board has *never* included such broad, indirect harm as part of its make-whole remedy. *See id.* at 18 (Kaplan & Ring, dissenting in part).

So what's covered by "direct or foreseeable harm"? Quite a lot, it turns out. While the Board declined "to enumerate all the pecuniary harms that may be considered direct or foreseeable in the myriad of unfair labor practices that come before us[,]" they made clear it's very expansive. *Id.* at 12. The Board explained that foreseeable harms include indirect costs, "such as out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet." *Id.* at 9. The Board also made clear that "penalties" related to "early withdrawals from [a] retirement account," "loan or mortgage payments," and "transportation or childcare costs" could all be fair game. *Id.* And this list didn't even represent the "limits of the Board's statutory remedial authority," it's only the "*minimum*" for make-whole relief. *Id.* at 7 n.10 (emphasis added). The Board's General Counsel added even more costs to the list: unreimbursed tuition payments, job search costs, day care costs, specialty tool costs, utility disconnection/reconnection fees, relocation/moving costs, legal representation costs in eviction proceedings, and expenses resulting from a change in immigration status. Office of the General Counsel Memorandum GC 24-04, Securing Full Remedies for

All Victims of Unlawful Conduct (Apr. 8, 2024).[1] So now everything is on the table under the Board's newly claimed authority—the only limit is the Board's imagination.

Of course, the Board denied that these broad remedies make up "consequential damages." But that's hard to believe given that the Board specifically invited briefing on whether it should adopt consequential damages as part of its make-whole remedy in that very case. *Thryv, Inc.*, 372 NLRB No. 22, at 6 n.8, 8. Indeed, the Board's Chairman has labeled as "consequential damages" harms such as late fees on credit cards, penalties for early withdrawals from retirement accounts, and the loss of a vehicle or home if an employee is unable to make loan or mortgage payments. *See Voorhees Care & Rehab. Ctr.*, 371 NLRB No. 22, 4 n.14 (2021). Perhaps recognizing its overreach, the Board pretends its adoption of a "foreseeable damages" standard is something different than consequential damages. Yet the only distinction the Board draws between the two is observing 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." *Thryv, Inc.*, 372 NLRB No. 22, at 8. Yes, it's a term of art for tort and contracts law, but the Board can't simply put lipstick on the pig and call it "foreseeable damages." That doesn't change its legal nature—it's still consequential damages no matter how it's spun. And, as the Board admits, consequential damages are a remedy for

[1] Available at https://perma.cc/P8CN-HZBS.

private rights—not the sort of thing that the Board may vindicate.

The Board's remedy proved to be too much for its entire membership to stomach. Two members dissented. They explained that the Board's new remedial 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." *Id.* at 16 (Kaplan & Ring, dissenting in part). They warned that "this standard opens the door to awards of speculative damages that go beyond the Board's remedial authority." *Id.* First, they noted that "'foreseeability' is a central element of tort law" and that "[a]ny attempt to address tort claims in a Board proceeding obviously runs headlong into the Seventh Amendment's guarantee of the right to have such claims tried before a jury." *Id.* at 18-19. Second, the dissent observed that the Board's foreseeable damages remedy "go[es] well beyond tort law," because the remedy wasn't even limited by proximate cause. *Id.* at 19. So, to the dissenting members, the Board's newly minted power is *even greater* than the power to award consequential damages.

B.

The Board exceeded its authority in ordering Macy's to pay foreseeable or consequential damages. First, nothing in the text of the Act authorizes such expansive authority for the Board. Second, reading the Act to grant these broad remedies, as the dissenting Board members noted, puts the Board in conflict with the Seventh Amendment.

1.

Let's start with the Board's statutory authority to fashion remedies for unfair labor practices. To remedy an unfair labor practice, Congress granted the Board authority to:

> [I]ssue and cause to be served on . . . [a] person [who committed the unfair labor practice] 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 this subchapter.

29 U.S.C. § 160(c). Thus, in all cases, the Board's remedial authority must further the policies of the Act, which are to:

> [E]liminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

While an admittedly broad policy statement, it only provides for vindication of public rights—not of private rights, which consequential damages are

designed to remedy. Consistent with that understanding, the Supreme Court recognized long ago that the Board's functions are "narrowly restricted to the protection and enforcement of public rights" and that it thus has no role to play in the "adjudication of private rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362-63 (1940). So even with the Board's power to fashion affirmative acts to carry out federal labor policies, it can't order relief that is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). For example, the Board isn't vested with "a virtually unlimited discretion to devise punitive measures" and it can't "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). As Judge Learned Hand said long ago, "[t]he 'affirmative action' which the section contemplates must be remedial, and not punitive or disciplinary . . . and the order, qua payments, must therefore be confined to restitution for the wrong done, however widely that should be conceived." *NLRB v. Leviton Mfg. Co.*, 111 F.2d 619, 621 (2d Cir. 1940). Thus, the Board's authority begins and ends with the enforcement of public rights—its role is not to vindicate the private rights of aggrieved employees.

Even so, the Board expressly sought to vindicate private rights in its *Thryv* decision. In adopting its consequential damages or foreseeable harm regime, its goal was to "rectify[] the harms actually incurred by the victims of unfair labor practices." *Thryv, Inc.*, 372 NLRB No. 22, at 11. In justifying the broad remedy, the Board noted the need to assist

"*wrongfully-terminated employees* [who] may incur 'expenses for transportation, room, and board'" related to their termination. *Id.* at 7 (simplified) (emphasis added). This is no different than vindicating the private right against wrongful termination, which falls outside the Act's statutory policies.

The Board also acknowledged its new remedy has a compensatory—rather than restitutionary—purpose: "making employees whole should include, at least, *compensating* them for direct or foreseeable pecuniary harms resulting from the [employer's] unfair labor practice." *Id.* at 8 (emphasis added). And the Board reads "foreseeable harms" as broadly as possible—it includes medical expenses, credit card debts and fees, car payments, mortgage payments, childcare costs, and transportation costs. *See id.* at 9. These rectify *individualized* private harms at law. As the Court has said, "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" *United States v. Burke*, 504 U.S. 229, 235 (1992) (simplified). All this shows that the Board's make-whole remedy goes far beyond "effectuat[ing] the policies" of the Act. *See* 29 U.S.C. § 160(c). Instead, it vindicates private rights. And the Act "limits the Board's remedial authority to equitable, not legal, relief." *Starbucks Corp.*, 2024 WL 5231549, at *11.

Besides violating the policies of the Act, the Board's new remedy also violates the text of the Act. The Board can issue a "cease and desist" order and instruct the "reinstatement of employees with or without back pay." 29 U.S.C. § 160(c). None of these

express grants of power encompass the award of foreseeable or consequential damages. Under the Board's "cease and desist" authority, it may enjoin "future conduct" that would violate the Act. *See NLRB v. C.E. Wylie Const. Co.*, 934 F.2d 234, 237 (9th Cir. 1991). Yet injunctive power doesn't authorize the award of the damages it seeks now. And the power to authorize "back pay" doesn't provide the Board with the ability to award consequential damages. In this context, "back pay" means pay that is unpaid but due. *See* A Dictionary of Modern American Usage at 17 (1935) (defining "back pay" as an "arrears of a pay"); Webster's Collegiate Dictionary at 59 (1936) (defining "arrears" as "that which is unpaid but due"). Together, the Act authorizes the Board to remedy violations of unfair labor practices by restoring wages and employment positions that employees would have otherwise received in the absence of unfair labor practices. But such injunctive relief and back pay awards don't provide the textual hook for the expansive remedy sought here.

However broadly it's possible to read the Board's remedial authority, Congress confirmed its narrow powers through its Taft-Hartley amendments. *See* Labor Management Relations Act of 1947, Pub. L. No. 80-101, 101, 61 Stat. 136, 147. In 1947, Congress amended § 160(c) and precluded the Board from awarding remedies to an employee "who had been discharged because of misconduct." *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964). After the amendment, § 160(c) then said,

> No 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.

29 U.S.C. § 160(c) (emphasis added). Through this amendment, Congress expressly set the universe of the Board's remedial power to grant monetary relief for aggrieved employees—it's limited to reinstatement and back pay. If Congress intended the Board to have broader power to direct monetary relief, such as ordering foreseeable or consequential damages, it would have said so in this provision. Otherwise, the Board would be precluded from awarding back pay when the employee commits misconduct, but it may still grant the same employee foreseeable or consequential damages. This reading makes little sense. Our duty is to interpret the law "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (simplified). The best reading of § 160(c) then cabins the Board's remedial measures over employees and forecloses the Board from ordering consequential or foreseeable damages. So while the Board may have discretion to devise remedies to further the Act, when ordering relief for individual employees, it's limited to reinstatement and back pay. This flows from the Board's narrow design to remedy only public rights.

The Board dismisses this textual restraint on its powers. It does so by misreading *Fibreboard Paper Products*. In that case, the Board ordered a company to resume certain business operations, to reinstate

terminated employees with back pay, and to bargain with the union. 379 U.S. at 209. It was argued in that case that the Board's order violated § 160(c)'s prohibition against reinstatement and back pay for employees "discharged for cause." *Id.* at 217. As mentioned earlier, the Court determined that the provision precluded the Board from "reinstating an individual who had been discharged *because of misconduct*." *Id.* (emphasis added). But the Court observed that the provision did not "curtail the Board's power in fashioning remedies when the loss of employment *stems directly* from an unfair labor practice as in the case at hand." *Id.* (emphasis added). The Board takes this language to green-light the award of consequential damages. But it did nothing of the sort. Instead, with these sentences, the Court distinguished between employees fired *because of* misconduct and employees fired *because of* unfair labor practices. The Court simply reinforced the straightforward reading of the text—while the Taft-Hartley amendment implicated the former, it had nothing to do with the latter. Nowhere did the Court say that the Board could disregard the obvious textual limitations on remediating employees.

If there were any doubts as to the limits of the Board's authority, the Court laid them to rest in *Burke*. In that case, the Supreme Court analyzed the remedies available under Title VII—an employee anti-discrimination statute. *See Burke*, 504 U.S. at 237-38 (analyzing 42 U.S.C. § 2000e-2(a)(1)). Title VII is important here because its "remedial scheme was expressly modeled on the backpay provision of the National Labor Relations Act." *Id.* at 240 n.10. Indeed,

Title VII's remedial provision will look familiar. It's nearly identical to the Act's:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1).

Given their ties and similar language, we should follow the Court's reading of Title VII. The Court said, "Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief." *Burke*, 504 U.S. at 238. We should also follow how the Court defined the scope of Title VII's remedy: it "consists of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination." *Id.* at 239. Title VII doesn't permit the compensation of a "plaintiff for 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)." *Id.* Indeed, "[n]othing in this remedial scheme purports to" do so. *Id.* In the Court's view, Title VII's limited remedies stood in contrast "to those available under traditional tort law." *Id.* at 240.

So let's recap. Title VII and the Act have similar purposes (the protection of employees), a similar

remedial design, and similar textual language. And the Supreme Court has definitively established the remedies available under Title VII. The obvious response is to give the Act a similar reading. It's baffling that the Board argues otherwise.

But there's more evidence of this commonsense reading. In the Civil Rights Act of 1991, Congress amended Title VII to expressly add "compensatory and punitive damages" to its remedial scheme. *See* Pub. L. No. 102-166, 105 Stat. 1071; 42 U.S.C. § 1981a. If such damages were already available under the Title VII's original language, then Congress wouldn't have needed to act. Given their similarities, if Title VII required amendment to allow compensatory and punitive damages, logic dictates that the Act likewise would need amendment before granting the Board authority to order consequential or foreseeable damages.

* * *

Thus, the Board exceeded its authority under § 160(c) in devising its newfound foreseeable-damages remedy.

2.

Even though § 160(c) is clear on its face, the Seventh Amendment commands that we resolve any ambiguity by rejecting the Board's claim of broad authority to order consequential or foreseeable damages. The Seventh Amendment guarantees the right to trial by jury "[i]n Suits at common law." U.S. Const. amend. VII. If administrative agencies, like the Board, seek to impose damages on a party that resemble those available in "Suits at common law," then the party must receive a jury trial. Issuing broad

consequential damages—a tort remedy—thus implicates the Seventh Amendment. The dissenting Board members saw this danger clearly in opposing the Board's power grab. *See Thryv, Inc.*, 372 NLRB No. 22, at 16 ("We further observe that the Board faces potential Seventh Amendment issues if it strays into areas more akin to tort remedies.") (Kaplan and Ring, dissenting in part). So even if the Board's statutory authorities here are "susceptible of multiple interpretations," we should "shun an interpretation that raises serious constitutional doubts and instead . . . adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018).

The Supreme Court recently explained the scope of the Seventh Amendment. *See SEC v. Jarkesy*, 603 U.S. 109 (2024). The Court first reiterated that the right to a jury trial is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care." *Id.* at 121 (simplified). The Court then concluded that the term, "Suits at common law," contrasted with cases in equity and admiralty. *Id.* at 122. The right to jury trial, then, applies to *all suits* "which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id.* (simplified). And it doesn't matter whether the claim is born of statute. The constitutional guarantee also encompasses statutory claims that are "legal in nature." *Id.* (simplified). And to determine whether a claim is "legal in nature," the Court directed that we consider both "the cause of action and the remedy it provides." *Id.* at 122-23. In the end, however, the

remedy is the "more important consideration" in determining whether the Seventh Amendment applies. *Id.* at 123 (simplified). Indeed, in many cases, consideration of the *remedy* should be "all but dispositive." *Id.* But even when the Seventh Amendment applies, an exception exists. *Id.* at 127. Under the "public rights" exception, "Congress may assign [a] matter for decision to an agency without a jury, consistent with the Seventh Amendment." *Id.*

Jarkesy gives us some takeaways. First, it doesn't matter who brings the claims or how they are labeled. The Seventh Amendment applies even to administrative agencies and even if they call the claim something other than a "legal claim." *See id.* at 121-24. Second, we look at both the *nature* of the claim and the *remedies* the agency seeks. And the remedy *alone* may be enough to invoke the Seventh Amendment. *See id.* at 123-24. Third, we must consider if the "public rights exception" would still allow the administrative adjudication to go forward. *See id.* at 127.

Given these principles, reading § 160(c) to authorize the Board to award consequential or foreseeable damages would raise serious constitutional doubt under the Seventh Amendment.

First, consider the remedies the Board seeks to impose—arguably the most important concern. Recall, under its make-whole authority, the Board believes that it may make employers pay for *any* foreseeable pecuniary harm that employees experience because of an unfair labor practice. This includes such attenuated harms as babysitting fees, credit card late fees, car payments, and attorneys' fees to sue

landlords. But all this exceeds the purely equitable remedies that the Board may order.

Without question, the Board has the equitable powers to restore employees to the status quo through monetary relief. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (the Board may order a monetary recovery as "an incident to equitable relief"); *Leviton Mfg. Co.*, 111 F.2d at 621 (the Board's authority to order payments "must . . . be confined to restitution for the wrong done"). But it has no authority to award money damages as a tort remedy. *See Jarkesy*, 603 U.S. at 123 ("[M]oney damages are the prototypical common law remedy"); *Teamsters v. Terry*, 494 U.S. 558, 570 (1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law.'") (simplified).

To be sure, sometimes equitable restitution and money damages can look the same. In some cases, they can even lead to the same dollar award against a party. *See* Dan B. Dobbs, 1 Dobbs Law of Remedies 280 (2d. ed. 1993). Even so, they are distinct. And this distinction is significant:

> [T]hey are often triggered by different situations and always measured by a different yardstick. Damages always begins with the aim of compensation for the plaintiff . . . . Restitution, in contrast, begins with the aim of preventing unjust enrichment of the defendant. To measure damages, courts look at the plaintiff's loss or injury. To measure restitution, courts look at the defendant's gain or benefit.

Id. In other words, when distinguishing ordinary money damages at law from "equitable restitution and other monetary remedies available in equity," "the question is what has the owner lost, not what has the taker gained." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (simplified). And so, as a corollary, the question for equitable remedies is only the unjust gain of the taker or employer—not the loss to the owner or employee.

Explaining the difference between equitable monetary relief and monetary damages should illuminate the problem here. The Board wants to measure monetary relief from the perspective of the employee's loss—not the employer's gain. The Board's foreseeable-damages regime asks: What did the *employee* lose? What fees did the *employee* incur because of the unfair labor practice? What opportunities did the *employee* forgo because of the proscribed conduct? But this would be inappropriate under equity. Equitable relief should ask only what the employer has unjustly gained. When employers withhold pay from employees based on unlawful employment actions, employers unjustly keep the employees' wages and so equitable relief equates to back pay—exactly as contemplated by § 160(c). On the other hand, the award of broad foreseeable damages goes beyond equitable restitution and crosses into the tort remedy of money damages.

Indeed, given how far-reaching the Board views foreseeable damages—encompassing any *indirect* harm no matter how remote from the unfair labor practice—these awards are nearly indistinguishable from punitive damages, which only courts of law may

impose. *See Jarkesy*, 603 U.S. at 123-25. As the dissenting members noted, the Board's new consequential-damages regime isn't even limited by the requirement of "proximate cause"—which makes the Board's remedy "go well beyond tort law." *Thryv, Inc.*, 372 NLRB No. 22, at 19 (Kaplan and Ring, dissenting in part). By awarding damages for harms that are not directly or proximately caused by unfair labor practices, we move from mere compensation to granting a windfall to aggrieved employees. And when "compensatory damages exceed pure compensation," they may become "punitive." *See* Dobbs, Law of Remedies 455.

True, the Board tries to get around this conclusion by denying any punitive motive for its new remedy. But let's look at what the Board said. The Board claimed the remedy wouldn't be punitive because it applied to all cases, rather than just to extraordinary ones. *Thryv, Inc.*, 372 NLRB No. 22, at 17. Yet the Board conceded that "if we were to issue this make-whole relief only to address the most deplorable or flagrant violations of the Act, these remedies run the risk of becoming punitive rather than restorative." *Id.* In other words, the Board acknowledges the punitive nature of its expansive foreseeable-harm remedy but understands that applying it selectively would make it blatantly punitive, which it knows it can't do. But a punitive measure is still punitive even if it applies across the board.

Thus, based on the remedies *alone*, the Board's imposition of foreseeable damages would implicate the Seventh Amendment—giving us every reason to avoid reading § 160(c) so broadly.

Second, the "close relationship" between the Board's efforts to block unfair labor practices and the common-law tort of wrongful termination supports reading the Board's remedial powers narrowly. *See Jarkesy*, 603 U.S. at 125. Take this case. The Board asserts that Macy's violated the Act by locking out employees without clearly and fully informing them of the conditions for their reinstatement—effectively terminating them. *See Macy's, Inc.*, 372 NLRB No. 42, at 20. But California, where most of the Macy's stores were located, recognizes a tort cause of action for wrongful terminations that violate public policy. *See Freund v. Nycomed Amersham*, 347 F.3d 752, 758 (9th Cir. 2003) (requiring that the public policy "inures to the benefit of the public rather than serving merely the interests of the individual" (simplified)); *see also* American Law of Torts § 34:83 (2024) (observing that the tort of wrongful termination exists 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."). And the wrongful-termination tort has a historical pedigree tracing back to the English common law. *See* American Law of Torts § 34.85; *see also* 1 William Blackstone, Commentaries *413 ("[N]o master can put away his servant, or servant leave his master, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace[.]").

Consider the individualized assessments necessary to prove the foreseeable harms for each employee. As the Board admitted, "aggrieved employees will . . . have to submit evidence to substantiate pecuniary harms for which they seek

reimbursement" before the Board's ALJs. *Thryv, Inc.*, 372 NLRB No. 22, at 11. What then distinguishes these Board proceedings from individualized tort claims in federal or state court? Not much.

Thus, both the Board's actions and wrongful-termination tort "target the same basic conduct," *Jarkesy* 603 U.S. at 125,— preventing wrongdoing in the employment context. *See also Lewis v. Whirlpool Corp.*, 630 F.3d 484, 487-89 (6th Cir. 2011) (noting the overlap between wrongful-termination claims and the Board's jurisdiction). Indeed, the Board's jurisdiction so overlaps with the wrongful-termination tort that it may preempt federal or state tort actions. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *Platt v. Jack Cooper Transp., Co.*, 959 F.2d 91, 94 (8th Cir. 1992); *Lewis*, 630 F.3d at 487. While not necessarily a perfect overlap, no "precise[] analog[ue]" is necessary under the Seventh Amendment. *Tull v. United States*, 481 U.S. 412, 421 (1987). Rather, the jury right "extends to statutory claims unknown to the common law, so long as the claims can be said to sound basically in tort, and [they] seek legal relief." *Monterey*, 526 U.S. at 709 (simplified). So the basic "legal" nature of the claim here supports rejecting the Board's expansive remedial powers.

Finally, the public rights exception doesn't justify the Board's broad assertion of remedial powers. The Court has reminded us that this exception is *only* an exception. *Jarkesy*, 603 U.S. at 131. After all, "[i]t has no textual basis in the Constitution." *Id.* So "[e]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is

in favor of Article III courts." *Id.* at 132 (simplified). Thus, we don't focus on whether an action "originate[s] in a newly fashioned regulatory scheme." *Id.* at 133 (simplified). Rather, "what matters is the substance of the action, not where Congress has assigned it." *Id.* at 134.

And the Court has made clear that the public rights exception must remain a narrow one. When the Court has recognized a "public rights" exception, it is based on "centuries-old," "background legal principles." *Id.* at 131. Indeed, the Court has only recognized a few categories of administrative adjudications that fall within the exception: the collection of revenue; customs law; immigration law; relations with Indian tribes; the administration of public lands; and the granting of public benefits, such as payments to veterans, pensions, and patent rights. *Id.* at 129-30. On their face, these categories have little resemblance to traditional legal claims—they all involve interests that would not exist without the federal government. In contrast, in *Jarkesy*, the Court refused to expand the list to include administrative adjudications over conduct that resembles "common law fraud." *Id.* at 134. Thus, courts should be reluctant to expand the exception beyond the enumerated historical categories.

The Board's new make-whole remedy is identical to traditional legal-claim remedies vindicating private rights and doesn't fit within the public-rights exception. The Board's remedy goes beyond defending the public interest in federal labor policy and instead targets "the wrong done the individual employee," which falls outside the Board's authority when

fashioning unfair labor practice remedies. *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967). So the award of consequential or foreseeable damages bears little relation to public rights, and the Board cannot escape this conclusion by merely calling it a "make-whole" or "equitable" remedy. *See Jarkesy v. SEC*, 34 F.4th 446, 457 (5th Cir. 2022) ("Congress cannot change the nature of a right, thereby circumventing the Seventh Amendment, by simply giving the keys to the SEC to do the vindicating."). However appropriate a consequential-damages regime may be in the labor context, when an administrative agency strays into the realm of legal remedies, that's a matter for Article III courts not administrative tribunals.

And the Board is wrong to contend that the Court settled the Seventh Amendment question back in the 1930s. In *Jones & Laughlin Steel Corporation*, the Court concluded that the Seventh Amendment didn't preclude the Board from ordering the "payment of wages for the time lost by the discharge"—in other words, back pay. 301 U.S. at 48. The Amendment wasn't implicated, the Court said, because the ordered back pay was "incident to equitable relief," even though the same "damages might have been recovered in an action at law." *Id.* Key to the Court's opinion, then, was that back pay was a form of equitable relief. Indeed, the Court has emphasized the equitable nature of the back-pay remedy. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-418 (1975) (characterizing back pay awarded against employers under Title VII as equitable). Here, however, the Board seeks far greater remedial authorities. It doesn't just seek damages "incident to equitable relief," but it seeks consequential or foreseeable

damages associated with a "[s]uit at common law." So *Jones & Laughlin* isn't the end of the analysis when the Board imposes remedies far beyond back pay. Based on precedent since the 1930s, the Board's award of consequential damages would contravene the Seventh Amendment's right to a jury trial.

To be clear, the Seventh Amendment doesn't invalidate all Board remedial authorities to direct monetary relief. As limited by § 160(c)'s express authority to order "back pay," the Board may act consistently with the Seventh Amendment. But when the Board strays from the text and seeks extra-statutory authorities, like the power to direct consequential or foreseeable damages, then the Seventh Amendment has something to say. We thus must read § 160(c) as precluding the type of monetary relief the Board seeks here. *See Jennings*, 583 U.S. at 286.

II.

The Board's Merits Decision Was Wrong

Even worse, we didn't need to reach the remedy issue at all. Instead, the Board's decision to conclude that Macy's committed an unfair labor practice was arbitrary and capricious and unsupported by the evidence. The Board concluded that Macy's committed an unfair labor practice under § 8(a)(1) and (3) of the Act by not reinstating the Union members after their offer to return to work and by locking them out without informing them of the terms to end the lockout. *Macy's, Inc.*, 372 NLRB No. 42, at 20. But this conflicts with the Act for two reasons. First, the Board was wrong to conclude that Macy's offensive lockout was "inherently destructive" because it took two-

business days to communicate its offer to end the lockout. Second, the Board overlooked some key facts in deciding that Macy's actions were not a proper defensive lockout.

Section 8(a)(1) and (3) of the Act "make it an unfair labor practice for an employer 'by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.'" *Fresh Fruit & Vegetable Workers Loc. 1096 v. NLRB*, 539 F.3d 1089, 1096 (9th Cir. 2008) (quoting 29 U.S.C. § 158(a)(1), (3)). To find a violation of these provisions, "the relevant inquiry is whether or not the employer's action likely discouraged union membership and was motivated by anti-union animus." *Id.* So usually, evidence of discriminatory conduct *and* discriminatory intent are necessary. But this isn't always the case. Sometimes conduct is so "inherently destructive," that "improper motive" can be inferred. *Id.*

We've described the framework for analyzing "inherently destructive" conduct as this:

> If employer conduct is "inherently destructive," the Board may find an improper motive regardless of evidence of a legitimate business justification. . . . If, on the other hand, "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,'" and the employer establishes a legitimate and substantial business justification for its actions, there is no violation of the Act without a finding of an actual anti-union motivation.

Id. (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967)). Both the Board and Macy's agree that this *Great Dane* framework governs this case.

Establishing "inherently destructive" conduct is a high bar. It requires conduct that "carries with it an inference of unlawful intention *so compelling* that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311-12 (1965) (emphasis added). The conduct must have "*far reaching* effects which would hinder future bargaining" and "creat[e] visible and *continuing* obstacles to the future exercise of employee rights." *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976) (emphasis added). In other words, the conduct must have "the natural tendency . . . to *severely* 'discourage union membership while serving no significant employer interest.'" *Fresh Fruit & Vegetable Workers Loc.*, 539 F.3d at 1097 (quoting *Am. Ship Building*, 380 U.S. at 312) (emphasis added). Thus, the effect of the conduct must be more than temporary or slight. It must *significantly* alter the bargaining relationship. In sum, there must be "*no question* that the employees were being punished for their union activities." *Id.* (emphasis added).

The Board hasn't met that standard here.

A.

There's nothing inherently problematic with the use of lockouts. *Am. Ship Bldg.,* 380 U.S. at 308-313. Proper offensive lockouts may occur when an employer locks out employees "in support of legitimate bargaining demands." *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 679 (2007). The Board

never found that Macy's had anti-union animus in initiating its lockout and so the Board must show that Macy's actions were "inherently destructive" to support its charge. But all the facts reveal that the delay in providing a new proposal at the time of the lockout had no "far reaching," "continuing," or "sever[e]" effect on collective bargaining. To the contrary, the lockout served a legitimate economic purpose.

Let's recap the facts from 2020:

- On August 31, Macy's gives its best and final offer to the Union.
- On September 4, the Union's members begin to strike.
- On October 8, Macy's informs the Union that its best and final offer will expire on October 15.
- On October 15, Macy's best and final offer expires.
- On November 25, the Union presents a counter proposal to Macy's.
- On December 4, Macy's rejects the Union's counter proposal. That Friday evening, the Union unconditionally offers to return to work "immediately" in an email sent after hours on the East Coast. Macy's asks the Union to hold off on returning to work and promises to respond by the close of business on Monday. The Union asks if "this mean[s] you are locking them out till Monday?"
- On December 5-6, Macy's reiterates its request for time to respond, noting the

"administrative, logistical, and economic" challenges of reinstating employees on short notice. The Union refuses to accommodate Macy's and declares that its members will return to work unless they're locked out. Macy's again asks for time because "[t]hey have been out for 90+ days, and to think you can just flip a switch and have them back is not possible."

- On December 7, Macy's notifies the Union it will not reinstate its members "until there is an agreement in place," which is "in support of [its] bargaining position." Macy's proposes dates for new bargaining sessions, including a date on December 10.
- On December 10, Macy's presents a new collective bargaining agreement proposal to the Union.

So the Union demanded to return to work within one business day on a Friday evening. Macy's reasonably asked the Union to hold off on returning to work while it figured out its position over the weekend. On Monday, Macy's told the Union that it was locking out the Union members in support of its bargaining position and notes that a new bargaining agreement must be reached before reinstatement. Two days later, Macy's and the Union were back at the bargaining table with Macy's presenting a new proposal. The Board decided that this *two-day delay* in informing the Union of its latest offer was an unfair labor practice. Indeed, the Board held that Macy's failure to communicate a new offer by Monday morning (one business day) was an unfair labor

practice. *See Macy's, Inc.*, 372 NLRB No. 42, at 20 ("the lockout was unlawful at its inception, on December 7"). But this is not even close to meeting the exacting standard of "inherently destructive" conduct.

We've already been skeptical of the need to *immediately* reinstate employees after an offer to return to work. In *Fresh Fruit & Vegetable Workers Local*, after a strike and 14-year long lockout, an employer offered to reinstate striking Union workers but delayed reinstatement for one month. 539 F.3d at 1093-94. The employer justified the delay by the need for the employees to give notice to their existing employers and to allow for a particular manager to train the returning employees. *Id.* at 1094. The Board thought that this delay was inherently destructive and ordered back pay. *Id.* at 1094-95. We rejected the Board's conclusion. *Id.* at 1096. We explained that the one-month delay after a 14-year lockout did not meet the high bar for "inherently destructive" conduct. *Id.* at 1097. Given the "short" reinstatement delay "relative to the lockout period," we concluded the delay couldn't be viewed as "punishment for a protected activity." *Id.* "After a fourteen-year lockout," we said, "a delay of a few more weeks prior to reinstatement does not *necessarily express anti-union animus* beyond that expressed by the lockout itself." *Id.* (emphasis added). Rather, the delay would be understood as the time "necessary and normal to accomplish reinstatement," not as an attempt to "obstruct or discourage employees from exercising their statutory rights." *Id.* Thus, we reversed the Board's conclusion of a violation of the Act. *See id.* at 1100.

As in *Fresh Fruit*, the Board didn't consider the totality of the circumstances before concluding that Macy's committed an unfair labor practice. The Board ruled that the lack of an immediate, clear, and complete proposal to the Union within one business day of the offer to return constituted "inherently destructive" conduct. But that's wrong. After the Union engaged in a three-month strike, rejected Macy's final offer, and then sought to jam Macy's with a Friday night return-to-work offer, Macy's taking a mere two business days to formulate and communicate a new, detailed offer can't be viewed as anti-union animus. Given the relatively short period in which Macy's developed a new offer after the months-long strike, nothing shows that the minor delay in communicating its latest offer after the lockout was *necessarily* made to punish the Union for its protected activity or was *necessarily* an attempt to obstruct or discourage the employees' union activity. Instead, the 48-hour delay could be viewed as the "necessary and normal" time to figure out Macy's response to the Union's unexpected return-to-work offer and to draw up a new proposal. *See id.* at 1097. Without any evidence of anti-union animus, the Board hasn't shown how the short delay here had more than a "comparatively slight" impact on the Union under *Great Dane Trailers*, 388 U.S. at 33. Establishing a hard-and-fast rule that an employer *must* provide a "timely, clear, and complete offer" before engaging in an offensive lockout within one-business day was arbitrary and capricious. *See Macy's, Inc.*, 372 NLRB No. 42, at 1.

Indeed, labor disputes often involve complex circumstances that can't be resolved on the short fuse

that the Board requires here. Under the Board's arbitrary rule, Macy's could have only responded two ways to the Union's Friday-night offer: (1) immediately reinstate the workers and lose its bargaining position after the three-month strike, or (2) institute the offensive lockout but come up with a new offer essentially *overnight*. Nothing in the Act requires these grim choices.

Well, couldn't Macy's have immediately revived its final offer to comply with these rules? Yes, but that would defeat the purpose of the "best and final" offer as a bargaining tactic. Now, a union can decide whether an offer is a best and final one or not. All a union must do to resurrect an expired offer is make an unconditional offer to return to work on short notice before a weekend.

But, what's wrong with forcing Macy's to reinstate the employees by Monday morning? First, this ignores the enormous logistical difficulties with returning dozens of striking employees to work over a weekend. Second, this would also weaken Macy's bargaining position by decreasing the need for an agreement. Unless an employer shows anti-union animus, the Act doesn't permit the Board to force a one-sided solution in a labor dispute.

And nothing in the Board's precedent supports its draconian ruling here. Start with *Dayton Newspapers*. In that case, an employer locked out several delivery drivers after a one-day strike. *In re Dayton Newspapers, Inc.*, 339 NLRB 650, 650 (2003). Negotiations and the lockout continued for months. But, on December 23, the union made an unconditional offer to return to work. *Id.* at 651. Four

days later, the employer rejected the offer and communicated that the union had to accept several "changed circumstances," including unspecified "operational changes." *Id.* The next day, the union agreed to the "changed circumstances," although it noted that the "operational changes" condition may need further negotiations. *Id.* More than a month later, on February 4, the employer nonetheless rejected the union's offer, suggesting that the union hadn't accepted all the conditions of reinstatement. *Id.* at 652. The Board concluded that the employer engaged in an unfair labor practice in not reinstating the locked-out drivers because the employer failed to "clearly and fully set forth" the conditions of reinstatement. *Id.* at 656. In particular, the demand for acceptance of "operational changes" was "unclear and changing" and became a "moving target." *Id.* Under these conditions, the union couldn't "intelligently evaluate its position and obtain reinstatement." *Id.*

The differences between *Dayton Newspapers* and this case are glaring. First off, notice that the negotiations over reinstating the drivers took place over weeks—not days or hours, as here. The Board never criticized the employer for taking *too long* to communicate its condition of reinstatement—it criticized the employer for not being clear on the conditions themselves. *See id.* at 656-58. In contrast, the Board here held that Macy's failure to communicate a new offer by Monday morning—one business day later—was an unfair labor practice. *See Macy's, Inc.*, 372 NLRB No. 42, at 20. So the Board is punishing Macy's for taking a total of 48 hours more to communicate its newest offer to end the lockout.

Indeed, Board precedent requires parties to afford each other fair time to evaluate and respond to offers. In *Alden Leeds,* the Board concluded that giving a union "only one working day's notice, in which to evaluate and understand [employer's] uncertain, ambiguous, and confusing offer, vote on it and accept it, is clearly insufficient and not the 'timely' notice required by Board precedent." 357 NLRB 84, 95 (2011). So the Board violates its own precedent to reach its desired outcome. If that's not arbitrary and capricious, nothing is. We then just give the Board a blank check to do what it wants in the labor context.

B.

As if it weren't enough, the Board gives us one final reason to deny the Board's petition. Macy's argues that it had good-faith concerns about the Union's actions during the strike that justified a defensive lockout. According to Macy's, strikers orally abused its employees, attacked its customers, flouted COVID safety protocols, caused a sewage backup by blocking a drain outside its San Francisco store, and sabotaged its facilities. It was especially concerned about having the employees return to work given the upcoming holiday season, which accounts for much of the company's profits. *See Macy's, Inc.*, 372 NLRB No. 42, at 20. The Board rejected Macy's defensive lockout justification because it believed that the defensive lockout concern was simply a pretext to pressure the Union to accept the company's offer. But that conclusion was arbitrary and capricious and unsupported by the record.

To justify a defensive lockout, an employer need only be "*reasonably concerned*" about the employees'

actions. *See Sociedad Espanola de Auxilio Mutuo y Beneficiencia*, 342 NLRB 458, 462 (2004). This is a relatively low bar. While we must defer to the Board's factual findings if they are supported by substantial evidence, we have a duty to correct when the "administrative agency has made an error of law." *NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. and Gen. Pipefitters of N.Y.*, 429 U.S. 507, 522 n.9 (1977). Here, neither the ALJ nor the Board cited the "reasonably concerned" standard and only looked at whether Macy's *proved* the incidents of misconduct by Union members. But that's not the legal standard to justify a defensive lockout. All that's necessary is that Macy's show that it was "reasonably concerned" about the misconducted. Thus, we should have remanded on this basis alone. *See id.*

Moreover, as Macy's raised to the Board, the ALJ glossed over all the evidence of Macy's "good faith" belief that the striking employees engaged in misconduct or sabotage. Despite our deference to factual findings, the ALJ and the Board can't ignore significant evidence contrary to its position. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1335 (11th Cir. 2012) (noting the Board "cannot ignore relevant evidence that detracts from its findings" (simplified)).

Neither the ALJ nor the Board considered the fact that, before the lockout, Macy's *twice* sought injunctive relief in state court against the Union. On

November 20, Macy's filed a motion for a preliminary injunction alleging causes of action against the Union for nuisance, trespass, false imprisonment, assault, battery, and intentional interference with prospective economic relations. Before the lockout, the state court denied the request without prejudice because Macy's had not yet proven irreparable harm. But the state court did not appear to rule on the facts of Macy's allegation. By going to state court on the very same concerns as raised for the defensive lockout, Macy's showed it was "reasonably concerned" with the Union members' actions. Indeed, filing for a false or bad-faith injunction would have subjected Macy's to judicial sanctions. Yet the ALJ and the Board never said why this evidence wasn't sufficient to prove Macy's defensive reasons. By not accounting for these significant facts, the ALJ and the Board acted arbitrarily, capriciously, and without support.

III.

Let's recap the Board's extraordinary actions here. After a lengthy and acrimonious strike, the Union made an unconditional offer to return to work—expecting to be accommodated within one business day. On the next workday, Macy's responded that it was locking out the striking employees in support of its bargaining position. True, Macy's didn't have an offer on the table then, but that's not unexpected given that the Union had rejected its best and final offer. In any case, Macy's put together a new offer two days later. Despite these efforts, the Board determined that Macy's committed an unfair labor practice. If this wasn't unusual enough, the Board then imposed extraordinary damages—making Macy's pay for "all

direct or foreseeable harms" that occurred to the employees since the lockout. Until recently, the Board never claimed the authority to order consequential damages as here. And the Board ignores the obvious statutory and constitutional roadblocks to this newly claimed authority. The majority largely ignores these concerns and just proclaims that we must defer to the Board because it is at the "zenith" of its discretion. That's incorrect. The law and the Constitution are supreme here—not the bureaucrats of the Board. We should not have condoned this government overreach.

I respectfully dissent.

Appendix C

UNITED STATES NATIONAL LABOR RELATIONS BOARD

No. 20-CA-270047

MACY'S INC.,

Respondent,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39,

Charging Party.

Filed: January 17, 2023

By Chairman McFerran and Members Kaplan and Wilcox

DECISION AND ORDER

On April 6, 2022, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief to each answering brief. The Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language, and in accordance with our decisions in *Paragon Systems*, 371 NLRB No. 104 (2022); *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021); and *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Member Kaplan acknowledges and applies *Paragon Systems* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), we have also amended the make-whole remedy and modified the judge's recommended order to provide that the Respondent shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River*

ORDER

The National Labor Relations Board orders that the Respondent, Macy's, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Locking out its employees without providing them with a timely, clear, and complete offer that sets forth the conditions necessary to avoid the lockout.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Medical Center, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

Unlike his colleagues, Member Kaplan would require the Respondent to compensate these employees for other pecuniary harms only insofar as the losses were directly caused by the unlawful lockout, or indirectly caused by the unlawful lockout where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with his partial dissent in *Thryv, Inc.*, supra.

The Charging Party requests that the Board grant several extraordinary remedies, including multiple notice readings by upper-level managers involved in the lockout, notice posting on the Respondent's public website, notice mailing to all of the Respondent's employees who had worked at locations where employees were locked out, and notice posting for at least three years. We deny this request because the Board's traditional remedies are sufficient to effectuate the policies of the Act in this matter.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer those employees whom it unlawfully locked out on December 7, 2020, who have not yet been reinstated, full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary employees hired in their place while they were locked out.

(b) Make the locked-out employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful lockout, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate all affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected employee.

(d) File with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's W-2 form(s) reflecting the backpay award.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Northern California and Reno, Nevada facilities copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's

[3] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 2020.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 17, 2023

* * *

APPENDIX

Notice to Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lock you out without providing you with a timely, clear, and complete offer, that sets forth the conditions necessary to avoid the lockout.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer the employees whom we unlawfully locked out on December 7, 2020, who have not yet been reinstated, full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary employees hired in their place while they were locked out.

WE WILL make the locked-out employees whole for any loss of earnings and other benefits resulting from the unlawful lockout, less any net interim earnings, plus interest, and WE WILL also make them

whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful lockout, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate all affected employees for the adverse tax consequences, if any, of receiving a lumpsum backpay award, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each affected employee.

WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

* * *

DECISION

STATEMENT OF CASE

John T. Giannopoulos, Administrative Law Judge.[1] This case was tried before me over a 6-day period in June 2021. Because of the compelling circumstances created by Covid-19 pandemic, pursuant to the stipulation of the parties, the trial occurred via video conference. Based upon charges filed by the International Union of Operating Engineers, Stationary Engineers, Local 39 (Union or Local 39), the Government alleges that Macy's Inc. (Respondent or Macy's) violated Section 8(a)(1) and (3) of the Act by locking out employees represented by the Union at a time when Respondent did not have a bargaining proposal on the table for the Union to consider in order to avoid a lockout. Macy's denies that its actions violated the law.

Based upon the entire record, including my observation of witness demeanor, and after

[1] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, Charging Party, and Administrative Law Judge exhibits are denoted by "GC," "R," "U" and "ALJ" respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.[2]

I. Jurisdiction and Labor Organization

Respondent is a Delaware corporation and operates department stores throughout the United States, selling a wide range of merchandise including apparel, accessories, cosmetics, home furnishings, and other consumer goods. In conducting its business operations, each year Respondent derives gross revenues in excess of $500,000; it purchases and receives at its San Francisco store goods and materials valued in excess of $5,000 directly from points located outside of the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and the National Labor Relations Board ("NLRB" or the "Board") has jurisdiction pursuant to Section 10(a) of the Act.

II. Facts

A. General Background

Rowland Hussay ("R.H.") Macy was born on Nantucket Island in 1822. Mark D. Bauer, *Department Stores on Sale: An Antitrust Quandary*, 26 GA. ST. U. L. REV. 255, 265 (2010). He first worked on a whaling ship, but eventually left the ship, with a red star tattooed on his hand to show for it, and went

[2] Testimony contrary to my findings has been specifically considered and discredited. Witness demeanor was the primary consideration used in making all credibility resolutions.

to work in retail, the stock market, and real estate, before opening a small store in Manhattan in 1858. Id. Respondent traces its lineage back to this one small store, and the company's traditional red star logo mirrors the red star tattooed on R.H. Macy's hand. Id. Today Respondent operates over 700 store locations in 43 states, the District of Columbia, Puerto Rico, and Guam, under the Macy's, Bloomingdales, and Bluemercury brand names, generating billions of dollars in annual revenues.[3]

Nationwide, Macy's employs over 75,000 full-time and part-time employees. Because of the seasonal nature of the retail business, the number of employees peak during the holiday season. Approximately 7% of the Respondent's employees are represented by labor unions, and the company has about 60 contracts with various unions nationwide. (Tr. 631).

This case involves a strike called by Local 39, which represents a unit of building engineers and craftsmen that work at approximately 40 different location in 28 different cities throughout the Northern California/San Francisco bay area, along with engineers working at two locations in Reno, Nevada.

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[3] See https://sec.report/Document/0001564590-21-016119/ (Macy's Form 10-K, filed with the Securities and Exchange Commission on March 29, 2021, for the fiscal year ending January 30, 2021). For purposes of background, the effects of the Covid-19 pandemic, and for financial information, I take administrative notice of forms 10-K, 8-K, and 10-Q filed by Macy's Inc., with the Securities and Exchange Commission. *Pacific Greyhound Lines*, 4 NLRB 520, 522 fn. 2 (1937) (Board takes judicial notice of facts stated in company's annual report filed with the Security and Exchange Commission); Fed. R. Evid. 201(b). All filings were last accessed on April 4, 2022.

These employees are responsible for maintaining and repairing the company's retail stores, including their electrical and HVAC systems; they also perform carpentry, painting, and general repairs. (Tr. 553, 588, 632, 761-762; GC. 2; R. 49)

The Union and Macy's have had a collective-bargaining relationship involving this unit of employees for over 20 years. The most recent collective-bargaining agreement (CBA) between the parties was signed in 2018 and effective from September 1, 2018 through August 31, 2020, covering approximately 60 to 70 unit employees. (Tr. 636; GC. 2)

B. Respondent Closes its Stores and Lays Off Employees Due to Covid-19

In mid-March 2020, as the Covid-19 pandemic reached the United States, Respondent closed all of its stores nationwide. All employees were paid for two weeks, and on April 1, 2020 the majority of Respondent's workforce across the country was furloughed. The furloughs included the Local 39 engineers covered by the CBA. In total, about sixty Local 39 engineers were laid off on April 1, 2020. A small crew of Local 39 engineers, comprising primarily of the chief engineers, remained employed during this time for purposes of maintaining the empty buildings. (Tr. 634-636)

As different states and localities began to ease the regulations imposed to slow the spread of Covid-19, Macy's started reopening its stores and by the end of the second quarter of 2020, substantially all of Respondent's stores across the country had reopened. For the company's Northern California and Reno

based engineers, by mid-August 2020, 43 of the furloughed Local 39 engineers had been recalled to work. (Tr. 635-636)

The pandemic had a significant financial impact on Macy's in 2020. The below chart shows Respondent's revenues and net income for fiscal years 2018 through 2021.[4]

	2021	2020	2019	2019
	* in millions			
Net Sales	24,460	17,346	24,560	24,971
Net Income	1,430	(3,944)	564	1,098

As the chart shows, net sales for fiscal year 2020 dropped by over $7 billion in comparison to the previous two years and the company had a net loss of $3.9 billion for 2020. By the first quarter of 2021, Macy's had returned to profitability, with a net income of $103 million for the quarter.[5] Respondent's financial results continued to improve throughout 2021, with the company having net sales of $24.46

[4] Macy's ends its fiscal year on the Saturday closest to January 31.

[5] See https://www.sec.gov/ix?doc=/Archives/edgar/data/794367/000156459021031943/m-10q_20210501.htm (See Macy's Form 10-Q filed with the SEC on June 7, 2021, for the quarter ending May 1, 2021)

billion and a net income of $1.43 billion in fiscal year 2021.[6]

C. Bargaining for a Successor Agreement

The parties started bargaining for a successor agreement in July 2020.[7] Because of the pandemic, the bargaining sessions occurred via videoconference. (Tr. 37, 638-639)

Rose Ashmore, Macy's director of labor strategies, served as lead negotiator for the company. Ashmore has held this position for over 20 years and is responsible for negotiating collective- bargaining agreements nationwide; she is also involved with grievance processing, arbitrations, and other associated labor relations matters. Eddie Ramirez, the Business Representative for Local 39, was the lead negotiator for the Union at the start of negotiations. He was replaced as lead negotiator by Jay Vega in mid-August; although Ramirez remained on the bargaining team. Vega is a district representative for the Union, overseeing the San Francisco office. He also supervises the Union's various business representatives in the district. (Tr. 31-32, 54, 631, 638-639)

Between July and August the parties held about 12 bargaining sessions. The primary issues preventing an agreement were economic. Specifically, the Union sought wage increases to bring salaries closer in line with those paid to building engineers working in San

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[6] See https://www.sec.gov/Archives/edgar/data/794367/000156459022005771/m-ex991_6.htm (Exhibit 99.1 to Macy's Form 8(k) filed with the SEC on February 22, 2022).

[7] All dates are in 2020 unless otherwise noted.

Francisco area commercial buildings who were covered by a collective-bargaining agreement between the Union and a multiemployer association representing the building owners. Macy's thought the Union's wage demands were unreasonable. Ashmore believed that the commercial building engineers had greater job duties than their counterparts at Macy's. Plus, the building owners could pass any increased costs onto their tenants, whereas Macy's had to absorb these costs. (Tr. 640-644; U. 1)

On August 31, Macy's presented the Union with its Last, Best, and Final Offer (Final Offer) which called for a three year contract, with employees receiving a 2.5% wage increase each year, starting on September 1. It also provided for increased pension fund contributions each year as follows: 4.3% ($8.70) in 2020; 3.4% ($9.00) in 2021; and 3.0% ($9.27) in 2022. Finally, in the Final Offer, Macy's proposed a nearly $20,000 investment in company health care contributions, across all plans, for the 2020-2021 plan year, provided the Union withdrew its Health and Welfare proposal and the contract was ratified. On September 2, the Union presented the Final Offer to its membership for a vote; it was overwhelmingly rejected by the bargaining unit. That same day the Local 39 engineers decided to go on strike starting September 4. (Tr. 38-41, 642; GC. 3)

D. The Union's Strike

The Union went on strike on September 4 and conducted picketing at the San Francisco Macy's store, which is located directly across the street from the city's iconic Union Square (referred to as the "Union Square store"). Union Square is a 2.6-acre public plaza

located in the heart of downtown San Francisco's shopping district. (Tr. 120) See *Cuviello v. City of San Francisco*, 940 F.Supp. 2d 1071, 1077 (N.D. Cal. 2013) (noting that Union Square is a 2.6 acre public plaza).

The Macy's Union Square store takes up about 3/4 of a city block. The store has nine floors of retail sales space, which includes a basement level. Along with a sales floor, the top floor includes a restaurant. On the north side of the block is the store's main entrance, which is located on Geary Street, directly across the street from Union Square. There are three public entrances on O'Farrell Street, which runs along the south side of the block. There is also an employee entrance on O'Farrell Street and a driveway which is used by trucks making deliveries to the store. Stockton Street runs on along the east end of the block, and has one public entrance to the store. On the west end of the block is Powell Street, which runs north to south. The buildings along Powell Street do not belong to Macy's, but house other commercial establishments. Even though striking engineers worked at multiple stores throughout Northern California and Nevada, during the strike picketing only occurred at the Union Square store. (Tr. 43, 316; R. 1, 9, 44, 45; ALJ. 2)

As for the picketing, it consisted of individuals patrolling the various store entrances, and also included the use of inflatables, bull horns, noise makers (such as airhorns, sirens, gongs, or whistles), and musical instruments. At times a drum set was stationed in front of the main entrance on Geary Street, with a full-time drummer. At one point, a marching band even made an appearance. (Tr. 201, 210-212; R. 3, 4, 8, 10, 17)

The picketing occurred every day from September 4 through December 4, seven days a week. It started when the store opened and ended when the store closed.[8] On different days members of other labor unions, the area labor-council, and the general public, also joined the picket line in a show of solidarity. (Tr. 13, 43-44, R. 17)

E. Respondent's Claims that Strikers Engaged in Misconduct and Sabotage

Macy's asserts that the striking employees engaged in various acts of misconduct and sabotage. In its brief, Respondent points to this conduct, in part, to support its claim that the employee lockout was lawful, asserting the company "legitimately feared the Union would engage in unabated misconduct without a contract in place;" it points to the following twelve specific allegations of misconduct and/or sabotage. (Macy's Br., at 23)

1. Allegations that union members used homophobic slurs and insulting comments

Respondent contends that, during the picketing, union members "directed homophobic and insulting comments at two Macy's employees: Gilbert Saavedra and David Plew." (Macy's Br., at 21) Both Saavedra and Plew testified about these claims at the hearing.

a. Testimony of Gilbert Saavedra

Gilbert Saavedra works at the Macy's Union Square store as the "customer experience manager of

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[8] Originally the store's hours were from 10:00 a.m. until 6:00 p.m. (Tr. 43-44) At some point the hours changed and the store was open from 11:00 a.m. until 7:00 p.m.. (Tr. 43, 131-132, 457)

beauty," having worked for Macy's since February 2019. Saavedra described his position as "manag[ing] the managers" in the beauty department, which consists of the fragrance, skin care, and cosmetic lines sold at the store. The beauty/cosmetics department starts in the part of the store facing the corner of O'Farrell and Stockton Street, and runs most of the length of the store on the O'Farrell street side. (Tr. 112-113; R. 1)

Saavedra testified that during the first three weeks of the strike Macy's instructed all managers, including himself, to station themselves at the Geary Street entrance, because that is where the majority of the picketing was occurring. The managers were scheduled to go to the entrance once a day, in one hour increments, and stand inside the store to open the doors so customers would have a clear path to enter and exit the store. During his shifts at the Geary Street entrance, Saavedra testified that he watched the picketing through the glass doors and that at any one time he would observe about 15 picketers. (Tr. 118- 120, 154-155)

Because the beauty/cosmetics department directly faces O'Farrell Street, Saavedra testified that during his workday he would primarily be near the O'Farrell side fragrance door and would also open doors for customers at this entrance. According to Saavedra, he was standing at this door around the end of the first week of picketing, when he opened the door for a customer and one of the picketers called out saying "there's the faggot manager." (Tr. 139-140) Saavedra testified that similar statements were made to him multiple times, on a daily basis, during the first

three weeks of the picketing as he was opening doors for customers. Saavedra did not recognize any of the people who called him names, saying that he just heard what was said and did not look right at the name callers. (Tr. 139- 142, 160-161)

During cross-examination, in an attempt to discredit Saavedra's testimony, the General Counsel produced a pre-hearing affidavit Saavedra provided in support of a charge filed by Macy's with the NLRB alleging picket line misconduct. In this affidavit, which is dated March 22, 2021, Saavedra does not say anything about the picketers making derogatory statements or engaging in name calling, nor does he use the word "harassment." To counter this testimony, Respondent claimed that Saavedra was only offered as a witness regarding the allegation that the picketers were making excessive noise, and Saavedra said that nobody asked him about the name calling. That being said, the charge in question includes an allegation that union members/agents were "harassing employees with derogatory homophobic slurs and actions." (GC. 13) Also, Saavedra provided his affidavit well after the lockout occurred, and the affidavit's jurat specifically states that Saavedra will "immediately notify the Board agent" if he remembered anything else important or wished to make any changes to the document. Saavedra did not notify the Board agent or make any changes to his affidavit. (Tr. 146-151)

During cross-examination, Saavedra also admitted that some of the people on the picket line were not union members, nor did he recognize them as working for Macy's. (Tr. 151-153) Finally, Saavedra

said that he never reported the name calling to Macy's management, and did not ask to be exempted from his duties monitoring the doors. (Tr. 161)

b. Testimony of David Plew

David Plew works as a lead visual security officer (VSO) for Macy's; Plew has worked for the company since August 2019. VSOs wear black pants and red polo shirts that say "Macy's Security." At the time of the picketing, Plew worked at the Union Square store five days a week during business hours and was assigned to the entrance doors. Plew said that he was responsible for handling the flow of traffic and trying to keep the doors open for customers who were making their way past the picketers as they came in and out of the store. (Tr. 356-357, 473-475, 489, 526-527; R. 9)

During the strike, Plew testified that he interacted with the picketers a lot and said that he lodged various complaints with the company about them. According to Plew, the first incident he had with the picketers involved an interaction that happened the morning of September 3, while Plew was located at the "fragrance store door." (478-480) Although the picketing did not start until September 4, Plew was consistent in his testimony that this, and other incidents, occurred on September 3. Plew said that he was helping a customer exit the door, when one of the picketers started "wailing" at him; Plew looked over at the picketer, who then said "you're a fag." (Tr. 478) Plew testified that he immediately turned around and went back inside the building and texted his supervisor who then removed him from working at that specific door. During his direct testimony, Plew

identified the picketer who made the comment as Local 39 engineer Greg Johnson. (Tr. 475-480)

Later that same day, Plew said he was back at the "fragrance door" when somebody was outside holding a bullhorn on his crotch and gyrating towards him. Plew testified that he believed the person with the bullhorn was Greg Johnson. Plew also testified that, starting on September 3, Johnson began calling him "doorstop," and that this nickname caught on with the other picketers who also started calling Plew doorstop. According to Plew, when he would arrive at work in the morning the picketers would say "good morning, doorstop." And when he would leave the building or go out for a break they would say "hi doorstop, have a nice lunch, doorstop." Then, one day when Plew was carrying a bag, he testified that someone said to him "nice purse, doorstop." In all, Plew estimated that up to 25 different picketers called him doorstop, and that it became an ongoing nickname that was used for him by the picketers throughout the strike. (Tr. 482-483, 523)

Plew further testified that, at one point on September 3, he was stationed at the Geary street entrance looking outside, when one of the picketers started blowing kisses at him in an exaggerated fashion. Plew identified this person as Local 39 engineer Diego Zarco. Plew also said that Zarco was "stalking" him at the doors, meaning that when Plew was standing inside the store, at the Geary Street doors, Zarco would stand outside the doors, opposite Plew, and smile at him. Plew said this happened on a regular basis, "ending with one time when he actually

was flipping me off right at the door." (Tr. 494) (Tr. 480-481, 492-501; R. 11)

Regarding his identifying Zarco as one of the people involved in these incidents, at the hearing Plew was shown two pictures of someone whose face was obscured by a picket sign, and without hesitation he identified the person in the pictures as Zarco. However, Plew ultimately admitted that, at the time of the incident, he did not know Zarco. He also admitted that Zarco does not work at the Union Square store, and someone else, at some later time, had told him that the person in the pictures was Zarco. When asked who told him this, Plew testified that he could not say exactly, but that he learned this "through the whole process of what we were doing as managers." He later said that he learned about Zarco's identity "through the staffing that I was working with." Nobody who actually knew Zarco identified him as the person in the photographs, or the person who was involved in the incidents Plew described. (Tr. 494-495, 509-512; R. 11, 43)

Regarding his identifying Johnson as the person making derogatory statements and gestures, Plew said that Johnson works as an engineer at the Union Square store, that Plew would see him at the store about once a week, and that he knew Johnson even before the strike started. However, according to Respondent's records, Johnson was not assigned to the Union Square store. Instead, he was assigned to the Oakridge, Monterey, Salinas/Northridge, and Capitola stores. Also, when asked during cross-examination if he knew Johnson's identity at the time of the incident, Plew said that he did not, but that he

knew Johnson's identity by December 2020. He then testified that he could not recall if he knew Johnson by December, before once again saying that he did, in fact, know Johnson's identity in December. (Tr. 478, 523-528; R. 49)

In a declaration provided to the California State Superior Court regarding these incidents, Plew identified someone else as holding the bullhorn, saying that Johnson was the person who yelled "you're a fag, and blew kisses at me" but that "[a]nother picketer . . . placed his bullhorn in front of his groin area and motioned up and down with the horn while looking at me." (Tr. 525, 530-531) Plew tried to explain this inconsistency by saying he was not "paying attention to everything else that was going on," and that there was "confusion" and "lot going on that day." (Tr. 528-529) Nevertheless, Plew insisted that Johnson was the person gyrating with the bullhorn. (Tr. 528, 531)

2. Allegations that Union members attacked customers and employees with assaultive noise devices and a picket sign.

a. Incidents involving Amanda Nalua'i

Amanda Nalua'i worked at the Union Square store as an asset protection manager, supervising the VSO staff. Nalua'i has worked at various Macy's stores in asset protection for over 14 years and at Union Square since August 2019. During the time of the picketing, Nalua'i reported directly to Kevin Uhe. At the time of the strike, Uhe was the director of operations and asset protection for the Union Square store. Uhe had been in this role for one year, and has worked for Macy's since 2005. (Tr. 175-176, 397-399)

Nalua'i testified that the first day she observed picketing was on September 3. As with Plew, Nalua'i was consistent in her testimony that various events happened on September 3, even though the picketing did not start until the next day. According to Nalua'i, she came to work on September 3 and saw some of the engineers positioned outside the O'Farrell Street doors. A colleague told Nalua'i the engineers were picketing at each of the customer doors, so Nalua'i went to the camera room, where the asset protection team monitors both the outdoor and indoor security cameras. (Tr. 402)

Macy's has security cameras posted outside each of the entrances to the Union Square store. They also have security cameras inside the store, which move 360 degrees. These cameras record video only and were operating throughout the duration of the picketing. The company has a security room where the cameras broadcast a live video feed and where tapes of the videos are maintained; the videos can be searched by date and time. When Nalua'i went to the security room and looked at the cameras on September 3, she testified that she saw various people she had worked with over the years, along with other people that she did not know, picketing. (Tr. 197-200, 246, 282-284, 290, 403)

Nalua'i testified that at one point on September 3 she exited the Geary street doors and found herself immediately surrounded by picketers. Nalua'i said that she could not move forward and was trapped against the glass door with her arms pinned to her sides because of the picketers. According to Nalua'i, the picketers were inches away, and in some cases

they brushed up against her, while blowing bullhorns directly into her face and ears. Eventually, Nalua'i testified that she was able move one of her hands backwards at an awkward angle to grab onto the door and inch her way back into the building. In a pre-hearing affidavit, Nalua'i gave a less intense description of what occurred, and did not mention the picketers either brushing up against her or blowing bullhorns directly into her face and ears. (GC. 35 #01213) Nalua'i said that she reported this incident to Uhe. Nalua'i reviewed the security camera footage for the day but did not see the incident on the security video. She did not file a police report regarding this incident. (Tr. 420-421, 452, 462-463)

Nalua'i also testified that on September 3, while she was at the Stockton Street entrance to speak with one of the VSOs, one of the picketers used a megaphone and started yelling "the fat one's back. Here comes the fat one. Look she's too fat to fit through the doorway." (Tr. 438-439) Nalua'i said she recognized the person with the megaphone as someone who worked at one of the other Macy's locations. (Tr. 439-440, 467)

On November 7, Nalua'i claimed that during the picketing she was hit with a picket sign being held by Union business agent Jay Vega. According to Nalua'i, she was outside the Geary Street doors repositioning stanchions which had been erected by Macy's. She adjusted one of the stanchions and said that Vega was "coming around" with a picket sign resting over his right shoulder. As Vega got closer, Nalua'i said that he moved the picket sign from his right shoulder over to his left shoulder, bringing the sign forward with both

hands and then moving it over to his other shoulder. When Vega passed Nalua'i, and as he was moving the sign from one shoulder to another, Nalua'i testified that his picket sign struck her shoulder. After the sign hit her, Nalua'i said that she told Vega "you can't hit me, that's assault," but Vega did not respond to her. Nalua'i claims that the picket sign hit her with enough force that it partially knocked her backwards, and she had to ice her shoulder later that day. However, she did not see a doctor. For his part, Vega denied ever hitting anybody with a picket sign, or that anyone claimed he had done so. (Tr. 431-433, 436, 466- 467, 796-797)

Although Nalua'i characterized what occurred as an assault, she did not report the incident to the police or file a police report. Instead, Nalua'i testified that she reported it to the off-duty police offer at the store but nothing came of it.[9] Nobody was ever given a citation or arrested regarding this event. Also, Nalua'i testified that she never checked the security camera video to see if this incident was captured by the cameras.[10] (434-435, 464, 467-468)

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[9] Macy's hires uniformed off-duty police officers to work inside the Union Square store to deter shoplifting, address issues involving disruptive customers, to help the Macy's security staff make apprehensions, and if necessary arrest individuals who commit crimes inside the store. (Tr. 441, 442-443, 470)

[10] Regarding this incident, while I believe that Nalua'i's shoulder made contact with a picket sign, I do not credit her version of events, nor do I find that anyone purposefully hit her. Nalua'i was generally overly dramatic throughout her testimony, she never checked the security cameras for video of the incident, no videos from that day were introduced into evidence even though cameras are pointed right at the Gary Street entrance,

b. The Union's use of noise devices

The Union used a variety of noisemakers throughout the picketing, including horns, whistles, sirens, drums, and a metal gong. Because of the noise, Macy's purchased earplugs and distributed them to employees working on the first floor. (Tr. 215-216, 426-427, 522; R. 3, 4, 5, 8, 10, 13, 41)

i. Use of air horns at the Geary Street entrance

At the Geary Street entrance the Union used a type of homemade airhorn unit consisting of a compressed air tank on wheels; a wooden frame holding four large airhorns was constructed on top of tank. At least one of the airhorns could be removed from the frame and was attached to a long air hose. This portable horn allowed a picketer to walk around, or stand at the Geary Street entrance, honking the airhorn while it was connected to the compressed air

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and Vega credibly denied ever hitting anyone with a sign. Instead, I believe Nalua'i walked into a group of picketers who were patrolling in front of the store and her shoulder incidentally contacted one of the picket signs as she was repositioning the stanchions. As for the September 3 incident, the evidence shows the picketing did not start until September 4. And while Nalua'i may have gone outside one day and felt surrounded by picketers, the evidence shows that throughout the strike both the picketers and Respondent were trying to assert control of the area in front of the customer doors. The picketers believed they had the legal right to conduct picketing activity in this area, while Respondent was trying to clear the picketers from this area to limit their interactions with customers. Nalua'i feeling surrounded by the picketers, or being subjected to the horns they used, was simply the attendant consequence of both sides trying to maintain what they believed was their legal right to be in this area.

tank that was stationed near the street. Sometimes the Union used the airhorns as a stand-alone unit, with the compressor and frame stationed somewhere on the sidewalk, and sometimes they would remove the portable horn and walk around honking it. (Tr. 207; R. 5, R. 41)

Multiple witnesses testified about the Union honking the airhorn constantly during the picketing. Amanda Nalua'i testified that she saw several picketers blowing horns in the faces of customers at the Geary Street entrance and said that she suffered from headaches, dizziness, and nausea because of the noise. David Plew testified that, after customers walked through the doors, picketers would use their signs to keep the doors open so they could honk the horn into the store. (Tr. 425-426, 464, 491)

Kevin Uhe testified that picketers used the removable horn to honk whenever a customer opened the door, surprising the customer and allowing the sound to echo throughout the building. Uhe said that he witnessed noisemakers and horns being blown directly into customer faces as they entered and exited the store and also testified that picketers blew the air horn at him as he walked out the Geary Street entrance on several occasions, making him feel dizzy or off balance. (Tr. 195, 206-207, 221)

According to Uhe, he tried to address the noise issue with picketers numerous times, but they would respond by either blowing the horn in his face, saying "fuck you" or telling Uhe that they "don't have to

fucking listen to you."[11] (Tr. 220-221) After being exposed to the noise, Uhe said that his ears were ringing, he had migraines, and had difficulty sleeping or concentrating. (Tr. 222)

Gilbert Saavedra testified that picketers used the removable airhorn while he opened doors for customers, and the noise would echo throughout the department. Saavedra also said that he observed picketers holding the horn and angling it at customers, who were less than a foot away, as they were walking through the doors. According to Saavedra, the horn was directed at him several times as he tried to let customers into the store. Even though he wore ear plugs, Saavedra said they did not completely block out the noise as the horn was blasted near his head. (Tr. 128-135)

Saavedra described the picketing as very intense and the noise very loud and consistent during the first three weeks of the picketing, with the picketers standing in front of the Geary Street doors and blowing the airhorn daily. However, towards the end of September/early October, Saavedra said the atmosphere started to calm down and the picketing was more orderly. The employer erected stanchions in front of the various entrances and the picketers were patrolling in circles. While the picketers were still making noise, and honking the airhorns, Saavedra

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[11] Uhe also testified that, when he asked picketers to not move the stanchions, or to follow Covid-19 protocols, they responded by saying "fuck off," or "fuck you," or calling him a "fucking clown." In all, Uhe said that he was told to "fuck off" nine times during the strike. However, he could only identify one person who told him to "fuck off." (Tr. 189, 205, 300, 351-352; R. 5)

said that they were no longer putting the horn into the doors when they opened. (Tr. 120, 125, 131, 155, 157-159)

ii. Video of a picketer blowing a whistle

Kevin Uhe testified about an incident saying it involved a picketer blowing a whistle "directly into a child's ear." (Tr. 196) This incident was captured on a Macy's security camera at the Stockton Street entrance. The incident was reported to Uhe by a company asset protection manager and Uhe then watched the security video. Uhe did not recognize the person blowing the whistle, but said the person had been picketing outside the store on multiple occasions. (Tr. 199-200)

The Macy's security video was introduced into evidence. It shows three picketers standing/walking around on the sidewalk outside the Stockton Street entrance. The video is dated September 5, 2020 and time-stamped at 5:16 p.m. Two of the picketers are standing/walking near the street, holding picket signs; one of them also has a megaphone. Another picketer is walking near the store entrance and is wearing a green hat, T-shirt with the union logo, and is also holding a picket sign. At one point the picketer with the green hat stops about one or two feet from the door, looks around, and puts on a pair of ear phones/ear muffs. He then takes a whistle out from his pocket, removes his face mask, and puts the whistle in his mouth. At the same time, it appears that one of the other picketers is speaking into the megaphone. As the picketer with the megaphone stops speaking, the one with the green hat blows a short blast of his whistle in the direction of a boy who is skateboarding by. Based

upon the grid-pattern in the sidewalk, the skateboarder was about 2 to 3 feet away from the picketer when he blew the whistle.[12] The boy, who was with a friend that was also skateboarding, stops, turns around, points to his ear and appears to say "what the fuck." He then unscrews the top off of a water bottle and starts throwing water on the picketer while also apparently saying "fuck you bitch." The picketer tries to avoid the water, points at the boy and says something. At this point a Macy's asset protection manager has walked out of the Stockton Street door and can be seen saying something to the picketer, who is speaking back to him. The boy with the water bottle can be seen pointing to his ear while his friend seems to be saying something to both the picketer and the Macy's manager. The Macy's manager goes back into the store, and the boy once again starts throwing water at the picketer while saying something to him. Having used up most of the water in his bottle, the boy walks past the picketer and out of the view of the

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[12] I take administrative notice of the City and County of San Francisco Department of Public Works Order No. 172,596, Sec. III(A)(2) which states that the standard sidewalk scoring pattern for downtown sidewalks shall be a three-foot square grid pattern. See https://sfpublicworks.org/sites/default/files/4078-Order%20No.%20172%2C596%20-%20Downtown%20Streetscape.pdf. (last accessed on April 4, 2022). *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.1977) ("matters of public record such as . . . city ordinances fall within the category of 'common knowledge' and are therefore proper subjects for judicial notice."); *Cota v. Maxwell-Jolly*, 688 F.Supp. 2d 980, 998 (N.D. Cal. 2010) ("Court may properly take judicial notice of the documents appearing on a governmental website."). I have also reviewed the sidewalk scoring patterns in photographs and videos to confirm various other distance estimates in this matter.

camera, to presumably throw the water bottle away. As he walks back into the camera view, the picketer and the boy can be seen speaking/disagreeing with each other. The boy starts walking down the street, holding his skateboard in one hand, while is friend starts skateboarding behind him. As he gets about 6 to 10 feet away from the picketer, the boy picks up a picket sign that was leaning up against the building. He walks down the street some more and then starts smashing the picket sign on the sidewalk. Meanwhile, the picketer puts the whistle back into his mouth and starts blowing it again. The other two picketers stood and watched the entire incident, which lasted just over a minute. (R. 13)

3. Allegations that Union members blocked ingress and egress of customers and delivery trucks.

a. Blocking deliver trucks

The Union Square store has a driveway entrance on O'Farrell Street for delivery trucks. The entrance has a roll-up steel garage door that is closed unless a delivery is being made. Behind the garage door, just inside the entrance, is a yellow barrier gate arm and a guardhouse where a Macy's VSO is stationed. As a delivery truck pulls up, the guards rolls-up the garage door and then lifts the gate arm. After entering, trucks follow the driveway down one level to a loading dock in the basement of the store. The driveway leading into the loading dock intersects a public sidewalk. Macy's has a security surveillance camera pointed at the entrance. (Tr. 241-246, 353-354; R. 1, R. 9, R. 45, p.1; ALJ. 2)

Kevin Uhe testified that that picketers would picket at the loading dock entrance. According to Uhe, when delivery trucks stopped to wait for the garage door to open, picketers would walk down the street from the customer entrances and stand in front of the garage door picketing. Uhe said this caused deliveries to be delayed and that sometimes delivery drivers turned around and left. (Tr. 241, 247-248)

For example, Uhe testified that between September 7 and September 9, deliveries for the Cheesecake Factory, a restaurant that leases space from Macy's, did not occur because the delivery drivers turned around. Also, he said that there were instances where UPS drivers did not service the store on particular dates. Uhe said that certain food and freight deliveries had to be rescheduled from afternoon to early mornings to avoid the picketers According to Uhe, this impacted operations as it created a backlog of items that needed to be shipped out, and at times the Cheesecake Factory ran low on some items or did not have a full takeout menu. In all, Uhe estimated that between 15-20 deliveries did not occur because of the picketing. (Tr. 247-250, 323-324, 470-471)

Uhe ultimately admitted that the UPS drivers are unionized and they refused to cross the picket line set up by Local 32, which interrupted deliveries. Eventually Macy's had to have these deliveries made by UPS managers. And, even though Respondent claims that deliveries were missed because picketers were "blocking the receiving dock" (Macy's Br., at 14), no security camera footage from the cameras at the dock entrance was introduced into evidence even

though Uhe admitted the cameras were working and that he reviewed footage from these cameras. (Tr. 246, 355-356) The lack of security camera video showing anybody actually blocking the driveway, along with Uhe's admission that unionized UPS drivers refused to cross the picket line established by Local 39, leads me to find that the various deliveries that did not occur were because the delivery drivers refused to cross the picket line, as opposed to them being physically blocked from entering the driveway by the picketers.

b. Blocking ingress and egress at the customer doors

Relying upon the testimonies of Gilbert Saavedra, Amanda Nalua'i, and Kevin Uhe, Respondent asserts that the picketers blocked customer ingress the egress during the picketing. (Macy's Br., at 12-13) During his testimony Saavedra was asked to describe instances of picketers obstructing a customer's ability to enter the store in early September. According to Saavedra, he witnessed picketers on O'Farrell Street standing right in front of the doors in the first few weeks of the strike. Saavedra said that if he was not present to open the doors, customers would have to try and push past the picketers. Saavedra testified that things calmed down in October; by then the company had placed stanchions at the doors which provided some distance between the picketers and the doors. (Tr. 124-125)

Nalua'i testified that, on September 3, at the Geary Street entrance, before the store opened the picketers were walking a circle holding picket signs. However, once the store opened, she said that one specific picketer, who she did not know, continuously

rushed the door to block customers from entering and exiting the building. She also said that several other picketers stood stationary, blocking the Geary Street entrance, sometimes standing less than a foot away from the doors. At the other entrances on September 3, Nalua'i said that she observed picketers standing stationary, about 5 feet away from the entrances. However, when the doors would swing open for a customer to enter or exit, these picketers would get much closer to the doorway. Nalua'i further testified that that throughout the strike she observed picketers standing directly in front of the doors and blocking the doorway when customers were trying to enter and exit the building. Nalua'i identified several specific individuals who she said blocked the entrances to the store on September 3 and November 7. (Tr. 403-407, 411, 417-418, 462)

Uhe testified about a video Respondent introduced into evidence, saying it accurately reflected how the picketers were marching in front of the Geary Street entrance. The Geary Street entrance is concave, and consists of four sets of large glass double doors, with a large glass window on each end of the entrance. On the ground, in front of the entrance area, is a large decorative oval. The middle of the oval delineates where the public right of way starts/ends. From the middle of the oval to the doors is Macy's property, and from the center of the oval to the street is part of the public sidewalk. A review of the evidence shows that the oval is about 36-40 feet long, and from the center of the Geary Street entrance to the middle of the oval is between 8 to 10 feet. (Tr. 184, 537-539, 542-543, 546; R. 44, R. 45, p. 6).

Regarding the video of the picketers, Uhe testified that it shows them "walking the loop, blocking all the customer doors." (Tr. 184) However, while the video does show picketers patrolling in an oval loop in front of the Geary Street entrance, it does not show anyone actually standing stationary blocking doors. (R. 17) It shows picketers patrolling in a tight formation, moving in an oval loop. It appears the picketers followed the outline of decorative oval in front of the entrance area while marching. (R. 17, R. 45, p. 5)

Uhe further testified that, in front of the O'Farrell Street entrances, the picketers stood in a cluster of five to seven people, in the middle of the doors, so customers could not easily enter the store without coming into "close, intimate contact" with the picketers. And on the Stockton Street entrance, he said the picketers would lean against the awning posts, from edge to edge, blocking the entrance. (Tr. 222)

At some point after September, Macy's placed stanchions with retractable belts at each entrance to allow enough room for customers to come and go outside of each door. How successful the stanchions were at controlling the entrances was subject to different testimony. Saavedra said the stanchions provided distance between the picketers and the doors and that after the stanchions were placed at the doors, things calmed down. Uhe and Nalua'i, on the other hand, testified the stanchions did not help, saying the picketers would move them or retract the belts between each station. (Tr. 124, 187-189, 223-224, 429-430)

Eventually, in mid-November, Macy's hired a private security guard service. The security guards were positioned outside the Geary Street entrance and were instructed to remind picketers of Covid-19 protocols, and to maintain room for customers to enter and exit the store. In a pre-hearing affidavit, Nalua'i said that after the security guards were hired, to her knowledge there were no more issues with stanchions being moved. (Tr. 224, 429; GC. 35 #01218)

No video from the Union Square store's security cameras was entered into evidence to corroborate the testimony about picketers blocking customers, despite the fact that there are security cameras covering all the entrances. The only videos in evidence, which were introduced by Respondent, show customers entering or exiting the store without any problems, notwithstanding the presence of picketers on the sidewalk. (R. 10, 13, 18)

Given the fact that picketing occurred every day for three months, there is no doubt there were individualized instances of picketers standing in front of doors, or momentarily standing in front of customers who were entering or exiting the store. However, the lack of security video footage leads me to find that these instances were one-off occurrences that happened primarily during the first few weeks of picketing. I credit Saavedra's testimony that things calmed down by October, after the stanchions were placed at the doors. Also, given the size of the doors, and the number of different store entrances, while a customer may have been momentarily inconvenienced, at times, by having to walk around a picketer, the record evidence does not support a

finding that customers were unable to enter or exit the store because of the picketers.

c. Blocking curbside pickup

Kevin Uhe testified that picketers disrupted Respondent's customer curbside pickup by parking their vehicles in the curbside pickup area, which was located outside the middle O'Farrell Street customer entrance. During the Covid-19 pandemic, Uhe said that curbside pickup became a much bigger part of the company's service. (Tr. 250-251; R. 1; R. 45 p. 3)

According to Uhe, every day during the picketing, picketers parked their cars in the spots designated for curbside pickup. Uhe claimed that this resulted in several orders being cancelled because Respondent could not deliver the orders to customers. (Tr. 251)

Uhe said that he initially asked picketers to park elsewhere, but they did not listen. He then called the City of San Francisco parking services and asked them to enforce the parking regulations. According to Uhe, he called the City of San Francisco parking services every single day, but said that sometimes it would take them up to 90 minutes to respond. Uhe also said that, when they did show up, picketers would move their cars after being threatened with a ticket, and after 45 minutes would once again park in the curbside pickup location. (Tr. 251-252)

Although Uhe testified that parking officers threatened to ticket vehicles, there is no evidence in the record of anyone being ticketed. The curbside parking area was located on O'Farrell Street, and was not on Respondent's property. It is unclear from the record whether the City of San Francisco had designated this area as a general loading zone, a

commercial loading zone, or if the public could park in this area at certain times, notwithstanding Macy's having designated this location for curbside pickup.

4. Allegations that Union members ignored Covid-19 safety guidelines

Respondent asserts that picketers ignored the mask-wearing and social distancing guidelines established by both Macy's and governmental authorities. (Macy's Br., at 16) Kevin Uhe testified that when the picketers were patrolling or picketing they were not keeping a six foot distance from each other, they did not wear masks consistently, and sometimes customers were forced to walk past the picketers at a very close distance. He also testified that the picketers did not observe Covid-19 protocols when they interacted with him. Amanda Nalua'i also testified that there were times when picketers were either not wearing their face masks, or not wearing them properly, while picketing. Despite Uhe's claim that Covid-19 protocol violations occurred hundreds of times there is no evidence that Respondent reported these violations to the San Francisco Department of Public Health, which was responsible for enforcing these regulations and had a unit that conducted inspection and enforcement activity. (Tr. 194-195, 297-299, 413-414; GC. 21, p. 25)

5. Allegation that union members intentionally did not return fleet vehicles as directed

Relying upon the testimony of Alan Westenberger, Respondent claims that Local 39 engineers purposely ignored written directives to leave their fleet vehicles at specified areas when the

strike started. (Macy's Br., at 11) Westenberger is Macy's Senior Director of Store Environment, overseeing maintenance, equipment, and construction for approximately 200 stores. Local 39 engineers work in about 40 of these stores. (Tr. 535, 588-589)

Westenberger testified that Macy's owns a fleet of vehicles that Local 39 engineers use during work hours to go between stores when needed. About ten engineers had access to these cars as part of their normal duties. Westenberger further testified about a memorandum he instructed a subordinate to send to the Local 39 engineers. (Tr. 561-565; R. 14) The memorandum is undated and is titled "L-39 Asset Collection." It reads as follows:

> Good Morning
>
> Thanks you for getting on this call this morning.
>
> We know that this is a very challenging time, labor negotiations are going on right now and we are hopeful that an agreement is made and a new contract goes into place.
>
> With the potential work disruption or strike we need to make sure we put procedures in place to insure it is business as usual.
>
> In the event that a work disruption event occurs, we would like to take the following actions an announcement is made.to all our supporting colleagues
>
> Colleagues to turn in all your keys, phones, and laptops to: store manager we want this to be as organized as possible so we can

> centralize and bring these items in so we can distribute them back when work resumes.
>
> Please have all fleet vehicles placed at the following location, Downtown Sacramento, Concord, Pleasanton, Modesto; Keys should also be giving to Store Manager
>
> Thank you for your partnership. Again we hope that there is no labor disruption or strike.

According to Westenberger, the company has a messaging application that allows Macy's to send out messages to certain specific groups of employees. Westenberger said that he believed this messages was placed on the messaging application to be sent to the Local 39 engineers. However, Westenberger did not draft the memorandum nor did he personally send it to employees. Instead, he testified that he saw the document when it was in a "draft stage" and was "informed that it was distributed and received by the colleagues . . . by my team." (Tr. 554) Westenberger said that the company has a communications team that actually does the distribution. However, he never explained who specifically is on this team, who told him the message had been distributed, or which employees it was sent to. There is no direct or credited evidence in the record that this message was actually sent to, or received by, the Local 39 engineers. And, it appears the message introduced into evidence was still in a draft form based upon the grammatical and punctuation errors in the document. (Tr. 554-557)

According to Westenberger, some Local 39 engineers returned their car keys, but three of them did not. Westenberger testified that six engineers left

their cars at the proper locations, but four engineers did not do so. This resulted in the company having to send out a vendor to pick up the four cars and drive them to a central storage location. According to Westenberger, the total cost to do so was $2,000. He also said that one vehicle was impounded and the tow company charged about $600 to release the car. Westenberger did not investigate this incident himself, but learned about what occurred from Hal Goldberg and Deborah Parker, who were members of his executive team. (Tr. 557-558, 562-563, 595-596)

6. Allegations that union members clogged a floor drain at the Union Square store

Kevin Uhe testified that on September 6, water was overflowing from the fifth floor down to other floors because a floor drain in the fifth floor alterations room that was packed full of paper towels. Uhe said the alterations room is located in a stock room behind a locked door just off of the men's department sales floor. The drain is in the back of the alterations room near some boiler equipment and piping. (Tr. 256-259; R. 6)

Uhe concluded that the plugged drain was caused by a Local 39 engineer. He based his conclusion on the fact the clog happened in a restricted area, behind a locked door, and said nobody was working in the alterations department that day. Also, Uhe testified that the floor drain is located near equipment the engineers would routinely use and test. According to Uhe, if the engineers were not on strike, addressing this issue would be within the purview of their responsibilities. During cross-examination, Uhe acknowledged that he provided two prehearing

affidavits to the NLRB and that neither affidavit included anything about a flood in the fifth floor alterations room. (Tr. 259-261, 317-319, 357-358)

7. Allegation that Macy's reasonably believed union members intentionally shoved refuse down a drainpipe causing sewage to backup at the Everbowl restaurant

On O'Farrell Street, directly east of the loading dock driveway and about 10 to 15 feet away from the employee entrance, Macy's leases space to a small restaurant. At the time of the strike the restaurant was named Everbowl; previously the space housed a yogurt shop named Pinkberry. Because of the pandemic, the Everbowl restaurant was closed at the time of the picketing, and had been closed since April 2020. (Tr. 264, 323, 330-331, 374-375,772; ALJ. 2)

a. Sewer backup occurs at the Everbowl

Kevin Uhe testified that on September 23 he received a call that water was running out of the Everbowl restaurant. Uhe said he was getting ready to leave the store for the day when he received a call about the backup. He went directly to O'Farrell Street and saw raw sewage running across the sidewalk. Uhe opened the door to the Everbowl and additional liquid, sludge, and debris came running out; there was also a terrible smell. Uhe initiated an emergency work order for a plumber and a restoration company to respond in order to identify and address the issue. (Tr. 264, 266, 371; R. 19)

Between the Macy's employee entrance and the Everbowl restaurant are two square sewer vents. These vents, which are about a foot apart, are located 10 to 12 feet west of the Everbowl's front door and

about four feet away from the curb. The vents are supposed to have square metal grate covers, to cover the four inch vent pipes which lead to the sewer. (Tr. 267, 272, 285-286, 369; ALJ 2, R. 45, R. 19)

Uhe testified that a plumber arrived and used a 500-foot snake to clear the backup. According to Uhe, the plumber identified the issue causing the backup as being a T-shirt and water bottle in one of the vent pipes. A series of pictures were introduced into evidence, showing the sewage in the restaurant and on the sidewalk, the cleanup efforts, a plumbers snake, a plumbers snake having retrieved some type of yellow netting or cloth, one of the vent pipes, one of the vent pipes being snaked, a plastic bottle, a T-shirt, and a trash bag along with a small unidentifiable object.[13] (Tr. 265-270, 365; R. 19)

In his testimony, Uhe identified the pipe that was plugged as one of the two sewer vents outside the Everbowl, saying that "[d]own this pipe is where the T-shirt and the water bottle was found that caused the backup." (Tr. 267) Uhe was not present when the plumber actually pulled the items out of the pipe. Instead, Uhe testified that he greeted the plumber, but then went back into the store to work. After the plumber had finished, he said the plumber called him to come outside and he saw various items placed on the sidewalk next to the open vent pipe; the plumber told him "this was what was down the drain that caused the backup." (370-372) (Tr. 267-269)

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[13] Although Uhe testified about all the pictures, it does not appear that he actually took the photographs. (Tr. 369)

Uhe said that he was not sure where the plumber actually inserted the snake to clean the backup. Nonetheless, he testified that the items in question came out of the vent pipe on O'Farrell Street just outside of the Everbowl restaurant. (Tr. 367-369; R. 19)

Based upon Uhe's testimony, along with the pictures introduced into evidence, the plumber retrieved a plastic bottle, a T-shirt, a trash bag, a clump of yellow netting/webbing or cloth, and another small yet unidentifiable item from the sewer that evening. Uhe estimated that the cost of the damage was "several thousand dollars for . . . the food and utensils, [and] plates." (Tr. 270) That being said, he did not explain why or how these items were in the restaurant since it had been closed since April 2020. (Tr. 267-270, 323; R. 10 pp. 4, 10, 18, 21)

b. Uhe's pretrial declaration and affidavits

Regarding this incident, Uhe provided a declaration that was filed with the California State Superior Court on October 7. In that declaration he states:

> At around 8 p.m., the plumber was able to dislodge a knotted up T-shirt and a large plastic water bottle, which came out from a drain pipe opening on Geary Street, just five feet from where Defendant had been picketing every day. The plumber deduced that the items must have been deliberately put in the drain pipe on Geary Street because the only other plausible explanation would be to flush the items down the toilet from inside the restaurant. (Tr. 388-389)

This exact same declaration was included as an attachment to an affidavit that Uhe provided the NLRB. (Tr. 390-391) In another affidavit that Uhe gave to the NLRB, dated November 24, regarding this incident he stated that:

> Macy's had sewage backing up into the store. We called the plumber, who used a 500-foot snake through the drain and pulled out a T-shirt and water bottle that came out on the other end at a drainpipe on Geary, within feet of where the picketers picket. The plumber deduced that the only way the items could have caused the backup is if they were shoved down the drainpipe on Geary. (Tr. 395)

c. Video of picketers on September 22

Uhe said that on September 24 he reviewed the security video for the entire day of September 22, the day before the backup occurred, to try and identify who was responsible for what happened. A 6 minute and 40 second video clip from September 22 was introduced into evidence. The video is from the security camera located next to the freight delivery driveway on O'Farrell Street. It shows the delivery entrance, the employee entrance, the sidewalk in front of the Everbowl restaurant, part of the sidewalk as it proceeds towards Stockton Street, and part of O'Farrell Street. Uhe testified that the clip is from sometime between 6:30 p.m. and 7:00 p.m. (Tr. 246, 273-274, 280-281, 287, 374; R. 18; ALJ. 2)

The video starts just as the picketers are beginning to pack up for the day. Two picketers are standing near the curb just outside the employee entrance while a group of three picketers are standing

about 30-40 feet away towards Stockton Street. A pickup truck pulls up, parks at the curb across from the employee entrance, and another two picketers get out. On the sidewalk across from the employee entrance is a large inflatable character, which looks to be somewhere between 8 to 10 feet tall and is tied to a street sign for stability. Next to the inflatable is a garbage can on rollers, with picket sign handles sticking upwards from the top of the can.

The two sewer vents on the O'Farrell Street sidewalk are not visible; the garbage can is obstructing the view of one vent, while the inflatable character is obstructing the view of the other. The four picketers continue packing everything up, deflating the blowup character, loading it into a carrying case, and placing the picket signs along with other items into the truck bed. After the blowup character is deflated and put in its carrying case, one of the picketers puts the case into the garbage can. At this point both street vents become visible; the vent closest to the Everbowl is missing a grate cover. Two of the picketers put a few other items into the garbage can and appear to be talking with their colleagues who are outside the view of the camera. At one point, the picketer who was driving the truck comes back into the camera angle; he puts a backpack into the cab of the truck and starts talking with two of the other picketers on the sidewalk. While he is talking, the driver of the truck takes a step backwards and steps into the open/uncovered sewer vent. He stumbles, steps back away from the vent, looks down, and makes a motion with his hand towards the open vent.

One of the picketers then walks up towards Stockton Street and talks with the three other picketers who are just standing around. Soon after, all four start walking towards the pickup truck holding their picket signs. As they are walking down the sidewalk to join their colleagues, one of the picketers is using the handle of his picket sign as a type of cane, holding the top of the sign with one hand and striking the butt of the handle on the sidewalk with each step. As he approaches the open vent, he plunks the handle of his sign down the vent. The handle drop down the open vent until it is stopped by the base of the sign. He leaves it there for about two seconds, then lifts the sign up and joins the others who are loading their signs into the bed of the truck.

After they put their picket sings into the truck bed, the other picketers seem to notice, gather around, and look at, the open vent. One of them takes a cell phone out of his backpack, leans over, and uses the flashlight on his phone to look down the vent. He looks down the vent for about 10 seconds, as three of the other picketers gather around and intermittently look at the open vent over his shoulder. The driver of the truck, who had earlier stepped into the opening, also leans in to look at the vent for a few seconds. The picketer with the cell phone then stands up and puts his phone away. The picketers seem to talk for another 10 seconds, while the driver gets into the pickup. The picketers then turn their attention away from the open vent and mill around chatting with each other while the pickup truck drives away. The remaining picketers then go their separate ways. Three walk towards Stockton Street, with one of them pushing the garbage can. Two of the picketers walk towards Powell

Street and the video ends. The video does not show anybody putting anything into the sewer vents.

Uhe testified that he reviewed the security video for the entire day of September 22, going back to around 5:00 or 6:00 a.m., well before the picketers arrived. Uhe said that he did not see anybody put anything down the sewer vents on the video he reviewed. Uhe also said that, based on the video he examined, he did not know whether both sewer vents were covered by grates at 6:00 a.m. that morning. Uhe also testified that the video he reviewed showed a homeless person looking down the open sewer vent at about 10:00 p.m. Uhe admitted that the homeless are frequently around the Macy's store, including in front of the employee entrance on O'Farrell Street. (Tr. 285-286, 334-335, 374)

d. Other incidents involving the space occupied by the Everbowl

During his testimony, Uhe denied that, in the past, there had been any other sewer backups and/or plumbing overflow issues involving the Everbowl restaurant. However, the General Counsel introduced into evidence a printout from Respondent's work-order tracking system revealing multiple sewer backups and/or plumbing overflow issues in the restaurant space used by the Everbowl going back to at least August 2018; this continued even after the picketing had ended. The printout also shows instances when the grates were missing from the vent covers. Specifically, the printout shows that: on August 22, 2018, a work order was placed to "snake [the] drain outside Pinkberry." On July 16, 2020 a work order was placed stating that the main sewer line was backed up

and black water was inside the Everbowl restaurant. On July 17, 2020 a work order was placed saying that a clogged plumbing pipe was causing overflowing black water in the Everbowl. On November 12, 2020 a work order notes that a drain cover near the Everbowl restaurant was missing and needed to be replaced. On April 8, 2021, a work order marked "Urgent" said that there were 2 plate covers outside of the employee door that were missing and needed covers. On April 7, 2021 a work order was placed showing "sewage coming up from the floor drain" in the Everbowl. And on April 13, 2021 a work order notes that two drains in the Everbowl overflowed and sewage black water was coming up from the drains. The printout also shows various other sewer line backups, clogged drains, or flooding, occurring in other parts of the store, unrelated to the Everbowl restaurant, including sewer problems occurring on Geary Street.[14] Finally, the printout states that on August 25, 2020, Macy's had issues with the main sewer line on O'Farrell Street and needed to "jet the line." (Tr. 323-328; GC. 28)

e. Uhe blames the Local 39 engineers for the sewer backup

During his testimony, Uhe attributed the sewer backup at the Everbowl to the Local 39 picketers on O'Farrell Street, saying that he believed the picketers put something down the drain on September 22. According to Uhe, as part of their job duties, the Local 39 engineers deal with sewage backups, and have a "working knowledge of all pipes and all branches

[14] See work orders for: 8/20/18; 8/23/18; 7/26/19; 7/31/19; 8/1/19; 8/21/19; 10/11/19; 8/25/20; and 2/21/21.

inside the store." (Tr. 269) Uhe said that the picketers were picketing directly over the sewer vents, "with their feet actually touching them," and that the day before the backup, one of the picketers used "his stick to push -- put down the hole. They take pictures of it, and then the next day, it floods." (Tr. 288) After the Everbowl incident, Macy's contacted store management throughout Northern California asking them to notify Westenberger's team of any incidents, concerns, or maintenance issues. (Tr. 284-285, 287, 566-567)

8. Allegation that union members tampered with a sump-pump.

Alan Westenberger testified that on October 9, Macy's received a report from store managers about a significant amount of water in the basement of the store located in Walnut Creek, California; a vendor was dispatched. According to Westenberger, the vendor provided feedback saying that, in their opinion, the sump pump was tampered with and not working properly because a foreign object was placed in the float assembly.[15] Westenberger said that the vendor repaired the pump, but ten days later the same issue occurred. (Tr. 567-571)

The sump-pump in question is located in the subbasement of the Walnut Creek store. To access the subbasement, someone has to walk across the sales

[15] Regarding the hearsay nature of the testimony involving the alleged acts of sabotage, and what third parties reported to Westenberger and Uhe, Respondent's stated that the testimony was not being offered to show that the incidents actually occurred. Instead the testimony was offered to show what was being reported to Macy's officials. (Tr. 216-217, 568)

floor and through doors that lead to the "back-of-house" which is an area where the stock and storage rooms are located. A set of stairs in one of the storage rooms leads to the subbasement and the sump pump. Westenberger attributed the sump pump problems to the Local 39 engineers, even though they were on strike at the time. Westenberger said he blamed the engineers because the sump pump is difficult to access, the engineers knew where it was located, and knew how it operates because they maintained the pump as part of their general duties. (Tr. 571-572, 575-576; R. 22)

Westenberger was not involved with the investigation of the incident, he was only copied on the vendor's findings. The Walnut Creek store has security cameras and there was video footage for the days in questions. However, no video from the store was introduced into evidence. While Westenberger claimed that, to his knowledge, there was no video footage of this incident, nobody who actually reviewed the security video testified in this matter about what the video did or did not show. And, Westenberger said that he did not ask anyone if security cameras showed who might have been responsible for the incident. (Tr. 609-610)

9. Allegation that union members tampered with the irrigation system at the Sunrise store

Macy's operates a store at the Sunrise Mall, just outside Sacramento, California, referred to as the Sunrise store, which employs Local 39 engineers. In October, while the engineers were on strike, water damage occurred in the store's "top-of table" department; this department sells plates and

dinnerware. (Tr. 579-580, 582, 588, 590; GC. 2, p. 25; R. 23)

According to Westenberger, the exterior of the building has an irrigation system and the flood occurred because a valve for this system was left open. This caused water to accumulate and seep through the outside wall and onto the selling floor. Westenberger said the valve was supposed to be shut because the company had removed all the landscaping and vegetation from the area. (Tr. 579-580, 612, 584)

Westenberger did not personally investigate this incident. Moreover, when asked if he knew whether anybody conducted an investigation, he said "that would fall under asset protection," but he did not identify anybody in particular who actually investigated the matter. Nor did Westenberger explain how he determined the cause of the flood. Westenberger also did not know if anybody from the asset protection team looked at any of the security camera footage, or whether there were, in fact, security cameras in the area. (Tr. 612-613)

Regarding the valve, Westenberger said that a special tool was needed to open and close the valve, and that the Local 39 engineers had access to this special tool when they were working. That being said, Westenberger testified that he has never seen this special tool, did not know what it looked like, and he could not describe the tool. When asked where the valve for the outdoor irrigation system was located, Westenberger said that he could not recall if the valve was located inside or outside of the store (Tr. 580-581, 612-613)

A report from a remediation company was introduced into evidence. Westenberger said that he received a copy of the report, but he could not recall exactly when. Although Westenberger testified that the flood happened on October 20, the report is dated October 19, and says that the scope of work was for "Emergency Water Damage Services." The report states that it will take the restoration company three days to complete the job. On the first day the restoration company contained the water damage, applied antimicrobial decontamination agents, sanitized the floors and walls, detached the carpet base, and set up drying equipment consisting of air movers and dehumidifiers. The next day the report says that the company will inspect for moisture, and on the last day conduct a final decontamination. Six photographs are attached to the report showing water damage to carpeting near the walls and at the base of the walls, containment work performed by the company, a moisture reading showing wet drywall at the base of a wall, and the air movers and dehumidifiers set up by the company. A separate photograph, which does not appear to be part of the actual report, shows water damage to carpet between a wall and some dishware on display. (Tr. 579, 585-586, 612; R. 23)

Westenberger testified that he attributed this damage to the Local 39 engineers because of "motive" and "familiarity . . . with the system and equipment." (Tr. 584) Even though he did not conduct an investigation, and could not identify a specific person who did, Westenberger said that the irrigation system was inactive as the landscaping and vegetation had been removed, there was no reason for the system to

be turned on and left to run, and that the water was turned on with the intent that there would be subsequent damage to the building. (Tr. 584, 612)

10. Allegation that union members cut bathroom sink wires at the Union Square store

Kevin Uhe testified that on November 7, he was called because the sinks in the sixth floor men's bathroom, located in the children's department, were not working. Uhe said he put his hands under the motion activated faucets and they did not work. He closed he bathrooms for the weekend and a vendor came to the store to address the issue. (Tr. 288-289)

Uhe described the bathroom configuration, saying that below the sinks are large wooden access panels with pressure plates used to access the plumping, pipes, and wiring for the sinks. Uhe said the vendors determined that the wires behind the access panel for the motion activated faucets had been cut. (Tr. 289)

Uhe attributed what occurred to the Local 39 engineers saying that they had a "working knowledge of how to access the wires underneath," and how to remove the access panels without being detected. (Tr. 290) Uhe said that it took him "about 15 minutes to try and get" the access panel "back together, because it's very sensitive in how you put it back on." (Tr. 289)

Even though there are security cameras throughout the store, including at the entrance doors, there was no footage entered into evidence showing any of the Local 39 engineers entering into the store, using the escalator, walking into the children's department, or using the bathroom. Uhe admitted

that any such videos, if they existed, would have been available to him. (Tr. 291)

11. Allegation that union members changed locks to the engineer's office

Alan Westenberger testified that when the Local 39 engineers returned to work on December 7, they went back to work at the Southland store for one hour, before being told that they had to leave because there was no agreement in place for them to return to work. The Southland store is located at a mall in Hayward, California. (Tr. 590, 597; GC. 2, p. 25)

According to Westenberger, in that one hour, the locks to the engineers' office were replaced, and the company could not access the office; Macy's had to replace the locks. Again, Westenberger did not actually investigate this incident, but said he was relying upon what was reported to him by his executive team: Hal Goldberg and Deborah Parker. Westenberger did not know if there were security cameras in the engineering department, and did not recall asking anybody to see if security cameras captured what occurred. (Tr. 590, 596-597, 614)

Regarding this incident, in a January 25, 2021 position statement submitted during the underlying investigation, Respondent stated that five union engineers came to the Southland store on December 7, and were greeted by the store manager who then called Deborah Parker to confirm that the engineers were permitted to report back to work. During this time, the engineers clocked in and were in the store for 40 minutes until the store manager instructed them to leave. In the position statement, Respondent further states that "[t]hree days later, Parker arrived at the

Southland Store to access the facilities office," but that she could not do so because the door handle unit had been replaced. Parker "also noticed that the door handle unit to a second door to access a supply room had also been replaced." (GC. 35 #01192-01193)

According to Westenberger, this was not the first time there was an issue involving locks. Westenberger testified that, in the days leading up to the strike, the lock cores were removed and the pins changed for the lock on the door to the engineers' office at the Valley Fair store in near Santa Clara, California. Westenberger said that, at least two days before the strike, store management accessed the office without any problems, but the following week they were unable to open the door with a master key. Westenberger said that Macy's had to call a vendor who replaced the lockset. Westenberger did not personally investigate this incident, did not know who conducted the investigation, and did not recall asking anyone to check to the store's security cameras. He attributed this incident to the three Local 39 engineers who used the office. (Tr. 559-561, 608- 610)

12. Allegation that union members intentionally damaged property

Respondent asserts that during the picketing, union members intentionally damaged a large concrete planter on the sidewalk outside the Union Square store, and sabotaged the sliding glass doors at the Geary Street entrance. (Macy's Br., at 10)

a. The concrete planter

On the sidewalk around the Macy's Union Square store are a number of square concrete planters belonging to the company; the planters are 3 feet high.

Westenberger testified that Macy reconfigured the placement of these planters in 2018, and during this process it purchased some new planters which cost approximately $5,000 each. (Tr. 264, 551; R. 3, R. 44)

One of these planters, which is painted gray, is located on the curb, just a few feet to the east of the Geary Street entrance. (R. 44; R. 45 p.6; R. 7) Macy's claims that the picketers intentionally damaged this planter, "causing permanent damage to it at an estimated cost of $5,000." (Macy's Br., at 10)

Respondent introduced into evidence a picture taken by Uhe displaying the top and two sides of the planter, which shows some cosmetic damage. Uhe said that he took the picture on November 13. (Tr. 263) Specifically, the picture shows that some of the paint and concrete, appearing to be less than an eighth of an inch, has flaked or chipped off the planter. The damage is most prevalent on one side. Based upon the planter's placement in relationship to the curb and street, it appears that the west side of the planter, which is directly perpendicular to the street/curb, has the most damage. The corresponding side of the planter shown in the picture is the north side, which abuts the street/curb. (Tr. 263; R. 7, R. 44)

From the picture, it appears that something was swinging against the planter in a wide ark, leaving scrape marks and causing damage to the middle/left portion of the west side of the container. On this same side, it also appears that something was striking against the planter, causing damage to the top left side. There are corresponding scrape marks on the adjoining (north) side, again showing that something was swinging at a wide angle against the planter.

Also, the picture shows that some of the paint and concrete has flaked off the top and the corners of both sides of the planter; again it appears to be less than an eighth of an inch of concrete and paint has chipped off.

Uhe testified that this damaged was caused by the picketers, saying that they "hung their metal gong that they would strike with a hammer at the beginning of the-of the picketing. They would hang it there and as they hit it, it rubbed up against and banged up against the concrete, damaging it." (Tr. 263) Uhe said that the swing marks delineate "where the gong would actually swing as they hit it." (Tr. 263) According to Uhe, he asked the picketers to "not hit the gong and don't do it against the property," but he was ignored. (Tr. 263)

A video showing this planter, and the picketers' gong, was also introduced into evidence. Uhe testified that he shot the video on November 3. The video shows a picketer striking a gong, consisting of a thick square piece of metal. However, the gong is not hanging against the planter. Instead, the gong has its own separate stand. The video shows the gong, and the stand, placed in the street about 10 to 15 feet away from the planter. The video also shows that the west side of the planter is undamaged. Based on the video, the damage could not have been a result of the gong being hung against the planter since the beginning of the picketing on September 4, as there is no damage to the planter in the video. Instead, if Uhe's testimony as to the dates of the video and the picture are correct, the damage to the planter must have occurred sometime between November 3 and November 13. There were no videos or photographs showing a

swinging gong attached to the planter. The only picture or video of a swinging gong in evidence is the one which shows the gong attached to its own separate stand; it is unclear how the gong in the video could have caused this damage. (Tr. 201, 203-204, 262-263; R. 4)

Finally, regarding Respondent assertion that the planter suffered permanent damage at an estimated cost of $5,000, this dollar amount is what Westenberger testified the price was for a new planter was in 2018. There is no evidence in the record showing that the planter in question needed to be replaced, as opposed to being repaired and repainted.

b. Sliding glass doors

Relying upon the testimony of Kevin Uhe and David Plew, Respondent claims that picketers "sabotaged the sliding glass doors at the Geary Street entrance" by throwing small rocks into the doorway to jam the doors, requiring three of the doors to be replaced. (Macy's Br., at 10) Plew testified that in October he complained about picketers "throwing rocks in the doors to jam the doors." (Tr. 486) However, Plew admitted that he never actually saw any of the picketers throw rocks at the doors. Instead, Plew said that he saw rocks near the doors which would wedge underneath the doors and keep them open. (Tr. 486-488).

Uhe testified that he received reports the picketers "were throwing rocks to hold the doors open so that they could . . . point their noisemakers into the store." (Tr. 292) Uhe said that three doors had to be rehung in mid-November because they were out of alignment and would not close properly. (Tr. 292-293)

Uhe described the rocks in question as being small, like pebbles, saying they would get between the door and the closing plate preventing the door from coming together and causing the door to hinge open. Uhe testified that he viewed the doors, and they would not close properly because they dragged on the ground. According to Uhe, three doors in total had to be rehung, two doors on O'Farrell Street, and one "set" on Geary Street. (Tr. 293-294)

Uhe also testified that he did not actually see any of the picketers throwing rocks at the doors and was relying solely upon what was reported to him. In fact, no witness testified that they actually saw any of the picketers throwing rocks at, or into, a doorway. Nor is there any security camera footage of this occurring. (Tr. 293-294)

During cross-examination, Uhe confirmed that as early as November 3, Macy's hung pieces of plywood on the doors, to protect the glass in anticipation of potential unrest arising from the presidential election. During this time period Macy's covered all of the doors and windows around the store with plywood. When asked whether placing heavy plywood on a door could pull the door off its tracks, Uhe answered that he did not know. (Tr. 377-378)

The workorder printout for the Union Square store shows that that even before the strike began, and at times unrelated to the strike, the Geary, Stockton, and O'Farrell Street doors had to be repaired on multiple occasions, including on the following dates: 8/1/2018, 8/7/2018, 8/30/2018, 9/8/2018, 10/5/2018, 10/16/2018, 11/11/2018, 11/14/2018, 11/29/2018, 1/14/2019, 1/28/2019, 2/1/2019, 2/16/2019, 2/22/2019,

2/28/2019, 3/1/2019, 3/7/2019, 4/23/2019, 4/25/2019, 5/27/2019, 6/25/2019, 7/3/2019, 7/4/2019, 7/14/2019, 8/15/2019, 9/17/2019, 10/21/2019, 10/22/2019, 12/2/2019, 12/4/2019, 12/6/2019, 12/26/2019, 12/29/2019, 1/1/2020, 1/9/2020, 2/26/2020, 10/22/2020, 1/19/2021, 1/20/2021, 2/22/2021. The workorder printout further shows that repairs were made because one or more of the doors were: out of alignment, not opening, off level, dragging and could not close properly, dragging and could not lock properly, dragging on the marble entrance, or dragging on the ground. (GC. 28)

F. Macy's tries to get a State court restraining order/injunction against the picketing

On October 7 Macy's filed an ex parte application for a temporary restraining order (TRO) in California State Superior Court regarding the picketing at the Union Square store. The Superior Court judge denied the application the next day, finding the company had not made every reasonable effort to settle the dispute through negotiations as required by California statute. (GC. 21, R. 47)

On October 26 Macy's and the Union held a mediation session, which was unsuccessful. Macy's renewed its application for a TRO on November 19, this time narrowing the relief it was seeking. The next day Macy's also filed a motion for a preliminary injunction, along with a motion for leave to file a first amended complaint alleging, among other things, causes of action against the Union for nuisance, trespass, false imprisonment, assault, battery, and intentional interference with prospective economic

relations. The motion for a preliminary injunction was set for hearing on December 18. (GC. 21)

On November 25, a hearing was held on Macy's application for a TRO. The Superior Court denied the request, without prejudice to Macy's seeking the same relief during the December 18 preliminary injunction hearing. Regarding the merits of the case, although the judge said he was not making any specific findings, he further stated that he was not convinced that substantial and irreparable injury would follow absent an immediate restraining order and therefore was not persuaded, on the pleadings presented, that Macy's had established a need for a temporary restraining order. The judge further noted that, based upon the filings, there was very little, if any, showing of irreparable harm, as over 80 days had passed since the strike started. Because of extant California law, and the prolonged nature of the dispute, the judge believed it was best to take a cautious approach and hold a full evidentiary hearing on December 18 before making a final ruling. A status conference was scheduled on December 4, at 1:30 p.m. (GC. 21)

G. Bargaining During the Strike

During the strike, Rose Ashmore said that she had a number of discussions with Vega about the status of bargaining. These happened via telephone every few weeks and generally evolved around the Final Offer and whether there was any desire to continue negotiations. Sometime in September 2020, during one of these conversations, Ashmore told Vega that the Final Offer would not be available forever and that at some point it would expire. In reply, Vega told

Ashmore that the membership never votes on the same deal twice. (Tr. 659-661)

On October 8, Ashford had another telephone conversation with Vega. During this call, she told him that that the Final Offer would expire in one week. Vega asked Ashmore to send this message to him in writing. On October 12, Ashmore sent Vega an email with a subject line that read "Macy's Last Best and Final Offer." The body of the email contained a letter dated October 8, which was also included as an attachment. The letter confirms the terms of the August 31 Final Offer, and says that the company's position has remained unchanged. The letter then complains about the "behaviors" that have occurred over the previous few weeks, saying it had negatively impacted the business and customer experience and has "has become costly to our business and disruptive to our colleagues."[16] The letter states that Macy's will hold "the offer currently on the table for one week, until Thursday, October 15, 2020, at which time the offer will expire." Ashmore ends the letter by saying that Macy's remains "focused on ensuring our people and our organization continue on the path to recovery and encourage our colleagues to strongly consider this current offer before it is rescinded." (GC. 4) (Tr. 47-48, 662-665)

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[16] Ashmore testified that she remembered also sending the email with the letter to Vega on October 8. (Tr. 664-665, 719) However, Respondent was not unable to find this email, which was covered by the trial subpoena issued by the General Counsel. (720-722) I do not credit Ashmore's testimony that she also sent Vega an email with the letter on October 8, but instead find that she emailed it to Vega for the first time on October 12.

After their October 8 phone call, Ashmore did not hear back from the Union until Vega called Ashmore on November 9 to ask if Macy's was going to put together another offer to present to the Union. Ashmore said no. She then asked Vega if he wanted to return to the bargaining table and resume bargaining. Vega told Ashmore that he would have to get back with her. (Tr. 665-667)

On November 25, the day before Thanksgiving, Vega sent Ashmore an email containing a contract proposal on wages and pensions. The Union proposed to accept the dollar amount of the total wage and pension increases contained in the Final Offer, with the caveat that the Union would determine how to allocate the respective increases. For example, in the Final Offer Respondent proposed a $1.22 per hour wage increase and a $0.30 per hour pension increase starting on September 1, 2021. This amounted to a total economic package of $1.52 per hour. Under Local 39's proposal, the Union would determine how much of the $1.52 increase would be allocated to wages and how much would go to pensions. The Union proposed that it would make this determination for each of the three years in the contract and then report the specific dollar amounts to Respondent within one week after the contract's ratification. In his email to Ashmore, Vega said that if the Union's new proposal was acceptable, the Union would recommend to its members that they ratify the agreement. (Tr. 54-57, 668; GC. 6)

Ashmore, who lives and works in New York City, did not receive the email until late in the afternoon. She responded to Vega via text message the same day

acknowledging receipt of the email. In her text, Ashmore told Vega that Respondent's offices were closed, that she would not be able to connect with her team to discuss the Union's offer until after the Thanksgiving holiday, and she would touch base with Vega accordingly. She then wished Vega a nice Thanksgiving. (Tr. 632, 669-671; R. 39)

On December 4, Ashmore sent Vega an email responding to the Union's November 25 contract offer. The email, whose subject line says, "Company Response to the Union Counter Proposal," reads as follows:

> On August 31, we provided you with our last and best offer. The Union rejected that offer and we were at an impasse. After several discussions, we were surprised that the Union waited approximately 3 months to make a new offer (which we note we received during a hearing regarding the Union's unlawful conduct during picketing, which includes assault, abuse, blocking of ingress and egress, the use of homophobic and racial slurs, and property damage).
>
> This offer is no better than the last one in economic terms and does not advance negotiations. It does nothing to make any effort to settle the underlying dispute and therefore it is rejected. It is unfortunate that after we have made every reasonable effort to settle both the underlying labor dispute and the dispute regarding the Union's picketing tactics; we are in no different position than the impasse after August. Hence, we will not

> bargain against ourselves, which is what the Union is asking us to do with the last offer therefore we consider the labor dispute to be at an impasse.

Ashmore testified that the Union's proposal came as a surprise, as the parties had not held a bargaining session since August 31. According to Ashmore, Respondent rejected the Union's proposal because it gave the Union discretion to determine the specific wage and pension rates. Ashmore said that Macy's did not function or budget this way, and giving the Union this discretion would potentially skew the hourly wage rates or pension contributions thereby precluding the company from efficiently planning its budget. (Tr. 58-60, 672-673; GC. 7)

Vega replied to Ashmore's December 4 email that same day. In his email Vega expressed surprise and disappointment at the company's response. He also referenced the State court proceedings that were initiated by Macy's in an attempt to enjoin the Union's picketing. Vega said that the Union believed its last proposal was sensible because it did not cost Macy's more money than the actual dollar amounts that were proposed in the Final Offer. Vega expressed his belief that Macy's wanted to continue the dispute but said that the Local 39 engineers did not. Therefore, Vega ended his email by stating that the Union was making "an unconditional offer to return our members to work immediately," and was awaiting Ashmore's response. (GC. 8) (Tr. 60-61, 674)

Ashmore replied to Vega later that evening by email. Ashmore wrote that the company appreciated the unconditional offer by the engineers to return

work, but in order to fully evaluate the offer she needed to discuss it "with all necessary partners." She told Vega to "please do not have the members report to work yet," and said that she would "connect with" Vega by the end of the business day (Pacific Time) on Monday, December 7. (GC. 9) About 10 minutes later, Vega replied by email, asking "[d]oes this mean you are locking them out till Monday?" (GC. 10) Ashmore replied on December 5, saying that the company planned to respond to the Union's "offer to have your members return to work" by the close of business on Monday. She further stated that Vega's "unexpected offer," which came on "a Friday afternoon after a contentious strike of over three months, implicates several administrative, logistical, and economic issues that need to be fully evaluated on our end with the input of several company employees. For that reason, we have asked you for the courtesy of giving us until the close of business Monday to assess." (GC. 11) After sending the December 4 email, the Union and its members took down their picket lines and stopped picketing. (Tr. 63-66, 676-677)

Vega replied on Sunday, December 6 saying "[u]nfortunately, we cannot accommodate your request. Unless you are locking them out, they will [be] showing up to work Monday morning." (GC. 12) Ashmore replied to Vega by email as follows:

> Again, as I indicated in my prior email, we plan to respond by close of business Monday to your offer to have your members return to work. As I'm sure you can appreciate, your unexpected offer, coming on a Friday afternoon after a contentious strike of over

> three months, implicates several administrative, logistical, and economic issues that need to be fully evaluated on our end with the input of several company employees.
>
> For that reason, the team should not return to work on Monday.
>
> This is not a lockout but we won't be ready for them. They have been out for 90+ days, and to think you can just flip a switch and have them back is not possible. If they show up they will be turned away so please show your members the courtesy of communicating with them.

Ashmore's email to Vega was sent at 12:32 p.m. (Pacific Time) (Tr. 66-69, 680-681; GC. 13)

H. Macy's Locks Out Returning Employees

On December 7 the Local 39 engineers started returning to work. Ashmore testified that there is evidence of engineers "coming through the door" and clocking-in. However, no time cards or documentary evidence was introduced into evidence showing which engineers reported to work. While it is unclear from the record exactly how many engineers worked on December 7, it is undisputed that at least some of them reported to work on both December 7 and December 8. (Tr. 681-682; GC. 16)

Ashmore testified that all of the engineers who came to work on December 7 reported to the same location, the Southland store, even though not all of them were assigned to this location. Specifically, Ashmore testified that some of the engineers who

reported to the Southland store on December 7 included: Ryan Tello, Tim Foster, and Jim Lybrand. (Tr. 682-684, 741)

Ashmore's testimony was contradicted by Jim Lybrand, who was the Chief Engineer at the Union Square store and had worked at this location for 21 years. Lybrand testified that he returned to work on December 7 at the Union Square store in San Francisco, along with his entire crew. (Tr. 770-772)

On Monday December 7, in the late afternoon/early evening, Ashmore sent Vega an email regarding the Union's unconditional offer to return to work. The email reads as follows:

> We have carefully evaluated your offer to have bargaining unit members return to work. We are not willing to reinstate bargaining unit employees until there is an agreement in place; this decision is being made in support of our bargaining position.
>
> We are available for bargaining sessions on Thursday 12/10, Friday, 12/11, Thursday 12/17, and Friday 12/18, from 9:00AM-11:00AM PST. (GC. 14)

On December 8, Vega replied to Ashmore saying that the Union was available for bargaining on all the dates proposed by the company except for December 18. Ashmore replied to Vega later that day confirming the parties would meet for bargaining on Thursday, December 10. In her email, Ashmore further states as follows:

> On a separate note, many of the Union employees reported to work on Monday even

> when I asked you to not have them report to work. Additionally, today they reported to work again and were turned away because as we explained yesterday, Macy's has carefully evaluated your offer to have bargaining unit members return to work. We are not willing to reinstate bargaining unit employees until there is an agreement in place; this decision is being made in support of our bargaining position. The Company understands the Local 39 members are available and we will consider them available. We want to be clear that they are not permitted to clock in and report to work and will be denied access to non-public areas until an Agreement is reached. (underline in the original)

Ashmore ended her email by asking that Vega communicate her message to Local 39 members. (GC. 16)

I. Testimony from Macy's Officials About the Reason for the Lockout

Alan Westenberger testified that he was part of the decision to lockout the Local 39 engineers, saying there was a meeting on this issue that included himself, Ashmore, Chanell Bracey- Davis, Bill Erbacher and one of Respondent's outside attorneys. Bracey-Davis is Ashmore's supervisor and Westenberger reports to Erbacher. (Tr. 615, 729-730)

According to Westenberger, he participated in only one discussion regarding this issue. Specifically, Westenberger testified as follows:

> [T]he lock out topic was that first week in December when we had Local 39 reporting

> back to our store and subsequent to the -- you know, them being back for one hour and they had already changed locks on us. So it was subsequent to that. I don't recall any other meetings on the -- the lock out topic prior to that.

Westenberger said the meeting occurred to make a "quick decision" on what the right course of action was for the company at that moment. (Tr. 615) When asked why Macy's refused to reinstate the Local 39 engineers, Westenberger testified that there were two reasons. First, Westenberger said it was done in the hope that Macy's "could get the Union back to . . . the bargaining table and . . . ultimately get a fair and reasonable contract for both parties." (Tr. 591) The second reason was because:

> we had significant concerns about the -- the misconduct and -- and the sabotage that occurred in that three-month period while they were striking. There was a concern that if -- if they were -- if they came back into the buildings without a contract, that at a moment's notice, they could either walk out and -- and leave us in a very vulnerable spot in terms of operating our business or they could have access to building operating systems and equipment that could cause additional disruption to our business and associated cost. (Tr. 591)

Westenberger noted that it was the holiday season, which is the company's most important time of year, and it could be detrimental to business if they had to

shut down a store, or have a business disruption, during this time. (Tr. 591-592)

Rose Ashmore testified that she was involved in the final decision to lock out Local 39 engineers, and that she consulted with Macy's attorney, Westenberger, Bracey-Davis, Erbacher, and John Bienes.[17] Ashmore said that there was no one single decisionmaker and that the decision to lockout the employees was a group decision. (Tr. 729-730)

Ashmore testified that there were several reasons why the company refused to reinstate the Local 39 engineers, and locked them out instead. First, Ashmore said it was for economic leverage, to get the Union back to the bargaining table. Next, Ashmore testified that it was because of the information she received about the misconduct that was occurring on the picket line. Finally, Ashmore said "the other piece was, you know, disruption during fourth quarter during December is not something that we wanted to endure. We just came out of the shutdown, so having them back without a contract could allow them to walk out at any time." (Tr. 699-700)

According to Ashmore, she reviewed written statements from Uhe and other employees about the strikers' conduct on the picket line, which primarily complained about noise, and relied upon these documents in connection with her decision regarding the lockout. Ashmore said she reviewed these statements "within the three months of the strike when they were sent to me." (Tr. 698) According to

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[17] The identity and job title of John Bienes is not discussed in the record.

Ashmore, the employee statements were sent to her by Respondent's attorneys, after Ashmore had asked for them. (Tr. 697-699; R. 27)

J. Bargaining After the Lockout

On December 10, the parties met for bargaining by videoconference. Among those present were Jay Vega for the Union and Rose Ashmore for Respondent. Just before the bargaining started, Ashmore emailed the Union a new bargaining proposal. Macy's proposed a three year contract with wage increases of 1.75% each year, starting on September 1, 2020. This was a decrease from the August 31 Final Offer which provided for a 2.75% yearly increase. As for pension and health care contributions, Macy's December 10 offer on these two subjects were identical to what was outlined in the Final Offer. (Tr. 74-77, 702; GC. 17, GC. 3)

Ashmore testified that she thought it was important to communicate this new offer during a bargaining session because Macy's wanted to explain to the Union why the wage increase proposal was lower than what was contained in the Final Offer and the changed circumstances in the company's business over the preceding few months. According to Ashmore, she discussed this with the Union during the bargaining. (Tr. 703-704)

After receiving Respondent's proposal, the Union presented Macy's with its own counter offer during the meeting. Regarding wages and benefits, the Union's proposal was substantially the same as the one it made on November 25. The Union agreed to accept the total dollar amount of the wage and pension increases in the August 31 Final Offer, with the understanding

that the Union would determine how much of the increase would be allocated to wages and pensions. However, in its December 10 proposal, the Union offered to cap the wage rates for each year to correspond with the rage rates proposed by Respondent in the August 31 Final Offer. No agreement was reached. (Tr. 78-79; GC. 18, GC. 3)

The parties met again on December 11. Macy's presented a new proposal to the Union, which was the same as the proposal it made the previous day, except that it included an additional 13-cent increase in wages for 2022, and an additional 3-cent raise in pension contributions for the same year. Even with the raises proposed for 2022, Macy's new proposal for wages and pensions was still less than what the company had originally proposed in the August 31 Final Offer. (Tr. 79-82, 705; GC. 19, GC. 3)

The Union presented an additional proposal to Macy's on December 11, offering to delete the Utility and Apprentice engineer classifications listed in the contract. The Union also proposed to delete the section of the contract which, in part, required Macy's to contribute $555 per engineer to a training fund which provided training to engineers who wished to improve their skills. The parties were unable to reach an agreement.[18] As of the time of the hearing the parties had still not reached an agreement on a new contract, and Respondent's lockout of the engineers continued. (Tr. 80-83, 705; GC. 20, GC. 2)

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[18] Ashmore testified that the parties also met on December 17, but there is no evidence in the record as to what was discussed during this meeting. (Tr. 705)

III. Analysis

A. Macy's Locked Out Employees Without Any Open Bargaining Proposals on the Table

While an employer can lockout employees for the sole purpose of bringing economic pressure to support its legitimate bargaining position, for a "lockout to be lawful, the union must be informed on a timely basis of the employer's demands so that the union can evaluate whether to accept them and prevent the lockout." *Alden Leeds, Inc.*, 357 NLRB 84, 93 (2011), enfd. 812 F.3d 159 (DC. Cir. 2018); see also *Dayton Newspapers*, 339 NLRB 650, 656 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005). An employer violates Section 8(a)(3) and (1) of the Act by locking out employees, while at the same time never clearly and fully informing them of the conditions that must be met in order to be reinstated. Id.

That is what happened here. As per Ashmore's October 8 letter, Respondent's Final Offer expired on October 15. (GC. 4) And there is no evidence that, at any time before the lockout, Respondent had presented the Union with any new contract offers or bargaining proposals. When Vega contacted Ashmore on November 9 to ask if Macy's had another contract offer to present to the Union, Ashmore told him "no, we do not." (Tr. 666) And, when Respondent received the Union's November 25 wage proposal, it was rejected without Macy's presenting the Union with any type of counter offer.

At the time Macy's locked out the Local 39 engineers on December 7, neither the Union nor the strikers knew Respondent's bargaining position. All they knew was that Macy's was refusing to allow the

engineers to return to work until there was a contract in place. However, because the Final Offer had expired, and Macy's had not presented any other bargaining proposals to the Union, at the time of the lockout, neither the Union nor the employees were "clearly and fully informed of the conditions they must meet to be reinstated," *Dayton Newspapers*, 339 NLRB at 656, nor did they have "a clear statement of the conditions that employees must accept to avert the lockout." *Alden Leeds, Inc.*, 357 NLRB at 95.

Respondent's failure to inform employees and the Union in a clear and timely manner of its demands was not cured when Macy's presented the Union with its new wage proposal on December 10. "[I]t is well established that a 'lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole.'" *Alden Leeds, Inc.*, 357 NLRB at 84 fn. 3 (quoting *Movers & Warehousemen's Assn. of Washington, D.C.*, 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977).

Here, the lockout was unlawful at its inception, on December 7, and the Macy's has not carried its burden "to show that its failure to restore the status quo ante had no adverse impact on the collective bargaining." Id. No such evidence was presented by Respondent at the hearing. And, the limited evidence in the record regarding subsequent barging shows that the opposite might be true; the failure to reinstate Local 39 engineers to work on December 7 may have weakened the Union's position at the bargaining table. Without unit member back at their jobs, when it made its first

counter-proposal on December 10, the Union offered to cap wage rates at the levels Respondent had originally proposed in its August 31 Final Offer. And the next day, the Union proposed to delete two engineer classifications from the contract, and further delete a section from the agreement that required Macy's to contribute over $500 per engineer to a training fund. Regardless, neither the Union nor the General Counsel has the burden to prove what impact the company's unlawful actions had on bargaining. The burden belongs to the Respondent and they failed to meet this burden.

B. Claims by Macy's that the Union Engaged in Misconduct and Sabotage

Macy's asserts that it was permitted to lock out all of the Local 39 engineers because it had good-faith concerns about union misconduct and sabotage. Respondent argues that employees could not return to work without a contract in place during the holiday season, because they would have "the same motive and even greater opportunity to engage in more acts of sabotage." (Macy's Br., at 39) However, none of the cases cited by Macy's stands for the proposition that an employer can lockout employees without informing them of the reason for the lockout or what specific contract terms employees need to adopt in order to be reinstated. Moreover, the fact that Macy's never told the Union, or the engineers themselves, that employees were being locked out because of the company's concerns about misconduct, sabotage, or the upcoming holiday season, supports a finding that the lockout was not motivated by these reasons, but instead that it was designed to bring economic

pressure on the Union so that it would agree to the company's wage proposal. *Highland Superstores, Inc.,* 314 NLRB 146, 148 (1994) (judge relies on company letters to the union and memorandum to employees to derive the true motive behind the lockout and discounts the alternate reason advanced by the employer which surfaced for the first time at trial).

Here, after the Union's unconditional return to work offer on December 4, Ashmore emailed Vega saying she needed to discuss the issue with "all necessary partners," asked that the engineers not report to work, and said she would connect with Vega by the end of business on December 7. (GC. 9) When Vega asked whether Macy's was locking out the engineers, Ashmore replied to him on December 5 saying that the company planned to reply to the Union by the close of business on December 7, as the offer to return to work "implicates several administrative, logistical, and economic issues that need to be fully evaluated on our end with the input of several company employees." (GC. 11) When Vega replied saying the engineers would report to work on Monday unless Macy's was "locking them out," Ashmore replied on December 6 writing "[t]his is not a lockout but we won't be ready for them," and again saying that the engineers' offer to return to work "implicates several administrative, logistical, and economic issues that need to be fully evaluated with the input of several company employees." (GC. 13) On Monday December 7, after the Local 39 engineers started reporting to work, Ashmore emailed Vega saying that Macy's was not willing to reinstate them without a contract in place, and that this decision was being made in support of the company's "bargaining

position." (GC. 14) On December 8, Ashmore again emailed Vega saying that

Macy's was not willing to reinstate the engineers until a contract was in place and reconfirming that this decision was "being made in support of our bargaining position." (GC. 16) At no time during any of these communications did Macy's tell the Union, or employees, that the engineers were being locked out because of the company's concerns about misconduct, sabotage, or that something might occur during the holiday season. Similarly, when the parties met for bargaining on December 10 and 11, there is no evidence that Macy's told the Union that these concerns were part of the reason for the lockout. Instead, Macy's presented the Union with a new wage proposal, which contained wage rates that were lower than the August 31 Final Offer. And, Ashmore testified that she thought it was important that this new proposal on wages be communicated to the Union during a bargaining session because Respondent wanted to explain the company's business position and how conditions had changed in the intervening months, with business not going in the direction the company had expected.

I also note that in an initial position statement submitted by Respondent during the underlying investigation, Macy's did not mention that misconduct, sabotage, or the holiday shopping season played any role in its decision to lockout the Local 39 engineers. (GC. 35; Tr. 756-757) It was only after the investigating agent brought the Board's holdings in *Alden Leeds, Inc.,* 357 NLRB 84 (2011) and *Dayton Newspapers*, 339 NLRB 650 (2003) to the company's

attention that Macy's submitted a supplemental position statement saying that the issues of alleged misconduct and sabotage played a role in its lockout decision.[19] The supplemental position statement does not mention the holiday shopping season. (GC. 35; R. 50)

In these circumstances, I do not credit the testimony of Respondent's witnesses that issues of sabotage, misconduct, or the holiday shopping season were reasons for the lockout. Instead, I find that these were post-hoc excuses, developed to bolster Respondent's defense in an attempt to justify why the lock out occurred at a time when the company did not have any bargaining proposals on the table. *Highland Superstores, Inc.,* 314 NLRB 146, 148 (1994).

I further believe this conclusion is bolstered by Westenberger's testimony about what occurred. Westenberger testified that the decision to lockout the Local 39 engineers occurred during a discussion that took place "subsequent" to the engineers reporting back to work on December 7, saying that the engineers were "back for one hour and they had already changed the locks on us." (Tr. 615) However, in its January 25, 2021 position statement Macy's stated that, after the Local 39 engineers were instructed to leave work on December 7, "[t]hree days later" a Macy's official arrived at the Southland store and could not access the

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[19] Both position statements contain a references to Case Number 20-CA-270110. During the hearing, Macy's acknowledged that the position statements were mislabeled and both documents were admitted into evidence as Respondent's position statements submitted during the investigation of Cases 20-CA-270047 and 20-CA-269858. (Tr. 757-758)

facilities office because the entire door handle unit had been replaced. (GC. 35, #01192-01193) Thus, by its own admission, Macy's did not learn about this incident until December 10, well after the lockout happened.

Also, I find Ashmore's testimony, saying that all of the Local 39 engineers who reported to work on December 7 showed up at the Southland store, was not accurate as it was contradicted by Jim Lybrand. Ashmore was not in California on December 7, and it is unclear where, or from whom, she received her purported information. Lybrand, on the other hand, had personal knowledge regarding what store he and his crew reported to on December 7, as he was there, working alongside his crew at the Union Square store. Ashmore's testimony that all the engineers reported to the Southland store was simply another attempt to bolster Respondent's post-hoc defense that alleged sabotage at the Southland store, after the engineers had reported back to work, played a role in the company's lockout decision, notwithstanding the fact Respondent did not learn about this incident until December 10.

While I have discredited Respondent's claims that issues of alleged misconduct, sabotage, or the holiday shopping season, played a role in the company's decision to lockout employees, I also believe that the evidence does not support a finding that Respondent's concerns about these issues were held in good faith. Other than the claims involving name calling and noise making, Respondent's evidence that Local 39 engineers engaged in acts of misconduct or sabotage during the strike was based primarily upon hearsay,

conjecture, and unknown, nonexistent, or inconclusive investigations.[20] Despite the fact Macy's has multiple security cameras both inside, and outside, their stores, and numerous retail and security employees were working in the stores during the strike, outside of the name calling and noise making allegations, virtually no credited evidence was presented that any of the Local 39 engineers purposefully committed any of the acts in question. And, in some instances, there was no evidence presented that any of the engineers were even in the vicinity when the incidents occurred.

For example, regarding the October 20 flood at the Sunrise store. There is no evidence that Local 39 engineers were anywhere near the store when the incident happened, or that they were otherwise involved with what occurred. While Westenberger testified that, during the course of their work, the engineers had access to some type of special tool needed to open and close the valve in question, the Local 39 engineers had not been working in the Sunrise store since the strike started on September 4. There was no picketing or handbilling at the Sunrise store, nor is there evidence that any of the engineers had even visited the store since the strike started. Moreover, Westenberger admitted that he has never seen the purported special tool that he claimed was used to open the water valve, he could not describe the tool, did not know where the valve was located, did not investigate the incident, and did know who, if anybody, actually investigated the matter. It appears

[20] Respondent has cited no cases where the Board has countenanced the lockout of an entire bargaining unit based upon instances of name calling and/or noise making.

that someone turned the sprinklers on at the Sunrise mall and did not turn them off. Clearly Westenberger wanted to blame the Local 39 engineers for the incident. But wishful thinking is not the equivalent of having a good faith belief. And this same wishful thinking seems to apply to the other incidents of purported sabotage as well.

Regarding the sump-pump issue at the Walnut Creek store in early October, again there was no evidence showing who actually tampered with sump-pump, or that any of the Local 39 engineers had even visited the store since the strike started. As with the Sunrise store, there was no picketing or handbilling at the Walnut Creek store, and although Westenberger testified about the incident, he was not involved in the investigation of the matter. It is hard to believe that a striking engineer could walk into the store, cross the sales floor, go through the doors to reach the back of the house, walk downstairs, tamper with the sump pump, walk out from the storage rooms, cross the sales floor again, and exit the store, without any of the security cameras capturing this person on video, or without a sales associate, security personnel, or anybody else, seeing the perpetrator walking around the store and accessing non-public areas.

Concerning the backup that occurred in the alterations room on September 6, while the Union was picketing the Union Square store at the time, there was no evidence that any of the Local 39 engineers entered the store that day, or the previous two days, let alone that one of them walked across the men's department sales floor to access the alterations room to put paper towels down the drain. The same is true

regarding the November 7 incident involving the men's sixth floor bathroom faucet in the children's department.

As for the fact that some of the entrance doors needing to be repaired, which the company blamed on the Union throwing rocks at the door jams during the picketing, none of Respondent's witnesses testified that they actually saw the Local 39 engineers throw rocks at the doors, nor is there any security video footage confirming these claims. And, Respondent's own work orders show that, at times unrelated to the picketing, the entrance doors at the Union Street store experienced similar issues and needed to be repaired on multiple occasions.

There was much evidence introduced into the record from Respondent about the Everbowl restaurant flooding that occurred on September 23, including a nearly seven minute security video from the previous day. However, none of this evidence supports a finding that any of the picketers were responsible for the backup. In fact, Respondent's work orders show that the space occupied by the Everbowl had a history of sewer backups and flooding. And, just a month earlier, before the picketing had started, Respondent had to "jet the line" because of problems with the main sewer line on O'Farrell Street. The work orders also show that, on various other occasions, the vent grates on the sidewalk outside the restaurant needed to be replaced as they were missing and the vent pipes were left uncovered. While the security video does show a group of picketers looking down the open vent on September 22, as one of them shines a flashlight down the pipe, the video does not show this

group putting anything down the vent pipe that would cause flooding. And, Uhe testified that he watched the entire security video for that day and did not see anyone put anything down the vent pipe. What the picketers were doing, or looking at, is rank speculation.

Uhe testified that he placed the blame for the incident on the O'Farrell Street picketers shown in the September 22 video, and said that the items causing the Everbowl flooding (a plastic bottle and T-shirt) were found down one of the O'Farrell Street vent pipes. However, in at least two pre-hearing affidavits that Uhe signed, he said that the items causing the backup came out from a drain pipe opening on Geary Street instead. Respondent made this same representation in a brief filed with the California State Superior Court on October 7, saying the items came out of a drain pipe on Geary Street. (R. 47, p. 4)

According to Uhe, the plumber used a 500 foot snake to dislodge the items that were causing the backup. There would simply be no reason for a plumber to use a 500 foot snake if the clog occurred in the open vent pipe on O'Farrell Street, as this vent pipe is only about 20 feet away from the Everbowl restaurant. However, Geary Street is over 275 feet away from O'Farrell Street (R. 44), and depending upon the location of the drain pipe opening on Geary Street, and the depth of the sewer, it is certainly conceivable that someone starting a plumbing snake in the vent outside the Everbowl restaurant on O'Farrell Street, would have to clean out hundreds of feet of pipe in order to dislodge the T-shirt and plastic bottle from the drain pipe opening on Geary Street.

While the facts show that a sewer backup occurred on September 23, to place the blame on the picketers that were on O'Farrell Street the previous day, as Uhe did, is simply conjecture.

Finally, while the Board in CII Carbon, 331 NLRB 1157 (2000) found that an employer with a multi-location bargaining unit had a legitimate and substantial business justification for locking out only those employees who worked at a specific location where an act of sabotage occurred, Respondent has cited no cases that allow for an employer to lockout the entire bargaining unit, across all locations. Here, the bargaining unit consists of employees who work at almost 40 different stores/locations, some as far away as Fresno, Sacramento, and Reno, Nevada. Many of these employees did not work at, and were not associated with, any of the stores where Respondent claims that misconduct and/or sabotage occurred, and there is no evidence that many of these employees even participated in, or were present at, the Union Square picketing. In these circumstances, even if the lockout was based on legitimate cases of misconduct, I find that Macy's has provided no business justification as to why such a broad and far-reaching lockout, affecting employees who had no connection to the stores where the alleged misconduct occurred, or the Union Square picketing, would be legitimate and necessary.

In conclusion, I find that Respondent's motive for the December 7 lockout was to gain economic leverage so the Union would accept the company's new wage proposal when it was finally submitted on December 10. Because the lockout occurred at a time when the

Respondent did not have any open contract proposals on the bargaining table, Macy's failed to inform the Union and employees in a clear and timely manner of its demands so as to give them a fair opportunity to evaluate whether to accept the company's proposal and avoid a lockout. Accordingly, Respondent's actions violated Section 8(a)(3) and (1) of the Act. Alden Leeds, Inc., 357 NLRB 93 (2011) enfd. 812 F.3d 159 (DC. Cir. 2018); Dayton Newspapers, 339 NLRB 650 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Operating Engineers, Stationary Engineers, Local 39, is a labor organization within the meaning of Section 2(5) of the Act.

3. By locking out its employees on December 7, 2020, without providing them with a timely, clear, or complete offer, which sets forth the conditions necessary to avoid the lockout, Respondent has violated Section 8(a)(3) and (1) of the Act.

The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully locked out is employees on December 7, 2020, I shall

recommend that Respondent offer reinstatement to all employees who were unlawfully locked out and make them whole for any losses of pay and benefits that they may have suffered by reason of the lockout. This shall include compensation for any adverse tax consequences of receiving a lump-sum backpay award in accordance, with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), and their search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.,* 364 NLRB 1153 (2016). Backpay, search-for-work, and interim employment expenses, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall also file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration. In addition, pursuant to *Cascades Containerboard Packaging- Niagara*, 370 NLRB No. 76 (2021), Respondent must file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order or such additional time as the Regional Director may allow for good cause shown, a copy of corresponding W-2 forms for the locked out employees reflecting the backpay award.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[21]

ORDER

Respondent Macy's Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Locking out its employees without providing them with a timely, clear, and complete offer, which sets forth the conditions necessary to avoid the lockout.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer each and every employee whom it unlawfully locked out on December 7, 2020, full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, employees hired from other sources to make room for them, and make them whole for

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

any loss of earnings or benefits to be calculated in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at all locations in Northern California and Reno, Nevada, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. April 6, 2022

* * *

APPENDIX

Notice to Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lock out our employees without providing them with a timely, clear, and complete offer, which sets forth the conditions necessary to avoid the lockout.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer our employees, whom we unlawfully locked out on December 7, 2020, reinstatement to their former jobs or, if these positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole the employees whom we unlawfully locked out on December 7, 2020 for any loss of earnings and other benefits, less any net interim earnings, plus interest, and

WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate the employees whom we unlawfully locked out on December 7, 2020 for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 form(s) reflecting the backpay awarded to the employees in question.

Appendix D

RELEVANT STATUTORY PROVISIONS

29 U.S.C. §158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization(not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the

employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e)of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents-

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting

commerce, where in either case an object thereof is-

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a

> particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

> (A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification-

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the

time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee

who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person "shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this

[1] So in original. Probably should be "unenforceable".

subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a)as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any

agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. §160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such

cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the

complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of 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 and cause to be served on such person 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 this subchapter: *Provided*, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158

of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the 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 order dismissing the said complaint. No 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. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any

time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to

the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such

a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub. L. 98-620, title IV, §402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(*l*) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against

the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (*l*).