No. 26-

IN THE

Supreme Court of the United States

VERMONT INFORMATION PROCESSING, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEPHEN D. ELLIS
Counsel of Record
JORDAN A. STALEY
PAUL FRANK + COLLINS, PC
P.O. Box 1307
Burlington, VT 05402
(802) 658-2311
sellis@pfclaw.com

Counsel for Vermont Information Processing, LLC

November 10, 2026

132611

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the D.C. Circuit improperly raised the standard for preservation of arguments on appeal by holding that Petitioner failed to preserve its challenge to the *Thryv* make-whole remedy despite quoting the remedy language in its exceptions to the Board and expressly objecting that the remedy was punitive, unlawful, and beyond the scope of relief authorized under the National Labor Relations Act.

2. Whether the NLRB exceeds its authority under Section 10(c) of the National Labor Relations Act, and violates the Seventh Amendment, by ordering an employer to compensate employees for "all direct or foreseeable pecuniary harms"—a remedy three courts of appeals have held unlawful and the Board has declined to defend in this Court.

3. Whether the substantial-evidence standard permits a court of appeals to enforce an NLRB order by identifying evidence supporting the Board's dispositive finding without evaluating material record evidence that undermines the factual premise of that finding, contrary to the whole-record review required by *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

PARTIES TO THE PROCEEDINGS

1. Petitioner Vermont Information Processing, LLC (formerly Vermont Information Processing, Inc.) ("VIP") was the petitioner and cross-respondent in the proceeding below in the United States Court of Appeals for the District of Columbia Circuit, and the respondent before the National Labor Relations Board.

2. The National Labor Relations Board was the respondent and cross-petitioner in the D.C. Circuit proceeding below.

3. Christopher Bendel, Gordon Dragoon, Kestrel Swift, and Kaleb Noble were the Charging Parties before the National Labor Relations Board.

CORPORATE DISCLOSURE STATEMENT

Petitioner VIP builds software and hosts data for the beverage industry. Until January 30, 2025, VIP was an employee-owned company and had no parent corporation, and no publicly traded corporation owned 10% or more of its stock. On January 30, 2025, VIP was acquired in a stock sale by an affiliate of Warburg Pincus, Vamos Bidco, Inc., which in turn is indirectly 100% owned by Vamos Topco, Inc. VIP has now converted to Vermont Information Processing, LLC, a limited liability company formed in Delaware. Its sole member, Vamos Bidco, Inc., is not publicly traded and has no publicly-traded shareholders.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Vermont Information Processing, Inc. v. NLRB*, 176 F.4th 690, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered on August 12, 2026. Petition for panel rehearing and petition for rehearing en banc denied August 12, 2026.

- *Vermont Information Processing, Inc. and Christopher Bendel and Gordon Dragoon and Kaleb Noble and Kestrel Swift*, Case 03–CA–301055, 373 NLRB No. 131, 2024 WL 4707049. Board decision issued November 5, 2024.

This Court previously denied Petitioner's application for a stay of the D.C. Circuit's mandate in *Vermont Information Processing, LLC. v. NLRB*, No. 26A332 (Sept. 16, 2026). Petitioner is not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

STATEMENT OF RELATED PROCEEDINGS iv

TABLE OF CONTENTS v

TABLE OF APPENDICES vii

TABLE OF CITED AUTHORITIES ix

GLOSSARY xv

THE OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. VIP preserved its statutory objection to the *Thryv* remedy; its constitutional objection presents a separate extraordinary-circumstances question 6

Table of Contents

Page

A. VIP's express statutory objection satisfied Section 10(e) 6

B. Extraordinary circumstances permit review of the constitutional objection 9

II. The NLRB exceeded its statutory authority and violated the Seventh Amendment by ordering VIP to compensate former employees for "all direct or foreseeable pecuniary harms." 11

A. The courts of appeals are divided over the Board's statutory authority. 12

B. The additional compensatory relief presents a distinct Seventh Amendment question. 14

C. The denial in *Macy's* does not resolve VIP's distinct preservation question or eliminate the controversy over its enforced order. 16

III. The decision below substitutes one-sided deference to the Board's findings for the whole-record review required by *Universal Camera* 18

CONCLUSION 21

TABLE OF APPENDICES

Page

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED MAY 26, 2026 ..... 1a

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 49a

APPENDIX C – JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 51a

APPENDIX D – DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, FILED NOVEMBER 5, 2024 ..... 59a

APPENDIX E – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 101a

APPENDIX F – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 103a

Table of Appendices

Page

APPENDIX G – LETTER OF THE NATIONAL LABOR RELATIONS BOARD, DATED AUGUST 18, 2026 . . . . . 105a

APPENDIX H – EXCERPT OF THE COMPLIANCE STATEMENT OF VERMONT INFORMATION PROCESSING LLC, DATED SEPTEMBER 9, 2026 . . . . . 115a

APPENDIX I – CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 130a

Constitution of the United States of America 130a

Amendment VII 130a

National Labor Relations Act (29 U.S.C. §§ 151, et seq) 130a

Section 2 of the Act (29 U.S.C. § 152) 130a

Section 7 of the Act (29 U.S.C. § 157) 131a

Section 8 of the Act (29 U.S.C. § 158) 132a

Section 10 of the Act (29 U.S.C. § 160) 132a

TABLE OF CITED AUTHORITIES

Page

Cases

3484, Inc. v. NLRB,
137 F.4th 1093 (10th Cir. 2025) 13

Allentown Mack Sales & Serv., Inc. v. NLRB,
522 U.S. 359 (1998) 18

Arrmaz Products Inc.,
2024 WL 5052710 (NLRB Dec. 6, 2024) 10

Atlas Roofing Co. v. Occupational Safety & Health Review Commission,
430 U.S. 442 (1977) 15

Camelot Terrace, Inc. v. NLRB,
824 F.3d 1085 (D.C. Cir. 2016) 7

Consol. Freightways v. NLRB,
669 F.2d 790 (D.C. Cir. 1981) 7

Curtis v. Loether,
415 U.S. 189 (1974) 15

Dupree v. Younger,
598 U.S. 729 (2023) 9

Fallbrook Hosp. Corp. v. NLRB,
785 F.3d 729 (D.C. Cir. 2015) 14

Page

Fibreboard Paper Prods. Corp. v. NLRB,
379 U.S. 203 (1964) 14

Golden State Bottling Co. v. NLRB,
414 U.S. 168 (1973) 13

Harvard Maint., Inc. v. NLRB,
165 F.4th 886 (5th Cir. 2026) 11

HHS Aviation, LLC,
2024 WL 4165108 (NLRB Sept. 11, 2024) 10

Hiran Mgmt., Inc. v. NLRB,
157 F.4th 719 (5th Cir. 2025) 12

Holguin-Hernandez v. United States,
589 U.S. 169 (2020) 9

HTH Corp. v. NLRB,
823 F.3d 668 (D.C. Cir. 2016) 10

Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB,
155 F.4th 1023 (9th Cir. 2025) 12

Lodi Volunteer Ambulance Rescue Squad, Inc.,
374 NLRB No. 26, 2026 WL 266163 (2026) 17

Loper Bright Enterprises v. Raimondo,
603 U.S. 369 (2024) 14

Page

Macy's Inc. v. NLRB,
No. 25-627, 2026 WL 1717973 (U.S. June 15, 2026) 12, 16, 17

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 15

Moody v. NetChoice, LLC,
603 U.S. 707 (2024) 11

Nat'l Licorice Co. v. NLRB,
309 U.S. 350 (1940) 15

Nexstar Media Group, Inc.,
374 NLRB No. 5 (Dec. 16, 2024) 10

NLRB v. Fed. Labor Relations Auth.,
2 F.3d 1190 (D.C. Cir. 1993) 10

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 15

NLRB v. Noel Canning,
573 U.S. 513 (2014) 11

NLRB v. Starbucks Corp.,
125 F.4th 78 (3d Cir. 2024) 7

NLRB v. Starbucks Corp.,
159 F.4th 455 (6th Cir. 2025) 7, 8, 9, 12, 13

Cited Authorities

Page

NLRB v. Transp. Mgmt. Corp.,
462 U.S. 393 (1983). 19

PG Publishing Co., Inc. v. NLRB,
No. 24-2788, 2025 WL 3142083
(3d Cir. Nov. 10, 2025), *cert. denied sub nom.*
PG Publ'g Co. v. NLRB, No. 25-1192,
2026 WL 2976691 (U.S. Oct. 5, 2026) 8, 9

PG Publishing Co.,
JD-41-24, 2024 WL 3355062 (July 9, 2024) 10

Phelps Dodge Corp. v. NLRB,
313 U.S. 177 (1941) 14

Randolph-Sheppard Vendors of Am. v. Weinberger,
795 F.2d 90 (D.C. Cir. 1986) 10

Regal Knitwear Co. v. NLRB,
324 U.S. 9 (1945). 13

SEC v. Jarkesy,
603 U.S. 109 (2024). 10, 11, 14, 15

Smith v. Atlas Off-Shore Boat Serv., Inc.,
653 F.2d 1057 (5th Cir. 1981). 12

The Oil Man Corp.,
374 NLRB No. 136, 2026 WL 1831595 (2026). 17

Page

Thryv, Inc.,
372 NLRB No. 22, 2022 WL 17974951
(Dec. 13, 2022), *vacated in part on other grounds*,
102 F.4th 727 (5th Cir. 2024) 3-8, 10-14, 16, 17, 21

Trader Joe's Co. v. NLRB,
167 F.4th 766 (5th Cir. 2026) 13

Troutbrook Co., LLC,
373 NLRB No. 125 (Sept. 30, 2024) 10

U.S. Nat. Bank of Oregon v.
Independent Ins. Agents of America, Inc.,
508 U.S. 439 (1993) 11

UAW-CIO v. Russell,
356 U.S. 634 (1958) 12, 14

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 6, 18, 21

Vermont Information Processing, Inc. v. NLRB,
176 F.4th 690 (D.C. Cir. 2026) 1, 13

Statutes and Other Authorities

U.S. Const. amend. VII. 2, 5, 7-11, 14, 15

28 U.S.C. § 1254(1). 2

Cited Authorities

Page

29 U.S.C. §§ 151 *et seq.* 2

29 U.S.C. § 160(c) 13

29 U.S.C. § 160(e) 4, 9, 18

Supreme Court Rule 10(a) 6

Supreme Court Rule 10(c) 6, 13, 14, 15, 17, 21

Supreme Court Rule 10(e) 6, 7, 9, 17

GLOSSARY

Abbreviation	Definition
App.	Appendix for this Petition for Writ of Certiorari
ALJ	Administrative Law Judge Arthur Amchan
Act	National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*
Board	National Labor Relations Board
Board Or.	Board's 11/05/24 Decision and Order
Bendel	Christopher Bendel
Noble	Kaleb Noble
Swift	Kestrel Swift
Dragoon	Gordon Dragoon
NLRA	National Labor Relations Act, 29 U.S.C. §§151 *et seq*
NLRB	National Labor Relations Board
VIP	Vermont Information Processing LLC

J.A.; S.J.A.	Joint Appendix and Supplemental Joint Appendix filed in the D.C. Circuit, Nos. 24-1360 and 24-1375; citations use those documents' original pagination, not pagination of this petition's appendix.
Maj. Op.	Opinion of the Panel Majority in *Vt. Information Processing, Inc.*, No. 24-1360, slip op. (D.C. Cir. May 26, 2026)
Dissent	Walker, J.'s Dissent in *Vt. Information Processing, Inc.*, No. 24-1360, slip op. (D.C. Cir. May 26, 2026)
NLRB *Macy's* Br.	*Macy's v. NLRB*, No. 25-627, Brief for Federal Respondent 12 (U.S. filed April 20, 2026)

THE OPINIONS BELOW

1. *Vermont Information Processing, Inc. v. NLRB*, 176 F.4th 690 (D.C. Cir. 2026): opinion issued May 26, 2026, reproduced herein as Appendix A (App. 1a-48a). The court entered its initial judgment on May 26, 2026 (ECF No. 2174926), and its order, reproduced herein as Appendix B (App. 49a-50a), and judgment, reproduced herein as Appendix C (App. 51a-58a), adopting the Board's proposed judgment on August 12, 2026 (ECF No. 2187787). The Board submitted its proposed judgment on June 9, 2026 (ECF No. 2177610).

2. *Vermont Information Processing, Inc. and Christopher Bendel and Gordon Dragoon and Kaleb Noble and Kestrel Swift,* Case 03–CA–301055*:* decision issued by the National Labor Relations Board on November 5, 2024. The NLRB decision is available at 373 NLRB No. 131, 2024 WL 4707049, and reproduced herein as Appendix D (App. 59a-100a).

3. The D.C. Circuit entered orders denying VIP's petitions for panel rehearing and rehearing en banc on August 12, 2026, copies of which are reproduced herein as Appendices E (App. 101a-102a) and F (App. 103a-105a).

JURISDICTION

The court of appeals issued its opinion and initial judgment on May 26, 2026 (ECF Nos. 2174929 and 2174926). Its judgment and order adopting the Board's proposed judgment was filed on August 12, 2026 (ECF

No. 2187787). Timely filed motions for panel rehearing and rehearing en banc were denied on August 12, 2026. Under Rules 13.1 and 13.3, the ordinary deadline for this petition is November 10, 2026, absent an extension. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq* (App. 130a-138a)

U.S. Const. amend. VII (App. 130a)

STATEMENT OF THE CASE

VIP, a Vermont software company serving the beverage industry, seeks review of the judgment enforcing the Board's liability determination and remedial order concerning Christopher Bendel. VIP terminated his employment following management's discovery of an employee salary-sharing spreadsheet in February 2022. Maj. Op., App. 2a-6a. The court of appeals remanded the claims concerning three other discharged engineers – Kaleb Noble, Gordon Dragoon, and Kestrel Swift. Maj. Op., App.15a-21a. Those claims are not before this Court.

Management learned of the spreadsheet during the rollout of VIP's restructuring of its software-development group into product-centered teams. On February 15, 2022, Bendel separately discussed the plan with his supervisor, Sam Graefe, and VIP's Director of Development, Chris McGinty. Bendel objected to his exclusion from planning and was dissatisfied with his new "free agent" role.

McGinty planned to discuss Bendel's employment status with Graefe after the rollout, an assessment that would be "highly influenced by his response to the roll-out." J.A. 1245, ¶¶ 15-20. McGinty presented the restructuring at a company-wide meeting on February 16. Approximately an hour after the meeting ended, management learned of the salary spreadsheet. J.A. 1246, ¶¶ 21-22.

VIP terminated Bendel later that day and the other three employees two days later. Maj. Op., App. 4a-6a. The four employees filed a charge, and the General Counsel issued a complaint alleging that VIP discharged them for engaging in protected concerted activity "by creating and disseminating a spreadsheet where employees could view and share salary information," in violation of Section 8(a)(1). J.A. 1258, quoted in Maj. Op., App. 7a, 15a-16a. An administrative law judge ("ALJ") ruled against VIP and ordered reinstatement and make-whole relief, including compensation "for all direct or foreseeable pecuniary harms that [the employees] suffered as a result of Respondent's unfair labor practices, regardless of whether those expenses exceed interim earnings." Board Or., App. 70a, 92a-94a. The ALJ expressly attributed this additional relief to *Thryv, Inc.*, 372 NLRB No. 22, 2022 WL 17974951 (Dec. 13, 2022). Board Or., App. 92a-94a.

VIP excepted to the ALJ's proposed remedies. Maj. Op., App. 8a. VIP quoted *Thryv*'s standard remedial language verbatim and objected that the remedy "is not a 'make whole' remedy authorized by the Act," and would "impose a punitive and unlawful penalty on VIP that is inconsistent with the remedial purposes of the remedies authorized by the Act." Maj. Op., App. 25a. VIP also challenged the ALJ's credibility determinations,

assessment of the record, and evidentiary support for the findings. Maj. Op., App. 8a; Board Or., App. 61a n.4.

On November 5, 2024, the Board affirmed the ALJ's decision. Addressing VIP's challenges to the credibility findings and assessment of the record, the Board stated that it was "satisfied" that VIP's "contentions are without merit." Board Or., App. 61a n.4. The Board further ordered VIP to compensate the employees for backpay and frontpay, and "for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful termination of their employment, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings." Board Or., App. 59a-62a, 92a-94a.

VIP timely petitioned the D.C. Circuit for review of the Board's November 5, 2024 decision, and the Board cross-applied for enforcement. Following briefing and oral argument, a divided panel issued its decision on May 26, 2026. The panel unanimously vacated the Board's liability findings as to Dragoon, Noble, and Swift, holding that the Board violated due process by resting its decision on uncharged conduct, and remanded their cases. Maj. Op., App. 15a-21a. As to Bendel, the panel affirmed the Board's liability finding and granted enforcement of the Board's remedies, including the *Thryv* remedy. Maj. Op., App. 21a-31a.

The majority did not reach the remedy's statutory legality. It held that VIP failed to preserve its "facial challenge" to *Thryv* under 29 U.S.C. § 160(e), construing VIP's objection before the Board as a case-specific "windfall" argument. Maj. Op., App. 25a-26a. It separately

held VIP's Seventh Amendment challenge unpreserved. Maj. Op., App. 30a-31a. Judge Walker dissented, concluding that VIP's exceptions put the Board on notice of its objection to the *Thryv* remedy and that the remedy awards legal damages Congress never authorized. Dissent, App. 32a-48a.

VIP filed a petition for panel rehearing and rehearing en banc on July 10, 2026. The D.C. Circuit denied rehearing on August 12, 2026. VIP then moved the D.C. Circuit to stay issuance of its mandate pending certiorari. The D.C. Circuit denied that motion on September 2, 2026, and its mandate issued on September 9, 2026. VIP then applied to this Court to stay issuance of the D.C. Circuit's mandate. This Court denied that application on September 16, 2026.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit enforced against VIP a compensatory remedy that three courts of appeals have held exceeds the Board's statutory authority, without reaching VIP's express objection that the remedy is unauthorized by the Act. VIP quoted the challenged remedy language and objected that it was punitive, unlawful, and beyond the make-whole relief Congress authorized. By holding that VIP failed to preserve its objections to the remedy, the D.C. Circuit effectively raised the bar for preserving arguments on appeal. The Court should grant review to resolve the appropriate standard to preserve issues for review and, if VIP correctly did so here, whether the Board may lawfully impose the disputed relief.

The enforced order has present consequences. It requires VIP to compensate Bendel for "any other direct or

foreseeable pecuniary harms." Judgment (Aug. 12, 2026), App. 54a; Board Or., App. 59a-64a. VIP has submitted a compliance statement to the Regional Office addressing that obligation while preserving compliance-phase objections to the lawful calculation and implementation of the remedial provisions. *See* VIP's Compliance Statement, App. 120a, 125a-128a. The question here is whether the Board may impose that category of relief at all, not how a particular award should be calculated.

The petition seeks review under Rule 10(a) of the competing approaches to preservation and the underlying remedial conflict, and under Rule 10(c) of the important federal questions concerning statutory authority and the judicial review required by this Court's decisions. The third question concerns whether the court of appeals deferred to the Board's finding of "shifting explanations" without independently examining the factual premise of that finding, as required by *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488-90 (1951).

I. VIP preserved its statutory objection to the *Thryv* remedy; its constitutional objection presents a separate extraordinary-circumstances question.

A. VIP's express statutory objection satisfied Section 10(e).

VIP's statutory objection was express and clear. Its exceptions quoted *Thryv*'s remedial language and argued that the award was "not a 'make whole' remedy authorized by the Act" and would "impose a punitive and unlawful penalty on VIP that is inconsistent with the remedial purposes of the remedies authorized by the Act." Maj. Op.,

App. 25a. The majority construed that objection as a case-specific challenge to a windfall rather than a challenge to statutory authority. Maj. Op., App. 25a-26a. But Judge Walker's dissent correctly concluded that the exceptions were more than enough to put the Board on notice under a standard that does not demand exacting detail, technical precision, or citation to the specific precedent challenged. Dissent, App. 43a-45a; *Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981); *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090-91 (D.C. Cir. 2016).

Section 10(e) is intended to give the Board an opportunity to address an objection before judicial review. VIP furnished that opportunity: its exceptions identified the quoted remedy as exceeding the statutory make-whole authority Congress conferred. Its additional objection that the award would produce a windfall did not negate the statutory objection. Neither the label "facial" nor a citation to the particular precedent was necessary to communicate the asserted limit on the Board's authority.

The D.C. Circuit's conclusion that VIP failed to preserve its objections to the *Thryv* remedy effectively raises the standard of review for the preservation of objections to Board decisions and creates a conflict with the standard in other circuits. For example, in *NLRB v. Starbucks Corp.,* 159 F.4th 455, 468 (6th Cir. 2025), the Sixth Circuit found preservation where the employer challenged the Board's authority to award additional compensatory relief. Similarly, in *NLRB v. Starbucks Corp.,* 125 F.4th 78, 95 (3d Cir. 2024), the Third Circuit found that the employer put the Board on adequate notice of its statutory interpretation and Seventh Amendment objections by pointing to the partial dissent in *Thryv* and

the concerns that dissent identified, including the Seventh Amendment, and arguing in its briefing before the Board that the NLRA does not allow monetary damages beyond backpay and benefits and describing the *Thryv* remedy as granting "consequential damages." VIP's exceptions likewise expressly disputed the Board's statutory authority to impose the remedy. Further, both *Starbucks* cases were being litigated by the Board at the same time as the proceedings in this case.[1] When VIP argued that the *Thryv* remedy exceeds the remedies authorized by the Act, the Board was clearly on fair notice as to the scope and meaning of VIP's objection.

This case is not like *PG Publishing Co., Inc. v. NLRB*, where the employer excepted to the ALJ's order to compensate workers for direct or other foreseeable pecuniary harms, as referenced in *Thryv*, but "did not provide the *basis* for its objection." No. 24-2788, 2025 WL 3142083 at *5 (3d Cir. Nov. 10, 2025), *cert. denied sub nom. PG Publ'g Co. v. NLRB*, No. 25-1192, 2026 WL 2976691 (U.S. Oct. 5, 2026) (emphasis in original). The court held "[m]erely quoting the remedy from the text of the ALJ's order, without expounding on the rationale for the objection, is insufficient to preserve the issue." *Id.* Here, VIP did more than merely quote the remedy language in *Thryv.* VIP provided multiple explicit reasons

1. In this case, the Board issued its decision on November 5, 2024. The opinion in *Starbucks* (3d Cir. 2024) was issued on December 27, 2024, addressing the Board's decision issued in February 2023. The opinion in *Starbucks* (6th Cir. 2025) was issued on November 5, 2025, but the Board issued its decision in August 2023. Thus, the Board was presented with the statutory and constitutional objections well before the Board decision in this case.

for its objection, including that the remedy was punitive, unlawful, and beyond the scope of relief authorized by the Act. Maj. Op., App. 25a. The preservation records in the *Starbucks cases*, *PG Publishing*, and this case differ, but the governing question remains whether the objection gave the Board fair notice—not whether VIP used specific terminology. Review is warranted to determine whether Section 10(e) permits the decision below to bar an express statutory objection to relief whose legality has divided the courts of appeals.

This Court has reviewed preservation rulings that needlessly foreclosed important legal questions. In *Holguin-Hernandez v. United States*, this Court held that a defendant requesting a shorter sentence preserved a substantive challenge to the longer sentence imposed. 589 U.S. 169, 173-75 (2020). In *Dupree v. Younger*, a purely legal issue resolved at summary judgment did not require post-trial renewal. 598 U.S. 729, 735-37 (2023). Although neither decision construes Section 10(e), both illustrate the importance of identifying what an objection communicated rather than requiring a redundant procedural formulation. VIP's exceptions communicated the essential statutory objection: the quoted remedy exceeded the authority Congress granted the Board.

B. Extraordinary circumstances permit review of the constitutional objection.

VIP's Seventh Amendment objection presents a separate preservation question. Because VIP did not raise it in its September 2023 exceptions, Section 10(e) permits review only if "extraordinary circumstances" excuse that omission. 29 U.S.C. § 160(e). VIP relies on

the intervening decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024), and the futility of renewed presentation in light of the Board's contemporaneous rejection of the same constitutional objection.

Jarkesy issued on June 27, 2024, after VIP's exceptions but before the Board's November 5, 2024 final order. The panel concluded that VIP could have brought the decision to the Board's attention while the case remained pending. Maj. Op., App. 30a-31a. VIP relies not on intervening authority alone, but also on futility, assessed when supplemental presentation or reconsideration was available. *See HTH Corp. v. NLRB*, 823 F.3d 668, 674 (D.C. Cir. 2016); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986); *NLRB v. Fed. Labor Relations Auth.*, 2 F.3d 1190, 1197 (D.C. Cir. 1993).

Thryv itself expressly rejected the Seventh Amendment objection. 372 NLRB No. 22, at *16 (Dec. 13, 2022). That position persisted after *Jarkesy* and before VIP's final order. *See HHS Aviation, LLC*, 2024 WL 4165108, at *1 n.2 (NLRB Sept. 11, 2024); *Troutbrook Co., LLC*, 373 NLRB No. 125 (Sept. 30, 2024). *See also PG Publishing Co.*, JD-41-24, 2024 WL 3355062 (July 9, 2024) (ALJ decision). VIP's futility argument rests on the Board's contemporaneous position, not on the ALJ decision alone or merely the prospect of an adverse ruling. Later decisions corroborate the continuity of that position. *See Arrmaz Products Inc.*, 2024 WL 5052710 (NLRB Dec. 6, 2024); *Nexstar Media Group, Inc.*, 374 NLRB No. 5 (Dec. 16, 2024).

The Fifth Circuit has applied futility to an omitted *Thryv* challenge. *Harvard Maint., Inc. v. NLRB*, 165 F.4th 886, 897 (5th Cir. 2026). That decision does not involve identical objections, but it supports evaluating whether the agency's settled position made presentation futile rather than treating omission as an absolute bar. Here, VIP relies on the Board's express rejection of the constitutional objection, maintained after *Jarkesy*. This alternative basis for review is distinct from VIP's primary submission that its statutory objection was expressly preserved.

II. The NLRB exceeded its statutory authority and violated the Seventh Amendment by ordering VIP to compensate former employees for "all direct or foreseeable pecuniary harms."

The merits question independently warrants review. Three circuits have held the *Thryv* remedy unlawful, the Board has declined to defend it in this Court, and yet it remains enforceable against VIP in this case.[2]

2. Though the Supreme Court is a "court of review, not of first view," *Moody v. NetChoice, LLC*, 603 U.S. 707, 726 (2024) (citation omitted), this general rule does not categorically preclude the Supreme Court from deciding an issue not reached by the court below. *See, e.g., NLRB v. Noel Canning*, 573 U.S. 513, 521-522 (2014) (addressed petitioner's "initial argument" as well as narrower issue actually decided by the D.C. Circuit); *cf. U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 447 (1993) ("[A] court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief.").

A. The courts of appeals are divided over the Board's statutory authority.

In *Thryv*, the Board announced that "in all cases in which our standard remedy would include an order for make-whole relief," it will order the respondent to compensate affected employees "for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice," including expenses awarded "regardless of whether these expenses exceed interim earnings." 372 NLRB No. 22, 2022 WL 17974951, at *9, *22 (Dec. 13, 2022), *vacated in part on other grounds*, 102 F.4th 727 (5th Cir. 2024) (emphasis in original). The remedy, in effect, awards classic forms of compensatory damages recoverable in tort—relief that is legal in nature. *See, e.g., Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. 1981) (tort-law "compensatory damages" include the "expenses of finding new employment"); *UAW-CIO v. Russell*, 356 U.S. 634, 645-646 (1958) (compensatory awards for "medical expenses" and "property damages" recoverable under state tort law were "beyond the scope of present Board remedial orders").

The Third, Fifth, and Sixth Circuits have rejected the additional relief authorized by *Thryv*; the Ninth Circuit has upheld it. *NLRB v. Starbucks Corp.*, 125 F.4th 78, 94-97 (3d Cir. 2024); *Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719, 725-29 (5th Cir. 2025); *NLRB v. Starbucks Corp.*, 159 F.4th 455, 467-82 (6th Cir. 2025); *Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB*, 155 F.4th 1023, 1048 (9th Cir. 2025), *cert. denied sub nom. Macy's Inc. v. NLRB*, No. 25-627, 2026 WL 1717973 (U.S. June 15, 2026). The Third Circuit held that the broad compensatory relief exceeded the Act; the Fifth Circuit

characterized the order as compensatory damages; and the Sixth Circuit concluded that the challenged monetary relief was legal rather than equitable. *See also 3484, Inc. v. NLRB*, 137 F.4th 1093, 1116, 1121-27 (10th Cir. 2025) (Eid, J., concurring in part and dissenting in part); *Trader Joe's Co. v. NLRB*, 167 F.4th 766, 801-02 (5th Cir. 2026) (Oldham, J., dissenting). This conflict warrants resolution of the statutory question once the preservation barrier is removed.

The D.C. Circuit majority below did not reach the question because it held VIP's objection unpreserved. *Vermont Information Processing, Inc. v. NLRB*, 176 F.4th 690, 703-707 (D.C. Cir. 2026). However, Judge Walker's dissent squarely presents both questions: whether VIP preserved its statutory objection and whether Section 10(c) authorizes the additional compensatory relief. Dissent, App. 32a-43a. Both questions require this Court's review.

The *Thryv* remedy cannot be squared with the Act, which "limits the Board's remedial authority to equitable, not legal, relief." *Starbucks Corp.*, 125 F.4th at 95 (3d Cir. 2024); *see, e.g., Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 178 n.4 (1973). Section 10(c) of the NLRA provides that, upon finding an unfair labor practice, the Board shall issue an order requiring the 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). Construing that language, this Court has long held that Congress "did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful

conduct," *UAW-CIO v. Russell*, 356 U.S. 634, 643 (1958), and that the Board was not created for the "adjudication of private rights…." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941). *Thryv* disregards both limits.

Nor can the remedy be sustained by deference to the Board's remedial discretion. The Board defended *Thryv* below by invoking the rule that its choice of remedy must stand unless it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *see Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735 (D.C. Cir. 2015). That standard governs the Board's choice *among* remedies Section 10(c) authorizes; it does not answer whether Section 10(c) authorizes a particular kind of relief at all. That antecedent question—which VIP pressed below—is one of statutory meaning, and after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), courts must decide it for themselves, exercising independent judgment rather than deferring to the agency. *Id.* at 412-13.

B. The additional compensatory relief presents a distinct Seventh Amendment question.

Jarkesy held that SEC civil penalties for securities fraud, an action analogous to common-law fraud, implicated the jury-trial right and did not fall within the public-rights exception. 603 U.S. 109, 122-40 (2024). The Seventh Amendment applies where a claim is "legal in nature," and the remedy sought is the more important consideration. *Id.* at 122-23. VIP challenges *Thryv*'s extension beyond reinstatement and backpay—equitable relief incident to restoring the employment relationship—

into compensation for individualized consequential injuries. That is compensatory damages, "the traditional form of relief offered in the courts of law." *Curtis v. Loether*, 415 U.S. 189, 196 (1974); *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). The constitutional question concerns that extension, not every administrative monetary award or the Board's established remedies.

The distinction turns on the nature of the claim and remedy. The Board's traditional reinstatement and backpay authority is supported by *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937), and *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363-65 (1940). *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 450, 455-61 (1977), recognizes administrative adjudication of certain statutory public rights. *Jarkesy* distinguished rather than overruled it. 603 U.S. at 137-40. But VIP contends that individualized consequential damages extend beyond that established framework and are legal in nature, like the compensatory damages discussed in *Curtis v. Loether*, 415 U.S. 189, 195-97 (1974). The Board's characterization of the additional relief as enforcement of a statutory public right does not itself resolve that distinction.

The Court may avoid that constitutional question by holding that Section 10(c) does not authorize the challenged extension. Alternatively, if the constitutional objection is reviewable and the additional relief falls outside the public-rights exception, the Court should hold that the Seventh Amendment precludes imposing it through the administrative procedure used here. Neither route calls into question the Board's traditional reinstatement and backpay authority.

C. The denial in *Macy's* does not resolve VIP's distinct preservation question or eliminate the controversy over its enforced order.

The Court's denial of review in *Macy's* on June 15, 2026, did not resolve *Thryv*'s legality. The union, Local 39, offered a case-specific reason to deny review: it represented that no evidence supported additional *Thryv* relief and disclaimed pursuing it. Brief in Opposition of Local 39, Question Presented 2 & § II, *Macy's Inc. v. NLRB*, No. 25-627 (filed May 4, 2026). Its supplemental brief asserted that there was "no possibility" Macy's would face such liability. Supplemental Brief of Local 39 1 (filed May 29, 2026). The Board sought vacatur and remand in *Macy's* and, after the Regional Director found no covered losses, vacatur of the *Thryv* relief as moot in *Teamsters*. NLRB *Macy's* Br. 12-16; Supplemental Brief of Local 39 1-2 (quoting NLRB Petition for Rehearing 3-6 (May 28, 2026)). Here, the Board has instead pursued enforcement. The distinction here is not the existence of an enforced order—*Macy's* had one too—but the absence of a comparable disclaimer of additional recovery.

Here, unlike *Macy's*, no union is involved; Bendel has participated through his own counsel throughout. *See* ALJ Decision 1, JD-49-23 (July 31, 2023); Deferred Joint Appendix, vol. 1, appearances page (unnumbered), Nos. 24-1360 & 24-1375 (D.C. Cir. May 7, 2025), ECF No. 2114756; Supplemental Joint Appendix, cover (unnumbered), ECF No. 2116871 (May 21, 2025). Neither the General Counsel—including Region 3's compliance officials—nor Bendel has disclaimed additional pecuniary relief under *Thryv*. The Board has suggested that Bendel's prompt return to paid employment "reduces the likelihood

that he is entitled to *Thryv* remedies or that a complex compliance proceeding will ensue." NLRB Opposition to Motion to Stay Issuance of Mandate 14, Nos. 24-1360 & 24-1375 (D.C. Cir. Aug. 28, 2026), ECF No. 2190436. But this is not a commitment to forego the remedies. Indeed, Region 3 directed VIP to compensate Bendel for "any other direct or foreseeable pecuniary harms," requested records to determine the amount due, and warned that refusal to comply would prompt referral for contempt proceedings. Letter from Donald S. Starr, Compliance Officer, NLRB Region 3, to Stephen D. Ellis, App. 106a, 109a-110a. VIP submitted its compliance statement on September 9, 2026; as of this petition's filing, the Region has neither responded nor disclaimed *Thryv* recovery. *See* VIP's Compliance Statement, App. 119a-120a. The remedy thus remains part of the judgment, without the assurance of no recovery supplied in *Macy's*. *See* Judgment (Aug. 12, 2026), App. 54a; Board's Proposed Judgment 3, ¶ 2(b), ECF No. 2177610 (June 9, 2026).

The possibility of agency reconsideration does not resolve VIP's preservation question. Members' openness to reconsidering *Thryv* does not alter that judgment. *See The Oil Man Corp.*, 374 NLRB No. 136, 2026 WL 1831595, at *4 n.3 (2026); *Lodi Volunteer Ambulance Rescue Squad, Inc.*, 374 NLRB No. 26, 2026 WL 266163, at *4 n.3 (2026). The availability and scope of subsequent judicial review following any compliance action remain questions for another day. This petition challenges the existing judgment enforcing the disputed relief and holding VIP's statutory objection unpreserved. VIP need not await a quantified award to seek review of that judgment. The grounds for certiorari are Section 10(e)'s preservation requirement and the conflict over Section 10(c)'s remedial

limits—not merely avoidance of further proceedings or the assumed unavailability of later review.

III. The decision below substitutes one-sided deference to the Board's findings for the whole-record review required by *Universal Camera*.

Deference to factual findings does not displace whole-record review. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-90 (1951); 29 U.S.C. § 160(e). VIP does not claim that the court was required to accept VIP's stated reasons for its decision; it contends that the panel sustained an inference of animus toward protected salary sharing without testing its factual premise against the whole record. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-71 (1998). The Board relied entirely on the ALJ's finding of VIP's supposed "shifting explanations" for the decision to terminate Bendel as evidence of animus, finding it unnecessary to rely on the ALJ's conclusion that immediate removal of the spreadsheet alone established animus. Board Or., App. 61a n.5, quoted in Maj. Op., App. 8a. The panel deferred to the ALJ's finding of "shifting explanations" without testing whether VIP's accounts were in fact materially inconsistent. The record shows they were not.

VIP's explanation has never shifted. Although VIP's briefing retrospectively described Bendel's termination as a "foregone conclusion" following his February 15 rejection of the restructuring and his "free agent" assignment, J.A. 1512-13, its supporting exceptions expressly stated that "the only decision at that point" (February 15) was to "move forward with our original plan" and roll out the restructuring on February 16. J.A. 424 (citing Tr. 311:22-

312:7). McGinty explained that he planned "a deeper discussion" about Bendel's status after the rollout, "which would be highly influenced by his response to the roll-out." J.A. 1245, ¶ 18. He described termination as "imminent" after the February 15 interactions, but "imminent" does not mean "immediate": the decision to terminate Bendel immediately was not made until February 16. J.A. 1247, ¶ 27.

The contemporaneous record corroborates this account. The February 15 messages between McGinty and Bendel's immediate supervisor, Sam Graefe, document concerns about Bendel's response to the restructuring before management discovered the spreadsheet. S.J.A. 4-6 (VIP Ex. 5); *see also* J.A. 1245, ¶ 20 (McGinty and Graefe discussed concerns that Bendel would disrupt the rollout). Although those messages also contemplated Bendel's continued participation in defining his role – a point the panel relied on, S.J.A. 5; Maj. Op., App. 14a – the two are not inconsistent. Management planned to assess Bendel's status after observing his response to the rollout, J.A. 1245, ¶ 18, so continued participation was part of that assessment, not a denial of management's preexisting concerns. VIP's explanation has always been that management's assessment of Bendel's participation ended with his response to the rollout, which management had anticipated and documented before it discovered the spreadsheet. Even if the spreadsheet was protected, protected status does not immunize an employee from discipline the employer would have imposed regardless; the question is causation. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399-403 (1983). VIP's consistent position is that management's pre-existing concern about Bendel's response to the rollout, J.A. 1245, ¶¶ 18, 20, not

the spreadsheet's protected character, drove its decision, and the panel never tested the "shifting explanations" inference against that record.

Because VIP never claimed that it planned to terminate Bendel before discovering the spreadsheet, the absence of an earlier discharge decision does not establish that VIP later changed its explanation. Instead of the required whole-record assessment, the panel relied on McGinty's "hope that, despite Bendel's dissatisfaction with the restructuring, '[Bendel] could play a role in planning it'" and that "VIP had planned to give Bendel a specific role within the restructured company," without considering the broader context of that hope on February 15, and how it was dashed on February 16. Maj. Op., App. 14a. The panel failed to consider management's documented concerns about Bendel's response to the restructuring. It also failed to address the contemporaneous documentary evidence and written accounts from both Bendel and management regarding the reasons given at the discharge meeting. Those accounts consistently attribute the discharge decision to Bendel's negative attitude toward the restructuring. J.A. 855, 1130, discussed in Maj. Op., App. 5a, 8a. The talking points for the discharge meeting likewise referenced that attitude, J.A. 1247, ¶ 29. VIP's exceptions, by identifying disruptive conduct directed at the company, supplied particulars of that reason, not a new one. J.A. 1604. By accepting the "shifting explanations" finding without considering the record as a whole, the panel relieved the Board of its obligation to demonstrate that the finding was supported by substantial evidence.

VIP seeks remand for whole-record review of whether its explanations were materially inconsistent and whether

that finding supports the inference of unlawful motive—not a fresh weighing of the evidence by this Court.

CONCLUSION

The petition should be granted. The Court should vacate the judgment enforcing the *Thryv* remedy and hold that Section 10(c) does not authorize the award of compensatory damages that are legal in nature. On the third question, the Court should vacate the judgment insofar as it enforces the Board's liability determination as to Bendel and remand for consideration of whether the challenged inference of pretext is reasonable on the whole record, as *Universal Camera* requires.

Respectfully submitted,

Stephen D. Ellis
Counsel of Record
Jordan A. Staley
Paul Frank + Collins, PC
P.O. Box 1307
Burlington, VT 05402
(802) 658-2311
sellis@pfclaw.com

Counsel for Vermont Information Processing, LLC

November 10, 2026

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED MAY 26, 2026 ..... 1a

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 49a

APPENDIX C – JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 51a

APPENDIX D – DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, FILED NOVEMBER 5, 2024 ..... 59a

APPENDIX E – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 101a

APPENDIX F – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026 ..... 103a

Table of Appendices

Page

APPENDIX G – LETTER OF THE NATIONAL LABOR RELATIONS BOARD, DATED AUGUST 18, 2026 . . . . . 105a

APPENDIX H – EXCERPT OF THE COMPLIANCE STATEMENT OF VERMONT INFORMATION PROCESSING LLC, DATED SEPTEMBER 9, 2026 . . . . . 115a

APPENDIX I – CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 130a

Constitution of the United States of America 130a

Amendment VII 130a

National Labor Relations Act (29 U.S.C. §§ 151, et seq) 130a

Section 2 of the Act (29 U.S.C. § 152) 130a

Section 7 of the Act (29 U.S.C. § 157) 131a

Section 8 of the Act (29 U.S.C. § 158) 132a

Section 10 of the Act (29 U.S.C. § 160) 132a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED MAY 26, 2026

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-1360
Consolidated with 24-1375

VERMONT INFORMATION PROCESSING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

CHRISTOPHER BENDEL, *et al.*,

Intervenors.

Argued October 15, 2025
Decided May 26, 2026

OPINION

Before: MILLETT, WALKER and PAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PAN.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WALKER.

Appendix A

PAN, *Circuit Judge*: Employees often wonder how much money their coworkers are making. Such information might help them negotiate salary raises, serve as a point of comparison when seeking other employment, or simply satisfy their curiosity. Sharing salary information among employees is a protected activity under the National Labor Relations Act. In this case, the National Labor Relations Board (NLRB) determined that Vermont Information Processing, Inc. (VIP) illegally fired four employees for creating and disseminating a salary-sharing spreadsheet. The Board ordered VIP to offer the employees reinstatement and to compensate them financially. VIP petitions for review of that order, while the NLRB cross-applies for enforcement.

We hold that substantial evidence supports the Board's determination that VIP illegally fired one of the employees, Christopher Bendel. But with respect to the other three workers, the Board impermissibly broadened its theory of liability to include an additional consideration beyond the scope of the NLRB General Counsel's complaint against the company. We therefore grant each petition in part, deny each petition in part, and remand for further proceedings.

I. Factual Background

VIP is a software company that services the beverage industry. It employs software engineers to build and maintain applications used by its customers, and it organizes those engineers into small software-development teams.

Appendix A

In February 2022, VIP began rolling out a restructuring plan. As part of the roll-out, software engineer Christopher Bendel met with his supervisor, Sam Graefe, to discuss how the restructuring would affect Bendel's role. The meeting did not go well. Bendel was dissatisfied with the new position that management had designed for him and expressed his concerns to Graefe. He ended the conversation abruptly and then called Graefe's supervisor, Director of Development Christopher McGinty, to discuss his concerns. Prior to those conversations, Bendel had informed both Graefe and McGinty that "he had offers from other companies." J.A. 851. When Graefe and McGinty compared notes about their interactions with Bendel, Graefe noted that Bendel "didn't seem too happy about our conversation," while McGinty wrote that it "wasn't a pretty conversation." S.J.A. 4–6.

Later that day, Bendel messaged another software engineer, Kaleb Noble, on VIP's Google Workspace platform. Bendel described his meeting with Graefe as a "shitshow" and claimed that he had "hung up on [Graefe]."[1] J.A. 1137–39. During that conversation, Noble asked Bendel, "Do you mind me asking your salary . . . ?" J.A. 1141. Bendel informed Noble that his salary was $95,000, and Noble responded that his was $87,000. Bendel then asked, "[W]anna start a [salary] spreadsheet?" *Id.* After Noble agreed, Bendel created a spreadsheet and shared it with Noble, and Noble said that he would share it with two

1. Graefe has never confirmed that Bendel hung up on him, and Bendel later testified that he had been "puffing [his] chest a little bit in the chat with" Noble. J.A. 594.

other software engineers, Gordon Dragoon and Kestrel Swift. Noble described the spreadsheet's purpose as follows: "The idea in my mind is so if you wanna ask for a raise you got some reference to see if you're getting fisted lol." J.A. 1145. Bendel agreed. Bendel and Noble shared the spreadsheet with Dragoon and Swift, and all four employees entered their names, positions, and salaries into the first four rows.

The next day, between 8:00 and 9:00 a.m., VIP held a virtual all-hands meeting to launch its restructuring plan. During or immediately after the meeting, the four employees began sharing the spreadsheet link with other employees. Around twenty-five coworkers entered information into the spreadsheet. An employee who received the spreadsheet shared it with a supervisor, who shared it with Development Director McGinty, who passed it on to Operations Director Louise Morgan.

At 11:26 a.m., Morgan met with McGinty to view and discuss the spreadsheet. From the file-ownership information, they could tell that Bendel had created it. And they noticed a notation on the spreadsheet indicating that "100 [percent]" of VIP's software developers were "underpaid." J.A. 1293 (showing two adjacent spreadsheet cells, the first reading "% of underpaid devs" and the next reading "100"). Morgan and McGinty attributed that statement to Bendel, as the spreadsheet's creator.[2] When

2. The record contains mixed evidence concerning whether Bendel actually added this notation, or whether a different employee did. But the record makes clear that, beyond identifying who originally created the spreadsheet, Morgan and McGinty made no further effort to verify that Bendel authored the notation.

they told Chief Financial Officer John Simard and other company leaders about the spreadsheet, Simard reacted strongly. Simard believed that the spreadsheet was "not appropriate," "not accurate," and "serve[d] no purpose." J.A. 1028. In particular, he took issue with "the idea that [the spreadsheet] was being used to demonstrate that all of [VIP's] programmers, a hundred percent of them[,] are underpaid." *Id.* Based largely on Simard's arguments, management decided to disable the spreadsheet. They then discussed Bendel's future at the company and quickly decided to fire him.

At around 11:32 a.m., VIP management disabled Bendel's internal accounts. The company remotely locked his computer and fired him at around noon. When informing Bendel of his termination, McGinty cited Bendel's "feeling towards VIP" and his "attitude," particularly "towards the restructuring and how he . . . was uninterested in partaking in that." J.A. 855; *accord* J.A. 1130 (Bendel's description of his conversation with McGinty). Management disabled the spreadsheet at around 12:19 p.m., but Dragoon informed Noble and Swift that he had already downloaded the spreadsheet and would transfer it to his personal email.

During and after these events, the four creators of the spreadsheet exchanged a plethora of colorful messages. Many of those messages pertained directly to the spreadsheet, their salaries, and their unhappiness with Bendel's firing. Other messages went further afield. For example, the employees discussed their desire to leave VIP and to convince one of their coworkers to join them. They

repeatedly used profanity to criticize VIP management; discussed "[p]urg[ing] [their] computers," J.A. 1197; and talked about sharing their complaints with a former VIP employee who was working for a VIP customer.

The day after Bendel's termination, VIP's Information Technology Director discovered the messages and forwarded them to management, prompting management to convene a meeting to discuss the messages and the fate of their authors. Senior executives reviewed the spreadsheet, the messages, and the employees' most recent performance evaluations. It came to light that in a performance review from two years earlier, Swift had stated, "VIP will fire me without remorse the second it doesn't think it can squeeze more money out of me tha[n] it pays me. Why would I be loyal? This is a loveless exchange of labor for currency between two mutually selfish parties." J.A. 1366. Simard, concerned by the messages and by Swift's statement, successfully advocated for firing the disgruntled employees. VIP terminated Dragoon, Noble, and Swift later that day. The company did not conduct any further investigation into the fired employees' conduct.

Immediately after the terminations, McGinty held a meeting with all VIP employees. He announced that VIP had terminated the four spreadsheet creators but emphasized that employees remained free to share salary information.

II. Procedural Background

Bendel, Dragoon, Noble, and Swift filed an NLRB charge against VIP, accusing the company of firing them for "salary sharing efforts." J.A. 1254. The NLRB General Counsel then filed a complaint and notice of hearing against VIP for violating the National Labor Relations Act (NLRA). The complaint alleged that VIP had fired the four employees for "engag[ing] in concerted activities with each other and with other employees for the purposes of mutual aid and protection, by creating and disseminating a spreadsheet where employees could view and share salary information." J.A. 1258.

The case was tried before an administrative law judge (ALJ). Numerous witnesses testified, including the four employees and several members of VIP's management team. The ALJ ruled against VIP. He concluded that VIP had terminated Bendel "for creating and disseminating the spreadsheet." J.A. 1739. And he determined that VIP had terminated Dragoon, Noble, and Swift "for their instant messaging chats about the spreadsheet and Bendel's termination," activities "inextricably linked to their roles in creating and disseminating the spreadsheet." *Id.* He found as a factual matter that the spreadsheet was not "materially inaccurate" and that the "100% underpaid" notation was "a statement of opinion, not an inaccurate statement of fact." J.A. 1740 & n.13. As to remedies, the ALJ ordered VIP to offer reinstatement to the four terminated employees and to compensate them financially for certain monetary losses caused by their wrongful terminations.

VIP timely filed exceptions to the ALJ's decision. Regarding Bendel, it argued that it had permissibly fired him for using VIP's resources "to create and disseminate false and misleading information for the purpose of disrupting an organizational restructuring to which he objected." J.A. 1604. It raised several arguments as to Dragoon, Noble, and Swift, including that the ALJ had impermissibly amended the General Counsel's complaint as to those three employees by finding that the "instant messaging chats about the spreadsheet and Bendel's termination" were protected conduct. J.A. 1615. Finally, it challenged the remedies of reinstatement and financial compensation that the ALJ had ordered.

The Board affirmed the ALJ's decision. As to Bendel, the Board largely adopted the ALJ's findings and noted that VIP's "shifting explanations for Bendel's discharge [were] additional evidence of animus towards his protected concerted activity." J.A. 1733 n.5. Regarding Dragoon, Noble, and Swift, the Board first "clarif[ied] that the relevant protected concerted activity that these employees engaged in and for which [VIP] discharged them is their online chat communications about the salary spreadsheet, workplace conditions, and frustration over Bendel's recent discharge." *Id.* It then "adopt[ed] the [ALJ's] pretext findings for the . . . reasons that the [ALJ] stated." *Id.*

The Board ordered several remedies, two of which VIP challenges here. First, it ordered VIP to offer reinstatement to the discharged employees, even though all four of them had already secured work elsewhere and had expressed no interest in returning to VIP. Second, it

ordered VIP to provide each employee with a make-whole financial remedy, including backpay and "reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings," consistent with the Board's earlier decision in *Thryv, Inc.* J.A. 1734 (citing 372 NLRB No. 22, 2022 WL 17974951 (Dec. 13, 2022), *vacated in part on other grounds*, 102 F.4th 727 (5th Cir. 2024)).

VIP petitions for our review, and the NLRB cross-applies for enforcement of its order. We have jurisdiction under 29 U.S.C. § 160(e)–(f).

III. Standard of Review

We will "uphold the judgment of the Board unless, upon reviewing the record as a whole, we conclude that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *DHSC, LLC v. NLRB*, 944 F.3d 934, 937 (D.C. Cir. 2019) (citation omitted). Evidence qualifies as "substantial" when "a reasonable mind might accept [it] as adequate to support a conclusion." *McLamb v. NLRB*, 141 F.4th 1308, 1315 (D.C. Cir. 2025) (cleaned up). Thus, "we may not displace the Board's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*." *Id.* at 1315–16 (cleaned up).

IV. Analysis

A. Christopher Bendel

The NLRA protects the right of employees "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. If an employer "interfere[s] with" that right, the employer has committed an unfair labor practice. *Id.* § 158. We and the NLRB have recognized that the NLRA's protections extend to salary sharing among employees. *See Banner Health Sys. v. NLRB*, 851 F.3d 35, 41 (D.C. Cir. 2017).

The parties agree that the NLRB's *Wright Line* framework — which applies "[w]hen an employer claims to have discharged an employee for legitimate reasons" — governs this case. *Windsor Redding Care Ctr., LLC v. NLRB*, 944 F.3d 294, 298 (D.C. Cir. 2019) (discussing *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)). That framework has two steps: "At step one, the General Counsel for the Board must make out a *prima facie* case that the employee's protected activity was a motivating factor in the employer's decision to fire her." *Id.* "If the General Counsel carries that burden, the analysis proceeds to step two, at which the burden of persuasion shifts to the employer to show that it would have taken the same action in the absence of the unlawful motive." *Id.* (cleaned up).

It is undisputed that the General Counsel has satisfied the first step of the *Wright Line* framework: VIP concedes that "Bendel's role in creating and disseminating the [salary] spreadsheet factored into his dismissal." Opening Br. 7. VIP instead focuses on the second *Wright Line* step, arguing that the company would have fired Bendel even if it had not discovered the spreadsheet. *See Windsor Redding*, 944 F.3d at 298.

In ruling against VIP and concluding that the company illegally discharged Bendel, the Board reasoned that "[t]he timing of the terminations and the lack of any credible evidence that [VIP] planned to discharge [Bendel] prior to [the day that management learned of the spreadsheet] supports the inference of discriminatory discharge." J.A. 1739.[3] The Board also "rel[ied] on [VIP's] shifting explanations for Bendel's discharge as . . . evidence of animus towards his protected concerted activity." J.A. 1733 n.5. Substantial evidence in the record supports the Board's determinations. *See DHSC*, 944 F.3d at 937. For example, the record reflects that Bendel was terminated within seventy minutes of management finding out about the spreadsheet; and before that day, management had

3. The Board did not view the timing of the spreadsheet's removal as "sufficient, on its own, to establish [VIP's] animus." J.A. 1733 n.5. But the Board did not, as VIP suggests, determine that the rapidity of the spreadsheet's removal could play no role in establishing animus. *Cf. RAV Truck & Trailer Repairs, Inc. v. NLRB*, 997 F.3d 314, 325 (D.C. Cir. 2021) ("Petitioner discharged [its employee] less than twenty-four hours after the Union filed its first petition. This timing supports an inference of unlawful motive.").

made no mention of firing Bendel and had planned to give him a new role in the restructured company.

VIP nevertheless insists that numerous lawful considerations motivated its decision to fire Bendel. But at bottom, VIP's arguments are unpersuasive: The Board reasonably rejected the company's version of events, and we review the Board's decision deferentially. *See DHSC*, 944 F.3d at 937 ("Substantial evidence is not a high bar.").

First, VIP claims that it did not fire Bendel for salary sharing, but rather because he used the "spreadsheet to disrupt the roll-out of the restructuring plan and to immunize himself against possible termination." Opening Br. 23–24. In other words, VIP argues that it objected only to the manner, timing, and motive behind Bendel's salary-sharing activity. But VIP cites no authority that permits an employer to terminate an employee for engaging in protected conduct in a disfavored manner or for disfavored reasons. Such a loophole would enable employers to evade the NLRA's requirements by simply framing their antipathy to lawful activity in terms of its potential for "disruption." VIP's disapproval of the circumstances that surrounded the creation and dissemination of the salary-sharing spreadsheet is just "another way of indicating that [Bendel] was terminated because he engaged in protected concerted activity." *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1203 (D.C. Cir. 2005).

Second, VIP claims that it fired Bendel for using VIP's information-technology "resources to create, disseminate and host documents for non-business purposes." Opening

Br. 26. To be sure, employers enjoy a circumscribed right to restrict NLRA-protected activity on company time and on certain company property. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798–99, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); *see also Caesars Ent.*, 368 NLRB No. 143, 2019 WL 6896714, at *8 (Dec. 16, 2019) (exploring *Republic Aviation*'s bearing on "virtual space[s]," like "email system[s]"). But here, the record does not support VIP's claim that it fired Bendel for such a transgression. The executives who discussed Bendel's alleged misconduct and decided to terminate him did not cite his use of VIP resources as a factor in their decision-making. In fact, Morgan "kind of chuckled" at how developers other than Bendel were modifying the spreadsheet. J.A. 1052–53. And Simard — the man who led the charge in firing Bendel — testified, as to the other developers' spreadsheet entries, "We didn't care. It [didn't] matter." J.A. 1053. Finally, VIP offered no evidence that it has ever disciplined any other employee for using its digital resources for purported "non-business purposes," and certainly not for such brief use on a single occasion.

Third, VIP claims that it fired Bendel for disseminating a "misleading and confusing document" — conduct that VIP implies falls outside the NLRA's protection. Opening Br. 13. Even if we assume that certain salary-sharing efforts might be so "maliciously untrue" as to lose their protected status, the Board determined that the spreadsheet at issue was not "materially inaccurate." J.A. 1740. Most notably, it found that the "100% underpaid" notation was "a statement of opinion, not an inaccurate statement of fact." J.A. 1740 n.13. VIP offers no basis

for us to overturn the Board's factual finding about the spreadsheet's accuracy.

Finally, VIP claims that it fired Bendel for his hostility toward the company, as demonstrated by his messages with his coworkers, his meetings with Graefe and McGinty, and his disclosure that he had received other job offers. But VIP fired Bendel before discovering his messages to coworkers, so those messages could not have factored into his termination. Moreover, even though Bendel's meetings with his managers about the restructuring went poorly, neither Graefe nor McGinty indicated in post-meeting discussions that they might fire Bendel. To the contrary, McGinty expressed his hope that, despite Bendel's dissatisfaction with the restructuring, "[Bendel] could play a role in planning it." S.J.A. 5. And Graefe accepted "some of the blame" for his poor discussion with Bendel. *Id.* Further, despite Bendel's disclosure that "he had offers from other companies," J.A. 851, VIP had planned to give Bendel a specific role within the restructured company.

In sum, substantial evidence supports the Board's determination that Bendel's termination was triggered by management's discovery of the salary-sharing spreadsheet. Within about ninety minutes of discovering the spreadsheet, VIP management disabled Bendel's account, fired him, and took down the spreadsheet. VIP's contrary arguments rely on an alternative view of the facts that the Board reasonably rejected.

B. Gordon Dragoon, Kaleb Noble, and Kestrel Swift

VIP argues that we should vacate the Board's findings in favor of Dragoon, Noble, and Swift because the Board "impermissibly found a violation based on uncharged conduct." Opening Br. 28. We agree.

"The Due Process Clause and the [Administrative Procedure Act] require that an agency setting a matter for hearing provide parties with adequate notice of the issues that [will] be considered, and ultimately resolved, at that hearing. This requirement ensures the parties' right to present rebuttal evidence on all matters decided at the hearing." *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005) (cleaned up); *see also* 5 U.S.C. §§ 554(b), 556(d). But "it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1199–200 (D.C. Cir. 2003) (cleaned up). Thus, where "the difference between the charge made and the violation found . . . is small," we will "not require . . . the General Counsel to re-try the case." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990).

Here, there are discrepancies between the conduct charged in the complaint, and the determinations made by both the ALJ and the Board. The General Counsel's complaint alleged that VIP fired Dragoon, Noble, and Swift for "engag[ing] in concerted activities with each

other and with other employees for the purposes of mutual aid and protection, *by creating and disseminating a spreadsheet where employees could view and share salary information.*" J.A. 1258 (emphasis added). The ALJ, however, found that VIP fired those three employees "for their instant messaging chats about the spreadsheet and Bendel's termination," noting that the messages were "inextricably linked to their roles in creating and disseminating the spreadsheet." J.A. 1739. The Board took it a step further: It "clarif[ied] that the relevant protected concerted activity that [Dragoon, Noble, and Swift] engaged in and for which [VIP] discharged them is their online chat communications about the salary spreadsheet, workplace conditions, and frustration over Bendel's recent discharge." J.A. 1733. The issue before us is whether the ALJ and the Board permissibly relied on factors that were "closely connected to the subject matter of the complaint," or instead unfairly considered issues for which VIP lacked adequate notice. *Casino Ready Mix*, 321 F.3d at 1200 (citation omitted).

As to the ALJ's ruling, we discern no error. The General Counsel's complaint alleged a violation based on VIP's response to the employees' creation and dissemination of a salary-sharing spreadsheet. The ALJ expanded the relevant conduct to encompass "instant messaging chats about the spreadsheet and Bendel's termination." J.A. 1739. In the ALJ's words, those chats were "inextricably linked to [Dragoon's, Noble's, and Swift's] roles in creating and disseminating the spreadsheet." *Id.* We agree. When a group of employees builds and circulates a spreadsheet, the participants necessarily will discuss that common

endeavor. And when management fires one member of the group for his actions related to that spreadsheet, his compatriots' discussion of what happened is an extension of the group's collaboration on the spreadsheet. The ALJ did not meaningfully change the scope of the protected conduct alleged in the complaint when he considered the employees' messages about the spreadsheet and Bendel's termination, which were closely connected to the creation and dissemination of the spreadsheet.

The Board, however, further enlarged the relevant conduct to include "online chat communications about . . . workplace conditions." J.A. 1733. In so doing, the Board stretched the charged conduct beyond its breaking point. "Workplace conditions" is a far-reaching category that can encompass anything from salaries to cafeteria options to interpersonal office dynamics. The employees' chats covered a wide range of topics, some of which do not appear "closely connected to the subject matter of the complaint" — *i.e.*, salary sharing. *Casino Ready Mix*, 321 F.3d at 1200 (citation omitted). The Board's invocation of those unrelated chats therefore violated VIP's due-process rights. *See id.* VIP did not have notice that its employees' discussion of workplace conditions might be considered protected conduct at the hearing, and the company therefore had no opportunity to rebut arguments to that effect. *See Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1012.

The NLRB's claims to the contrary come up short.[4] First, the NLRB argues that all the employees' "workplace conditions" messages, no matter how seemingly unrelated to their salary sharing, are "protected by association because [they] occur[ed] within the context of protected conduct." Oral Arg. 1:11:09–15. But the Board did not cite this reasoning below and therefore cannot raise it now. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also NLRB v. CNN Am., Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2017) (applying *Chenery* to the NLRB).

Second, the NLRB suggests that the only "workplace conditions" chats on which it relied were those that pertained to salaries, Bendel's firing, and other "closely connected" topics. But nothing in the record makes that clear, and the NLRB cannot rely on *post hoc* explanations to support its order. *See Chenery*, 318 U.S. at 87, 63 S.Ct. 454. In any event, even if the NLRB in fact relied only on "workplace conditions" chats connected to salary sharing, its failure to explain that reasoning when it rendered

4. At the threshold, the NLRB argues that VIP has not preserved its due-process argument: According to the NLRB, "VIP should have filed a motion for reconsideration to preserve its objection." Response Br. 41. But before the Board, VIP argued that the ALJ had "violated fundamental principles of due process" by treating the employees' "comments in the group chat" as protected. J.A. 1654–55. That was sufficient to preserve VIP's due-process claim for our review.

its decision was arbitrary and capricious. *Cf. Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1012.

We need not set aside a Board decision based on an error that did not prejudice the aggrieved party. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993). But here, the Board's reference to uncharged conduct was not harmless. In the proceedings below, VIP sought to refute the complaint's allegation that the company had terminated Dragoon, Noble, and Swift for "creating and disseminating a salary-sharing spreadsheet" by highlighting the employees' poor attitude, as evidenced by their unprofessional messages to each other. For example, VIP argued that those messages showed that the employees were "'on the verge of quitting' and making a 'pact' to take another developer with them, discussing 'purging' VIP computers, and collaborating with individuals outside of VIP" to harm the company. J.A. 1665–66.

Had VIP known that the Board might view some of those messages as protected statements about "workplace conditions," VIP likely would have tailored its defense to rely only on messages that the Board viewed as unprotected. Alternatively, had VIP known that the Board might view *all* the messages as protected conduct, VIP could "have expanded its defense [beyond the messages] to emphasize and corroborate the employees' disloyalty and imminent plans to quit." Opening Br. 29. Specifically, VIP says that it "would likely have called other employees as witnesses and introduced additional evidence (including

other chat transcripts)" that were not before the Board. *Id.* at 30.

The Board's eleventh-hour adoption of a "workplace conditions" theory thus "preclude[d VIP] from effectively presenting its case." *Midwest Terminals of Toledo Int'l, Inc. v. NLRB*, 783 F. App'x 1, 6 (D.C. Cir. 2019) (per curiam) (citation omitted); *see also Davis Supermarkets*, 2 F.3d at 1169 (indicating that prejudice may exist where the Board's reliance on uncharged conduct prevents a company from advancing a "significant defense"). Although the Board found that VIP's concerns about purging computers, disseminating inaccurate information, and using company technology were pretextual, it did not draw any such conclusions about the employees' discussions of quitting and of communicating with a former employee. New arguments and evidence related to such discussions therefore might have presented a significant defense to the Board's workplace-conditions theory.[5]

Because the Board prejudicially erred by citing "online chat communications about . . . workplace conditions" as protected conduct when the complaint did not charge such conduct, J.A. 1733, we vacate the Board's conclusion that VIP engaged in unfair labor practices as to Dragoon,

5. The NLRB also insists that VIP could not have suffered prejudice because "VIP had the opportunity to, and did, litigate claims that it fired [Dragoon, Noble, and Swift] for discussing the spreadsheet, their workplace conditions, and Bendel's termination." Response Br. 40. But that argument simply begs the question by not engaging at all with the meaning of "workplace conditions."

Noble, and Swift, and remand their cases for further consideration consistent with this opinion.

C. Bendel's Remedies

VIP contests the Board's order that the fired employees be reinstated and "made whole" financially. Because we remand for further proceedings as to Dragoon, Noble, and Swift, we address only the remedies awarded to Bendel. We grant the NLRB's motion to enforce as to Bendel because (1) the Board acted within its discretion when it ordered VIP to reinstate Bendel to his former position, and (2) VIP has not preserved its challenges to the make-whole financial remedy.

1. Reinstatement

In fashioning a remedy for an unlawful labor practice, the Board may "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). We will uphold a reinstatement remedy "unless the employer can show undue hardship." *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 957 (D.C. Cir. 1988). Such hardship exists, for example, where "compliance with the order is unduly economically burdensome" or where the order "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the" NLRA. *Id.* at 957–58 (citation omitted).

Here, VIP's challenge to the Board's order of reinstatement relies on a single Second Circuit case that

overturned a reinstatement remedy under circumstances that are readily distinguishable. *See KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d 291, 295–96 (2d Cir. 1996). In *KBI*, the court determined that a reinstatement order "would place an undue burden on the employer" if the to-be-reinstated employees had committed theft while at work. *Id.* at 292. The court remanded the case so that the agency could develop the factual record concerning whether the employees had committed the alleged thefts. *Id.* at 296. As the Second Circuit later explained, where an employee's discharge was motivated by both a "proper" reason (*e.g.*, alleged theft) and an "improper" reason (*e.g.*, illegal anti-union animus), the "proper" reason for discharge can sometimes "render[ ] reinstatement an undue burden." *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 122 (2d Cir. 2001).

VIP asserts that *KBI* governs because, "just as a security company [like KBI] should not have to reinstate a thief for risk of reputational harm, a software company should not have to restore [a] disloyal and untrustworthy engineer[ ]." Opening Br. 46 (cleaned up). But even if we assume that *KBI*'s reasoning is persuasive, VIP's argument fails because it is premised on a factual claim that the Board did not credit — *i.e.*, that Bendel was terminated, at least in part, for being "disloyal and untrustworthy." As explained *supra* section IV.A, the Board reasonably rejected VIP's arguments concerning Bendel's alleged disloyalty and untrustworthiness as entirely pretextual. Thus, unlike in *KBI*, VIP had no "proper reason" to terminate Bendel. *See G & T Terminal Packaging*, 246 F.3d at 122 (explaining that *KBI* applies

when an employee is discharged for "both a proper reason . . . and an improper reason").

VIP also argues that the remedy is improper because Bendel quickly found a new job and because the Board made no finding that Bendel desired reinstatement. That argument is unpersuasive because it fails to acknowledge the Board's goal of "effectuat[ing] the policies of the" NLRA. 29 U.S.C. § 160(c). VIP illegally terminated Bendel, and an offer of reinstatement directly addresses that wrong, even if Bendel ultimately declines to return to VIP. A contrary ruling would undermine the purpose of the NLRA, *see id.* § 151, by disadvantaging Bendel for seeking new employment. We "extend broad deference to the Board's choice of remedies," and we will "upset the Board's choice of how best to effectuate the policies of the" NLRA "only when a remedy is clearly inadequate." *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 254 (D.C. Cir. 1991) (cleaned up). VIP has not made the requisite showing here.

2. Make-Whole Financial Remedy

"One important policy goal [of the NLRA] is to achieve a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 38 (D.C. Cir. 2017) (cleaned up). To advance that goal, the Board often orders employers to "make whole" wrongfully discharged employees — *i.e.*, by giving them backpay and by reimbursing certain expenses, historically identified on a case-by-case basis. *See id.*; *see also NLRB v. Strong*,

393 U.S. 357, 359, 89 S.Ct. 541, 21 L.Ed.2d 546 (1969) ("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." (cleaned up)).

In its 2022 decision in *Thryv*, the Board adopted a new formulation of its make-whole remedy. *See* 2022 WL 17974951, at *9, *21 n.14. Prior to *Thryv*, in order to "ensure[ ] affected employees [were] made whole for the consequences of a respondent's unlawful conduct," the Board typically ordered the respondent to provide backpay; and it sometimes would consider whether the respondent should also compensate employees for other related costs, such as reasonable search-for-work expenses. *Id.* at *9–10. *Thryv* standardized the Board's practice by establishing "that in all cases in which our 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 *9 (emphasis in original). *Thryv* also explained that respondents should reimburse such "direct or foreseeable pecuniary harms" "without regard to a discriminatee's interim earnings." *Id.* at *9, *21 n.14. In other words, an employee must receive compensation for all direct or foreseeable pecuniary harms, even if his interim employment pays more than he would have earned in his former job — which means that the employee theoretically could end up better off than he would have been had he not been wrongfully terminated.

Citing *Thryv*, the ALJ ordered VIP to compensate Bendel "for all direct or foreseeable pecuniary harms that [he] suffered as a result of [VIP's] unfair labor practices, regardless of whether these expenses exceed interim earnings." J.A. 1740–41. VIP challenged this remedy in its exceptions to the ALJ's decision. In a section entitled, "The proposed remedies are unreasonably burdensome and punitive," VIP devoted a paragraph to the make-whole remedy. J.A. 1674, 1677. In full, that paragraph read:

> The ALJ appears to have ordered remedies that impermissibly exceed make-whole remedies. The [ALJ] proposes that VIP be ordered to compensate the charging parties "for any loss" of benefits and "for all direct or foreseeable pecuniary harms that they suffered as a result of Respondent's unfair labor practices, regardless of whether those expenses exceed interim earnings." If the ALJ proposes ordering compensation for a loss of net salary and benefits even if their net salary and benefits from their new employment exceeds what they would have received had they remained at VIP, that is not a "make whole" remedy authorized by the Act. It would provide the charging parties with an unwarranted and unauthorized windfall and impose a punitive and unlawful penalty on VIP that is inconsistent with the remedial purposes of the remedies authorized by the Act.

J.A. 1677 (cleaned up).

As this paragraph makes clear, VIP's argument below amounted to a claim that the four employees would receive a "windfall." *See King Soopers*, 859 F.3d at 39 (describing the contention that "a financial windfall" exists where "a claimant's interim earnings [from his new employment] equal or exceed the sum of his lost earnings and employment-search expense"). The Board rejected that argument and upheld the ALJ's make-whole remedy, ordering VIP to "compensate [the four employees] for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful termination of their employment, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings." J.A. 1734.

In its petition for review, VIP abandons the "windfall" argument that it advanced below and instead launches a broadside attack against the *Thryv* remedy. It claims that the "expansive *Thryv* remedy is no longer an equitable 'make whole' remedy" but rather a form of "compensatory damages," which the NLRB supposedly lacks the statutory authority to award. Opening Br. 49. To support that assertion, VIP devotes eleven pages of briefing to arguments drawing on statutory language, legislative history, an analogy to Title VII, and the constitutional-avoidance doctrine.

VIP advanced none of those arguments below and therefore has not preserved its facial challenge to the *Thryv* remedy. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court . . . [absent] extraordinary

circumstances."). Under § 160(e), "the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal." *Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981). Applying that standard, we have consistently disclaimed jurisdiction when a party objects to a given action (*e.g.*, a remedy) before the Board and then presents a different objection to the same action before this court. *See, e.g.*, *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 372 (D.C. Cir. 2016) (distinguishing between an argument challenging the "validity of [a] presumption" and one challenging the "application of that presumption"); *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1254–55 (D.C. Cir. 2012); *Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1349 (D.C. Cir. 2004) ("[T]he company put forward [a] wholly distinct argument [below.]").

Before the Board, VIP advanced an argument that the remedy in this case provided Bendel with an unjustifiable "windfall." It did not mention "*Thryv*," "legislative history," "Title VII," or "constitutional avoidance" in any of its filings. In other words, VIP did "not challenge the Board's standard remedial language" from *Thryv*; "instead, it argue[d] that, for case-specific reasons, a particular remedy should not be imposed." *Logmet, LLC v. NLRB*, No. 21-1273, 2022 WL 15603866, at *1 (D.C. Cir. Oct. 28, 2022). VIP may not assert for the first time before this court that the Board's earlier decision in *Thryv* violates the NLRA. We lack authority under § 160(e) to consider that unpreserved argument.

Our dissenting colleague resists our straightforward application of § 160(e). In so doing, he relies heavily on a single case: *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085 (D.C. Cir. 2016). That decision took a generous approach to issue preservation, but it is not comparable to what happened here. In *Camelot Terrace*, the petitioner made arguments before the Board and before this court expressly challenging the Board's asserted authority to award "bargaining costs." *Id.* at 1090–91.

But here, as discussed, VIP did not alert the Board to any general challenge to the *Thryv* remedy and did not even mention *Thryv* in its Board filings. Even if VIP characterized the specific remedy in this case as "unreasonably burdensome and punitive" and "impermissibly exce[ssive]" — as our dissenting colleague emphasizes — that did not preserve a facial challenge to the *Thryv* remedy. VIP simply did not "put the Board on notice that the [*Thryv*] issue might be pursued on appeal." *Consol. Freightways*, 669 F.2d at 794.

In our view, other cases are more on point than *Camelot Terrace*. For example, in *Advancepierre Foods, Inc. v. NLRB*, we held that we lacked jurisdiction over the petitioner's "frontal attack on Board precedent" where the petitioner had not "challenge[d that precedent] before the Board" but had instead focused on case-specific, fact-bound issues. 966 F.3d 813, 819 (D.C. Cir. 2020); *see also id.* ("Because AdvancePierre's frontal attack on Board precedent was never made to the Board and extraordinary circumstances do not excuse its failure, we cannot

reach this argument.").[6] And in *Enterprise Leasing Co. of Florida v. NLRB*, we disclaimed jurisdiction over the argument that a type of remedy was categorically "impermissibly punitive or otherwise unlawful" where the petitioner previously had pressed only a fact-bound challenge to a particular application of that remedy (*i.e.*, contesting "the *dates* of its . . . obligations" under the remedy). 831 F.3d 534, 550–51 (D.C. Cir. 2016) (emphasis added).[7]

6. The dissent argues that *Advancepierre* is off point because the petitioner there "had implicitly" affirmed the Board precedent that it later challenged in this court. Dissenting Op. 713 n.47. Though *Advancepierre* observed in a footnote the petitioner's prior "support of the ALJ's decision applying [the Board precedent at issue]," it did not emphasize, or rest its holding on, that observation. 966 F.3d at 819 n.6. Instead, *Advancepierre* explained that the petitioner had only "made passing reference" to its unpreserved appellate argument before the Board, *id.* — the exact basis on which the dissent here proposes to hold VIP's appellate argument preserved.

7. In critiquing our reliance on *Enterprise Leasing*, the dissent focuses on an inapposite portion of that opinion addressing the petitioner's exceptions to the ALJ's decision. That discussion was distinct from *Enterprise Leasing*'s holding, which turned instead on the petitioner's attempt to press in this court a categorical, facial objection to the remedy imposed when it had not made any such objection before the Board in response to the "General Counsel's exceptions that first requested" the remedy. 831 F.3d at 550–51.

3. Constitutional Challenge to the Make-Whole Remedy

In its petition for review, VIP also argues that *Thryv*'s formulation of the required remedy treats the underlying dispute as a private-rights claim, which, under the Seventh Amendment, may be addressed only by Article III courts. *See SEC v. Jarkesy*, 603 U.S. 109, 127–28, 144 S.Ct. 2117, 219 L.Ed.2d 650 (2024). We lack jurisdiction to resolve this unpreserved challenge — even VIP concedes that it "did not directly raise" this argument before the Board. Opening Br. 54. We are unconvinced by VIP's contention that *Jarkesy* constitutes an "intervening change in the law" that excuses its failure to preserve its claim. *Id.* at 54–55; *see also Stoiber v. SEC*, 161 F.3d 745, 754 (D.C. Cir. 1998) ("The failure to raise an issue in a prior forum is excusable when due to an intervening change in the law . . . ."). The Supreme Court decided *Jarkesy* in June 2024, and the Board did not issue its opinion below until November 2024. Thus, VIP could have brought *Jarkesy* to the Board's attention as supplemental authority while the case was pending, or VIP could have moved for reconsideration or rehearing based on *Jarkesy*. *See* 29 C.F.R. §§ 102.6, 102.48 (2024). VIP's failure to do so renders us "jurisdictionally barred from considering" the argument now. *NLRB v. Chipotle Servs., LLC*, 849 F.3d 1161, 1162 & n.3 (8th Cir. 2017).

VIP also contends that we should forgive its failure to raise a Seventh Amendment challenge below because doing so "would [have been] futile because of certainty of an adverse decision." *Randolph-Sheppard Vendors of Am.*

v. Weinberger, 795 F.2d 90, 105 (D.C. Cir. 1986) (cleaned up). But futility is a high bar, and VIP fails to identify "a very clearly articulated agency position" applying *Jarkesy*'s holding in the present context. *KPMG, LLP v. SEC*, 289 F.3d 109, 118 (D.C. Cir. 2002). We thus cannot consider VIP's Seventh Amendment argument. *See* 29 U.S.C. § 160(e).

* * *

For the foregoing reasons, we deny VIP's petition for review and grant the NLRB's cross-application for enforcement as to employee Christopher Bendel. We grant VIP's petition for review and deny the NLRB's cross-application for enforcement as to employees Gordon Dragoon, Kaleb Noble, and Kestrel Swift. We remand for further proceedings consistent with this opinion.

So ordered.

WALKER, *Circuit Judge*, concurring in part and dissenting in part:

The National Labor Relations Board concluded that Vermont Information Processing unlawfully fired Christopher Bendel for engaging in protected concerted activity. The NLRB's remedy included compensation for "direct or foreseeable pecuniary harms incurred . . ., including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings."[1] VIP argues the NLRB does not have the statutory authority to make that award. I agree and would vacate that part of the NLRB's order.

I. The Pecuniary-Harms Remedy Exceeds the NLRB's Remedial Authority Under § 10(c)

A. NLRB Remedies After *Thryv*

Before 2022, the NLRB's remedies typically centered on reinstatement and backpay. The Supreme Court has made clear that, in this context, those are equitable remedies.[2]

---

1. JA 1734.

2. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984) (describing backpay awards under the National Labor Relations Act as "equitable"); *Curtis v. Loether*, 415 U.S. 189, 197, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) ("In Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution.");

Then, in 2022, the NLRB decided *Thryv, Inc*. It announced that the standard make-whole remedy going forward would include compensation "for all direct or foreseeable pecuniary harms suffered as a result of [an] unfair labor practice."[3]

Thryv gave examples of what these harms might include: "interest and late fees on credit cards, or penalties if [an employee] must make early withdrawals from her retirement account in order to cover her living expenses," loss of the employee's car or home "if she is unable to make loan or mortgage payments," and "increased transportation or childcare costs."[4]

In all, the "pecuniary harms" category appears to function as a catch-all to compensate employees for any extra expenses they may incur due to the loss of a job and paycheck. If the employee was unable to make credit-card payments, the employer is responsible for the late fees. If the employee loses a home or car for the same reason, the employer must pay whatever it takes to compensate for those losses.

---

see also Bowen v. Massachusetts, 487 U.S. 879, 893, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (describing "an order providing for the reinstatement of an employee with backpay" as "an equitable action for specific relief"). *But cf. infra*, note 12.

3. 372 NLRB No. 22, slip op. at 13, 2022 WL 17974951 (Dec. 13, 2022).

4. *Id.* at 9 (quoting *Voorhees Care & Rehabilitation Center*, 371 NLRB No. 22, slip op. at 4 n.14, 2021 WL 3812220 (2021)).

Appendix A

Thryv remedies differ from the NLRB's traditional remedies in an important formal way. Whereas the traditional remedies are equitable, *Thryv* remedies require the employer to pay legal damages.

Let's unpack that, beginning with a classic case that awarded an equitable remedy. Zehmer contracted to sell a farm to Lucy. Zehmer breached. The court did not order Zehmer to pay damages, which would be a legal remedy. Instead, the court ordered Zehmer to sell Lucy the farm — an equitable remedy.[5]

In contrast, *Thryv* authorizes a version of consequential damages.[6] Here again, consider a classic case. When Baxendale delayed the reopening of Hadley's mill by failing to deliver an essential crankshaft, Baxendale was liable for damages that either arose naturally from the breach in the ordinary course of events or were reasonably within both parties' contemplation at the time

5. *See Lucy v. Zehmer*, 196 Va. 493, 504, 84 S.E.2d 516 (1954) ("generally, where a contract is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it").

6. *See 3484, Inc. v. NLRB*, 137 F.4th 1093, 1121 (10th Cir. 2025) (Eid, J., concurring in part and dissenting in part) ("Congress has never authorized the Board to award . . . tort-like legal damages"); *id.* (calling the standard *Thryv* remedy "an award of compensatory and consequential damages" regardless of "how the Board labels it").

of contracting.[7] The case stands for the proposition that in some situations a plaintiff can recover for "direct and foreseeable" harms — "a quintessential form of legal damages."[8]

In today's case, the NLRB ordered VIP to reinstate Christopher Bendel and give him backpay — equitable relief long understood to be authorized by the National Labor Relations Act. But the NLRB *also* ordered VIP to pay Christopher Bendel "for any other direct or foreseeable pecuniary harms incurred."[9] That *Thryv* award converted the NLRA's equitable remedial scheme into a general compensatory-damages regime.

B. The Scope of § 10(c)'s Remedial Grant

By passing the National Labor Relations Act, "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."[10] On the contrary, § 10(c) defines the NLRB's remedial authority in familiar equitable terms.

---

7. *Hadley v. Baxendale*, 9 Exch. 341 (Eng. 1854); *see also Remedy*, Black's Law Dictionary (12th ed. 2024) (describing an award of damages as the typical legal remedy).

8. *Trader Joe's Co. v. NLRB*, 167 F.4th 766, 801–02 (5th Cir. 2026) (Oldham, J., dissenting).

9. JA 1734.

10. *UAW-CIO v. Russell*, 356 U.S. 634, 643, 78 S.Ct. 932, 2 L.Ed.2d 1030 (1958).

Section 10(c) provides that if the NLRB finds that a person "has engaged in or is engaging in [an] unfair labor practice," the NLRB "**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.**"[11]

For four reasons — and a fifth if you look to legislative history — § 10(c) does not authorize compensatory relief for other losses flowing from an employer's wrongdoing.

First, the text refers only to equitable relief. It lists two examples of the "affirmative action" the NLRB may take: reinstatement and backpay, both classic forms of equitable relief according to Supreme Court and D.C. Circuit precedent.[12] It does not mention legal relief,

11. 29 U.S.C. § 160(b), (c) (emphases added).

12. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187–88, 188 n.6, 61 S.Ct. 845, 85 L.Ed. 1271 (1941) (implying that reinstatement is a form of "equitable relief"); *Hubbard v. EPA*, 949 F.2d 453, 462–66 (D.C. Cir. 1991) (treating reinstatement and backpay as equitable relief restoring the position and its pay); *see also Curtis*, 415 U.S. at 197, 94 S.Ct. 1005 (treating "backpay as an integral part of an equitable remedy" at least in the context of Title VII).

I do not mean to suggest that all restitutionary remedies, like backpay, are by their very nature equitable. *Cf. id.* (calling backpay "a form of restitution"). On the contrary, the Supreme Court has rightly rejected that. *See Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 212, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) ("[N]ot all relief falling under the rubric of

whether damages or otherwise. So although these two specific equitable remedies do not *exhaust* the NLRB's remedial tools,[13] they illustrate the exclusively equitable character of the broader category.[14]

Second, the rest of § 10(c) confirms the broader category's equitable character. Cease-and-desist orders function like injunctions.[15] Affirmative-action remedies

---

restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity."). So if we were writing on a clean slate, we might look to the type of restitutionary remedy at issue to determine whether it is legal or equitable. *See* Samuel L. Bray, *The System of Equitable Remedies,* 63 UCLA L. Rev. 530, 541–42 (2016); John H. Langbein, *What ERISA Means by "Equitable,"* 103 Colum. L. Rev. 1317, 1357–58 (2003) (discussing subrogation); *Restatement (Third) of Restitution and Unjust Enrichment* § 4 cmt. d (Am. L. Inst. 2011) (discussing methods for distinguishing legal and equitable restitution).

Here, though, we do not write on a clean slate. In the context of the NLRA, the Supreme Court has already decided that backpay is an equitable remedy. *See Sure-Tan, Inc.*, 467 U.S. at 901, 104 S.Ct. 2803. That is enough for today.

13. *See Phelps Dodge*, 313 U.S. at 188–89, 61 S.Ct. 845 (a list that begins with "including" is illustrative, not limited to the items in the list).

14. *See, e.g., United States v. Brock*, 94 F.4th 39, 57 (D.C. Cir. 2024) (an "illustrative list *illustrates* what type of conduct is encompassed by the definition, and so other unlisted forms of conduct must fit that same mold").

15. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 65 S.Ct. 478, 89 L.Ed. 661 (1945).

likewise operate like mandatory injunctions.[16] And the NLRB's remedial authority is discretionary[17] — a traditional feature of equity.[18] So taken together, the statute authorizes equitable, restorative relief: remedies that "recreate the conditions and relationships that would have been had there been no unfair labor practice." [19]

Third, the structure of § 10(c) confirms the same limit by barring only reinstatement and backpay for employees "suspended or discharged for cause."[20] The statute would not bar only those two remedies if an employee could be denied backpay but recover potentially larger

16. *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 177 n.4, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973). Though mandamus, a legal remedy, may also order actors to take certain actions, the Supreme Court has indicated that the NLRA's affirmative-action remedies are equitable remedies. *See Phelps Dodge*, 313 U.S. at 187–88, 188 n.6, 61 S.Ct. 845.

17. *Phelps Dodge*, 313 U.S. at 197–98, 61 S.Ct. 845.

18. *American Federation of Labor v. Watson*, 327 U.S. 582, 593, 66 S.Ct. 761, 90 L.Ed. 873 (1946) ("The power of a court of equity to act is a discretionary one.").

19. *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1092–93 (D.C. Cir. 2016) (quoting *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *see also Phelps Dodge*, 313 U.S. at 194, 61 S.Ct. 845 ("compensation for the loss of wages" and "offers of employment to the victims of discrimination" serve to "restor[e] . . . the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination").

20. 29 U.S.C. § 160(c).

sums through catch-all compensation for all foreseeable downstream financial harms.

Fourth, this approach better accords with the Supreme Court's understanding of the remedial provision in Title VII, and the Court interprets that provision in line with § 10(c) of the NLRA.[21] Even Title VII's broader language — authorizing reinstatement, backpay, "or any other equitable relief" — did not permit compensatory damages until Congress amended the statute in 1991 to authorize them expressly.[22] If that broader statute did not authorize compensatory damages, neither does this narrower one.[23]

Fifth, for any die-hards who still care a lot about legislative history, an early draft of the NLRA authorized the NLRB "to take affirmative action, or to pay damages, or to reinstate employees."[24] Then, during committee hearings, critics argued that allowing the NLRB to award

---

21. *See, e.g., Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001).

22. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a); *United States v. Burke*, 504 U.S. 229, 238, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) ("Title VII [as applied prior to the Civil Rights Act of 1991] does not allow awards for compensatory or punitive damages").

23. *See Franks*, 424 U.S. at 769 n.29, 96 S.Ct. 1251 ("To the extent that there is a difference in the wording of the respective provisions, § 706(g) grants, if anything, broader discretionary powers than those granted the National Labor Relations Board.").

24. S. 2926, 73d Cong. § 205(c) (as introduced March 1, 1934).

damages without defined standards raised "due process" concerns.[25] Finally, Congress enacted the statute with the monetary "damages" authority omitted.

* * *

As the Supreme Court explained long ago, the NLRA does not authorize the NLRB "to award full compensatory damages for injuries caused by wrongful conduct."[26] Rather, Congress drew a line between equitable and legal relief, and it opted for only the former.[27] By authorizing the NLRB to issue both, *Thryv* crosses the boundary that Congress drew — a conclusion that the Third Circuit reached in *Starbucks*, that the Fifth Circuit reached in

25. *To Create a National Labor Board: Hearing on S. 2926 Before the Senate Committee on Education & Labor*, 73d Cong. 362 (1934) (statement of James A. Emery) ("The Board may not only issue an order in the light of the complaint, it may do many more things, it may assess and require the employer to pay damages for which no rule is established; require the reinstatement of employees, or require any act which in its opinion achieves substantial justice, whatever that may be. The Board determines that. If that be due process of law, God save us.").

26. *UAW-CIO*, 356 U.S. at 643, 78 S.Ct. 932.

27. If Congress had authorized the NLRB to award legal damages, the Seventh Amendment would require a jury trial for claims seeking legal relief that are analogous to traditional common-law actions. *See SEC v. Jarkesy*, 603 U.S. 109, 144 S. Ct. 2117, 2130, 219 L.Ed.2d 650 (2024). But VIP forfeited its argument that a *Thryv* remedy violates the Seventh Amendment by not raising that argument before the NLRB.

Hiran Management, that Judge Eid reached in *3484*, and that Judge Oldham reached in *Trader Joe's*.[28]

B. *King Soopers*

In *King Soopers, Inc. v. NLRB*, this court held that the NLRB can restore employees "as nearly as possible" to the position they would have occupied absent the unfair labor practice by reimbursing them for search-for-work and interim-employment costs.[29] There, the costs arose directly from the employee's duty to mitigate lost wages,[30] and the NLRB justified their reimbursement by analogy to other employment-related losses that it has long compensated separately from backpay, such as medical expenses and retirement contributions.[31] *King Soopers* concluded that when those expenses represent a distinct

---

28. *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 95–97 (3d Cir. 2024); *Hiran Management., Inc. v. NLRB*, 157 F.4th 719, 725–29 (5th Cir. 2025); *see also 3484, Inc.*, 137 F.4th at 1125–27 (Eid, J., concurring in part and dissenting in part); *Trader Joe's*, 167 F.4th at 801–02 (Oldham, J., dissenting) ("The *Thryv* remedy is unlawful. . . . Foreseeable pecuniary harms are a quintessential form of legal damages."); *but see International Union of Operating Engineers, Stationary Engineers, Local 39 v. NLRB*, 155 F.4th 1023, 1052–53 (9th Cir. 2025) (upholding the NLRB's authority to award foreseeable pecuniary harms when those awards are limited to make-whole remedies).

29. 859 F.3d 23, 36–39 (D.C. Cir. 2017) (quoting *Phelps Dodge*, 313 U.S. at 194, 61 S.Ct. 845).

30. *Id.* at 37.

31. *Id.* at 38.

injury caused by the unlawful discharge, reimbursing them can permissibly produce an award that exceeds the backpay calculation.[32]

Whatever may be the faults of the NLRB's unprecedented[33] expansion of make-whole relief in *King Soopers*,[34] that expansion at least confined the remedy to a limited category of mitigation-related expenses tied to the employment contract. When this court reviewed that decision, it had no occasion to decide whether the NLRB can award broader categories of pecuniary damages.

* * *

To put it all together, an award for pecuniary harms is a compensatory-damages award. Congress did not authorize the NLRB to order those awards. This court did not say otherwise in *King Soopers*. We should say so now and hold that the NLRB exceeded its authority when

---

32. *Id.* at 38–39.

33. *See King Soopers, Inc.*, 364 NLRB 1153, 1160 (2016) ("we adopt a new policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest").

34. *See id.* at 1166 (Miscimarra, dissenting) ("my colleagues' new method for calculating backpay exceeds our statutory authority"); *id.* at 1167 ("the changes adopted by my colleagues may produce a substantial increase in contentious disputes over employment/search expenses, and these disputes, in *all* cases, are likely to delay the availability of *any* monetary remedies for employee-claimants").

it ordered VIP to compensate Christopher Bendel "for all direct or foreseeable pecuniary harms."

II. VIP's Challenge to the NLRB's Statutory Remedial Authority Is Properly Before Us

In the majority's view, VIP did not argue before the NLRB that a *Thryv* remedy exceeds the NLRB's statutory authority. On that basis, the majority declines to address the merits of VIP's challenge. I disagree. VIP "specifically objected in its exceptions" to the *Thryv* remedy.[35]

In its exceptions, VIP objected to the ALJ's proposal to award compensation "for all direct or foreseeable pecuniary harms . . . regardless of whether those expenses exceed interim earnings."[36] Not only does that language precisely describe the *Thryv* remedy, it quotes a part of the ALJ's proposal that followed this language with a citation to *Thryv* itself.[37] In addition, VIP's "brief in support of its exceptions adequately put the Board on notice" of

35. Parsippany Hotel Management Co. v. NLRB, 99 F.3d 413, 418 (D.C. Cir. 1996) (cleaned up); see also DHL Express, Inc. v. NLRB, 813 F.3d 365, 372 (D.C. Cir. 2016) (explaining that that is enough to preserve an issue for appeal).

36. JA 1677.

37. True, VIP didn't state that it was challenging the *Thryv* decision by name. But that does not matter. Preservation under Section 10(e) turns on notice of the *objection*, not on citation to the *precedent* the NLRB would likely rely on to defend the award.

its objection.[38] That brief includes a section titled "**The proposed remedies are unreasonably burdensome and punitive.**"[39] With VIP's specific objection to "**foreseeable pecuniary harms**" under a section heading objecting to "**punitive**" remedies, VIP put the NLRB on notice of its objection to the *Thryv* remedy.[40]

To be sure, VIP's examples focused on the risk of a windfall — pointing to the possibility that backpay or retirement benefits could overcompensate employees who had already secured higher-paying jobs. But VIP's illustrations do not represent the full extent of VIP's argument.[41] That argument goes like this: The proposed award exceeded the NLRB's statutory authority (to award equitable relief) because the proposed remedies are "punitive" (legal damages language), and an award of "foreseeable pecuniary harms" (more damages language) is part of the problem.[42]

---

38. *Parsippany Hotel*, 99 F.3d at 418 (cleaned up); *see also DHL Express*, 813 F.3d at 372.

39. JA 1623, 1674.

40. *Consolidated Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981) (requiring only that the objection be "evident by the context in which it is raised").

41. JA 1677 n.25 ("As one example . . .").

42. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12, 61 S.Ct. 77, 85 L.Ed. 6 (1940) ("We have said that the power to command affirmative action is remedial, not punitive.").

Would the question be easier if VIP had referred expressly to *Thryv*? I suppose. But the NLRB "received adequate notice of the basis for the objection."[43] And our court has not required a party to frame objections with exacting detail, technical precision, or citations to the precise precedent that it wants reconsidered.[44]

VIP's argument was no less developed than the argument that was preserved in *Camelot Terrace, Inc. v. NLRB*. In that case, a heading said, "The Board Lacks Authority to Award Litigation Expenses and Bargaining Costs."[45] This court held that the heading adequately alerted the NLRB to a challenge to its statutory remedial authority, even though the supporting argument was "no paragon of precision or detail."[46] So too today.[47]

---

43. *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090 (D.C. Cir. 2016) (quoting *Alwin Manufacturing Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999)).

44. *See, e.g., id.* at 1090–91.

45. *Id.* at 1091 (emphasis omitted).

46. *Id.* at 1090–91 (cleaned up).

47. The majority compares this to two other cases — one that is truly "not comparable," and another that favors VIP.

In *Advancepierre Foods, Inc. v. NLRB*, the ALJ had applied the precedent in question (Mohawk) in the petitioner's favor and the petitioner accepted that framework before the NLRB — "support[ing]. . . the ALJ's decision applying Mohawk in its favor." 966 F.3d 813, 819 n.6 (D.C. Cir. 2020). It makes sense that this court would not then entertain the petitioner's facial challenge to *Mohawk* after the petitioner had implicitly affirmed that decision

III. VIP's Objection Is Ripe

By awarding monetary relief that exceeds interim earnings, the NLRB's order imposes a final, binding obligation on VIP.[48] In response, VIP makes a purely legal argument: Section 10(c) does not permit the NLRB to impose an award that exceeds its equitable make-whole

---

before the NLRB and won on that point. Cf. New *Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (discussing the rule of judicial estoppel which "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase" (cleaned up)). VIP has never, in any way, argued that *Thryv* applies favorably to its situation. It challenged its foundational premise — that the NLRB has authority to award pecuniary harms — from the start.

In *Enterprise Leasing Co. of Florida v. NLRB*, the court explained Enterprise's failure this way: "Nowhere in any of its filings in the proceedings below did Enterprise argue that it was impermissibly punitive or otherwise unlawful for the Board to prevent Enterprise from collecting from its employees the dues it had failed to pay to the Union." 831 F.3d 534, 550 (D.C. Cir. 2016). The "recoupment bar" Enterprise challenged there was not even a part of the ALJ's proposed remedy that Enterprise challenged before the NLRB. *Id.* Every part of that description cuts the other way here. By the very logic of *Enterprise Leasing*, VIP put the NLRB on notice of its objection to the *Thryv* remedy.

48. JA 1734 (ordering VIP to pay employees for "any other direct or foreseeable pecuniary harms . . . regardless of whether these expenses exceed interim earnings").

authority. That purely legal challenge to a final, binding order is ripe for review.[49]

True, we don't yet know the *amount* of VIP's liability. But the NLRB has *already* imposed the disputed obligation as part of its final order — to pay Christopher Bendel, among other things, "for any other direct or foreseeable pecuniary harms."[50] In that situation, when a remedy is "objectionable on its face,"[51] courts routinely review such challenges to the NLRB's remedial authority on direct petition.[52] And we should do so here, where the issue is not how much VIP will ultimately owe, but whether the Act authorizes the NLRB to impose this category of

---

49. *Natural Resources Defense Council v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011) ("because the Guidance is final, and because the issue raised by [the petitioner] is purely legal, the question before us is fit for judicial review").

50. JA 1734.

51. *Scepter, Inc. v. NLRB*, 448 F.3d 388, 391 (D.C. Cir. 2006).

52. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12–13, 61 S.Ct. 77, 85 L.Ed. 6 (1940) (reviewing NLRB authority to impose a remedy requiring payments to governmental agencies); *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1089–91 (D.C. Cir. 2016) (reviewing authority to impose bargaining-costs remedy without awaiting compliance).

Notwithstanding my disagreement with the Court's conclusion that review should await compliance, I agree that VIP must be permitted to renew the challenge in a later petition for review if the NLRB enforces relief that exceeds the *King Soopers* benchmark. We cannot tell VIP that its claim is premature now if we would call it forfeited later.

relief at all — a question no future factual development can affect.

IV. Conclusion

The NLRB ordered recovery for "any . . . direct or foreseeable pecuniary harms."[53] Because that provides for compensatory damages unauthorized by § 10(c) of the NLRA, I respectfully dissent from the majority's decision not to vacate that portion of the order.[54]

---

53. JA 1734.

54. Though I think the question is close, this court's NLRA precedents require us to deny VIP's challenge to the NLRB's conclusion that Christopher Bendel was unlawfully fired. So I join the majority's decision to deny that part of VIP's petition. I also join the majority's decision to vacate the NLRB's award for the three other employees fired by VIP.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-1360
Consolidated with 24-1375
NLRB-03CA301055

VERMONT INFORMATION PROCESSING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

CHRISTOPHER BENDEL, *et al.*,

Intervenors.

Filed August 12, 2026

ORDER

BEFORE: Millett, Walker, and Pan, Circuit Judges

Upon consideration of the proposed judgment submitted to the court on June 9, 2026, by the National Labor Relations Board, it is

ORDERED that the National Labor Relations Board's proposed judgment be adopted as the judgment of the court, replacing the judgment entered on May 26, 2026.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/_____
Daniel J. Reidy
Deputy Clerk

APPENDIX C — JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24-1360, 24-1375
Board Case No. 03-CA-301055

VERMONT INFORMATION PROCESSING, INC.,

Petitioner /Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent /Cross-Petitioner,

CHRISTOPHER BENDEL, GORDON DRAGOON,
KALEB NOBLE, AND KESTREL SWIFT,

Intervenors for Respondent/Cross-Petitioner.

Filed August 12, 2026

JUDGMENT

Before: Millett, Walker and Pan, *Circuit Judges*.

THIS CAUSE came to be heard upon a petition filed by Vermont Information Processing, Inc. to review an Order of the National Labor Relations Board dated

Appendix C

November 5, 2024, in Case No. 03-CA-301055, reported at 373 NLRB No. 131, and upon a cross-application for enforcement filed by the National Labor Relations Board to enforce said Order. The Court heard argument of the parties and has considered the briefs and agency record filed in this cause. On May 26, 2026, the Court handed down its opinion granting in part the petition of Vermont Information Processing, Inc., and granting in part the National Labor Relations Board's cross-petition for enforcement. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the District of Columbia Circuit that Petitioner/Cross-Respondent Vermont Information Processing, Inc., its officers, agents, successors, and assigns, shall abide by the said Order as modified by the Court. (See Attached Order and Appendix).

/s/_____
Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/_____
Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/_____
Judge, United States Court of Appeals
for the District of Columbia Circuit

ENTERED:

Appendix C

VERMONT INFORMATION PROCESSING, INC.

v.

NATIONAL LABOR RELATIONS BOARD

ORDER

Vermont Information Processing, Inc., Colchester, Vermont, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending or otherwise discriminating against any employee for engaging in protected concerted activity.

(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 National Labor Relations Act.

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

(a) Within 14 days from the date of the Court's Order, offer Christopher Bendel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Christopher Bendel whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the Administrative Law Judge's decision as amended by the Board.

(c) Compensate Christopher Bendel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, 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.

(d) File with the Regional Director for Region 3 a copy of the corresponding W-2 form(s) for Christopher Bendel reflecting the backpay award as set forth in the remedy section of the Administrative Law Judge's decision as amended by the Board.

(e) Within 14 days from the date of the Court's Order, remove from its files any reference to the unlawful discharge of Christopher Bendel, and within 3 days thereafter notify Bendel in writing that this has been done and that his discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director for

Region 3 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 the Board's Order.

(g) Post at its facility in Colchester, Vermont, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 3, 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

1. If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-l9) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees has 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]."

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, andfor 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 notice is 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 February 16, 2022.

(f) Within 21 days after service by Region 3, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Mandate shall issue forthwith.

ENTERED:

Appendix C

APPENDIX

Notice To Employees

POSTED PURSUANT TO A JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
ENFORCING AN 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 discharge, suspend or otherwise discriminate against any of you for engaging in protected concerted activity.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We Will, within 14 days from the date of this Order, offer Christopher Bendel full reinstatement to his former job or, if that job no longer exists, to a substantially

equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

WE WILL compensate Bendel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 3, 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 Bendel.

WE WILL file with the Regional Director for Region 3, 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 the corresponding W-2 form(s) for Bendel reflecting the backpay award.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Bendel's unlawful discharge and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

VERMONT INFORMATION PROCESSING, INC.

APPENDIX D — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, FILED NOVEMBER 5, 2024

NATIONAL LABOR RELATIONS BOARD

Case 03-CA-301055

VERMONT INFORMATION PROCESSING, INC.

AND

CHRISTOPHER BENDEL AND
GORDON DRAGOON AND KALEB NOBLE
AND KESTREL SWIFT

November 5, 2024

DECISION AND ORDER

By Chairman McFerran and
Members Prouty and Wilcox

On July 31, 2023, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Parties each filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

1. The Respondent has requested oral argument. The request is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Appendix D

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings,[3]

---

2. The General Counsel moves to strike the Respondent's brief in support of its exceptions on the ground that it fails to comply with the Board's Rules and Regulations in that it does not contain references to the specific exceptions to which its arguments relate. Although the Respondent's brief does not comply in all particulars with Sec. 102.46(a)(2), we accept it because the Respondent's brief is otherwise substantially compliant. See, e.g., *Michael Cetta, Inc. d/b/a Sparks Restaurant*, 366 NLRB No. 97, slip op. at 1 fn. 2 (2018), enfd. 805 Fed.Appx. 2 (D.C. Cir. 2019).

3. We reject the Respondent's argument that the judge failed to adequately address a purported violation of his sequestration order. Specifically, the Respondent asserts that one or more discriminatees surreptitiously accessed the virtual hearing while Manager Chris McGinty testified on direct examination during the Respondent's case-in-chief. It was not (and is not) clear that any of the discriminatees did so. In any event, the judge acted within the bounds of his discretion when he ruled that, if any party were to recall the discriminatees to the stand, the judge would permit the Respondent to ask them whether they had violated the sequestration order, and, if they had, the judge would then decide upon an appropriate sanction. Ultimately, no party called these discriminatees to testify again. In finding no abuse of discretion, we emphasize that, under longstanding precedent, the Board permits discriminatees to be present during the course of the entire hearing except when other witnesses on behalf of the General Counsel or the charging party are testifying about events as to which the discriminatee will be expected to testify. See, e.g., *Greyhound Lines*, 319 NLRB 554, 554 (1995); *Unga Painting Corp.,* 237 NLRB 1306, 1308 (1978). Further, the Respondent has not demonstrated that the judge's ruling prejudiced its case.

findings,[4] and conclusions[5] and to adopt the recommended

4. 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. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

5. In analyzing the allegation that the Respondent unlawfully discharged Christopher Bendel, Gordon Dragoon, Kaleb Noble, and Kestrel Swift, the judge applied *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), citing *General Motors*, 369 NLRB No. 127 (2020). *General Motors* was subsequently overruled in *Lion Elastomers*, 372 NLRB No. 83 (2023), vacated and remanded 108 F.4th 252 (5th Cir. 2024). However, the parties here litigated this case under *Wright Line*, and no party argues that an alternative framework should be applied. The General Counsel is always free to proceed on a *Wright Line* theory of liability when challenging the legality of discipline or discharge, even where a violation might also be proven under *Lion Elastomers*. Here, the General Counsel has chosen to proceed under *Wright Line*, and there is no basis to require relitigation of the case under *Lion Elastomers*. Consequently, we affirm the judge's application of the *Wright Line* standard and adopt his findings of violations.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging employee Bendel for disseminating the salary spreadsheet, we also rely on the Respondent's shifting explanations for Bendel's discharge as additional evidence of

Appendix D

Order as modified.[6]

---

animus towards his protected concerted activity. We find it unnecessary to rely on the judge's finding that the Respondent's decision to take the salary spreadsheet down almost immediately is sufficient, on its own, to establish the Respondent's animus towards the employees who disseminated the salary spreadsheet.

In affirming the finding that the Respondent violated Sec. 8(a)(1) by discharging employees Dragoon, Noble, and Swift, we clarify that the relevant protected concerted activity that these employees engaged in and for which the Respondent discharged them is their online chat communications about the salary spreadsheet, workplace conditions, and frustration over Bendel's recent discharge.

We do not rely on any implication in the judge's decision that the Respondent's review of the employees' online discussions might have constituted unlawful surveillance, an allegation neither alleged in the complaint nor argued to the Board on exceptions. Nor do we rely on the judge's statement that the Respondent's failure to threaten to sue and to possibly criminally prosecute Dragoon, Noble and Swift for sabotaging its IT systems indicated that the Respondent was not genuinely concerned about sabotage. We adopt the judge's pretext finding for the other reasons that the judge stated.

6. Because the judge omitted a conclusions of law section from his decision, we have set forth the conclusions of law in full below. In addition, we amend the judge's recommended remedy as discussed below. We shall also modify the judge's recommended Order to conform to the violations found, to the Board's standard remedial language, and in accordance with *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022). We shall substitute a new notice to conform to the Order as modified.

Appendix D

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by discharging employees Christopher Bendel, Gordon Dragoon, Kaleb Noble, and Kestrel Swift because of their protected concerted activities.

3. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Amended Remedy

Although the judge properly recommended a remedy consistent with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), he did so using nonstandard language. In accordance with our decision in *Thryv*, the Respondent shall also compensate Christopher Bendel, Gordon Dragoon, Kaleb Noble, and Kestrel Swift for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful termination of their employment, 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 Medical Center*, 356 NLRB 6 (2010).[7]

ORDER

The National Labor Relations Board orders that the Respondent, Vermont Information Processing, Inc., Colchester, Vermont, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b), delete paragraphs 2(d) and (e), and reletter the subsequent paragraphs.

"(b) Make Christopher Bendel, Gordon Dragoon, Kaleb Noble, and Kestrel Swift whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision."

2. Substitute the following for what is currently paragraph 2(i), now relettered as 2(g).

7. For the reasons set forth in *Airgas USA, LLC*, 373 NLRB No. 102, slip op. at 1 fn. 2 (2024), the Board's decision in *Thryv* remains valid precedent.

"(g) Post at its facility in Colchester, Vermont, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 3, 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 employees by such means. Reasonable steps shall be

8. If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is 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 facility reopens and a substantial complement of employees has 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."

taken by the Respondent to ensure that the notice is 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 February 16, 2022."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 5, 2024

/s/
Lauren McFerran, Chairman

/s/
David M. Prouty, Member

/s/
Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Appendix D

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 the National Labor Relations Act 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 discharge, suspend or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Appendix D

WE WILL, within 14 days from the date of this Order, offer Christopher Bendel, Gordon Dragoon, Kaleb Noble, and Kestrel Swift full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Bendel, Dragoon, Noble, and Swift whole for any loss of earnings and other benefits resulting from their unlawful discharge, 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 discharges, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Bendel, Dragoon, Noble, and Swift for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 3, 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 Bendel, Dragoon, Noble, and Swift.

WE WILL file with the Regional Director for Region 3, 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 the corresponding W-2 form(s) for Bendel, Dragoon, Noble and Swift reflecting the backpay award.

Appendix D

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Bendel, Dragoon, Noble, and Swift and we will, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

VERMONT INFORMATION PROCESSING, INC.

The Board's decision can be found at https://www.nlrb.gov/case/03-CA-301055 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Abigail Snelling, Desmond D. Metzger, and *Caroline V. Wolkoff, Esqs. (on brief),* for the General Counsel.

Stephen D. Ellis and *Carl "Ott" Lindstrom, Esqs. (on brief) (Paul, Frank & Collins, P.C.*), of Burlington, Vermont, for the Respondent.

Claudine C. Safar and *Carly Rippel, Esqs. (Monaghan, Safar, Ducham, PLLC),* of Burlington, Vermont, for the Charging Parties.

Appendix D

DECISION

Statement of the Case

Arthur J. Amchan, Administrative Law Judge. This case was heard via Zoom video technology between June 12 and June 14, 2023. The Charging Parties' attorney filed the charge on their behalf on August 9 or 10, 2022. The General Counsel issued the complaint on January 31, 2023.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by terminating Christopher Bendel on February 16, 2022, and terminating Gordon Dragoon, Kaleb Noble, and Kestrel Swift on February 18, 2022.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Parties, I make the following

Findings of Fact

I. JURISDICTION

Respondent is a software development company located in Colchester, Vermont. It purchases and receives at that facility goods valued in excess of $50,000 directly from points outside of Vermont. 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.

Appendix D

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent, Vermont Information Processing (VIP), is located in Colchester, Vermont. It builds software and manages data for the beverage industry. Its customers include Anheuser-Busch, Molson, Coors, Heineken and Bacardi. VIP is 100 percent owned by its employees through an Employee Stock Option Plan (ESOP).

VIP hired Christopher Bendel in June 2018. At the time of his termination on February 16, 2022, Bendel was a senior software engineer III.[1] There is no credible evidence that Respondent had any plans to terminate Bendel before he circulated a spreadsheet on February 16, 2022. To the extent Respondent's evidence suggests otherwise, I discredit it.

Kaleb Noble and Kestrel Swift were hired by VIP on June 1, 2015. As of his termination Noble was a software engineer II. He had been seeking a salary increase and a promotion to level III (Tr. 134). Noble discussed his desire for a promotion with his Supervisor Sam Graefe several months prior to February 2022.

Swift and Gordon Dragoon were team leaders, software engineer III. VIP hired Dragoon in 2016. There is no credible evidence that Respondent planned to terminate any of the three before becoming aware on February 17, 2022, of an instant messaging chat in which

1. Software engineer III is a higher classification than software engineer II and generally comes with a higher salary.

they participated. To the extent Respondent's evidence suggests otherwise, I discredit it.

None of the four employees had been disciplined by VIP during their employment prior to February 16. All four had received salary increases and favorable performance reviews. VIP contends the four discriminatees (or at least Swift and Dragoon) were statutory supervisors excluded from the Act's protections. It bases this claim on the fact that several of them had input in hiring decisions. While they sat in on interviews and provided an assessment of an applicant's technical abilities, they did not make final hiring decisions, nor was their approval of a candidate determinative in the decision whether or not to hire (Tr. 259-260, 271-272, 347).

There is also no evidence that any of the discriminatees played any role in determining which applicants made it to the interview stage of the hiring process. Moreover, after the interview in which they participated, the applicant talked to a hiring manager. Thus, it is clear that the opinion of the discriminatees that an applicant was technically qualified did not necessarily result in the applicant being hired.

The two team leads, Dragoon and Swift, at times determined what specific task a member of their team would perform. There is no evidence that they had any role in determining which employees would be on which team or the general responsibilities of their team members. None of the alleged discriminatees played any role in Respondent's February 2022 plan to restructure its teams.

There is no evidence that any of them were consulted about the restructuring plan beforehand.

In mid-February 2022, VIP was preparing to embark on a reorganization of its product teams. The four alleged discriminatees, particularly Bendel, were unhappy with the plan. Bendel was not going to be assigned to a specific product team but was to be on a team that would provide service to the product teams.

The Spreadsheet

On February 15, 2002, Bendel met virtually with Sam Graefe, his immediate supervisor. He questioned Graefe about his role after the reorganization. Bendel was not satisfied with the responses he received. He may have hung up on Graefe (R. Exh. 11, p. 3).[2] Bendel then called Chris McGinty, VIP's Director of Development. He was also dissatisfied with the responses he received from McGinty as to his future role and whether it would come with a salary increase.

2. While Bendel wrote in a chat that he had hung up on Graefe, at trial he testified, that he was "puffing my chest a little bit in the chat with my friends, Tr. 95. Graefe did not testify so it is unclear whether Bendel hung up on him. However, it is clear that the conversation ended abruptly. Whether or not Bendel hung up on Graefe, there is no credible evidence that Respondent relied on this in terminating him. Graefe in his account of the conversation to Chris McGinty did not claim that Bendel hung up on him (R. Exh. 5 pp. 3–4).

Bendel then talked with Kaleb Noble. Noble told Bendel that he was due to be promoted to software engineer III and asked Bendel about his salary. Bendel told Noble he was making $95,000 a year ($500 more than he was actually making) (GC Exh. 5). Noble responded that he was making $86,000 a year. Bendel then suggested starting a spreadsheet. Noble then prepared the spreadsheet.

In the chat, Noble stated: "The idea in my mind is so if you wanna ask for a raise you got some reference to see if you're getting fisted lol."

Noble and Bendel created a spreadsheet which was accompanied by a Google form for employees to enter into the spreadsheet their name (although they were able to remain anonymous), their department, their position and annual salary (GC Exh. 3). The spreadsheet also contained a section in which to analyze the data. Noble and Bendel then sent the spreadsheet to Kestrel Swift and Gordon Dragoon, who disseminated it to other employees. At some point someone included a note at the bottom of the sheet indicating that 100 percent of the developers were underpaid. The four discriminatees were the first four names entered on the spreadsheet.

On the morning of February 16, Bendel, Noble, Swift and Dragoon participated in a Group Chat about the spreadsheet.[3] The four employees were using their VIP computers and were connected to the VIP server.

3. The time indicated for the various entries are the time in the Greenwich (London) time zone. The chat took place starting at about 8:17 East Coast time.

This chat occurred while Chris McGinty was conducting a group chat about the VIP reorganization. The four disparaged the VIP reorganization plan (R. Exh. 14).

A number of employees entered their data, including salaries into the spreadsheet. At about 11 a.m., Louise Morgan, VIP's Director of Operations accessed the chat and saw the spreadsheet. Morgan was apparently told about the spreadsheet by supervisor Chris Morse. Morse was concerned that some of the data was inaccurate and the conclusion at the bottom of the spreadsheet that 100 percent of VIP programmers were underpaid (Tr. 317).[4] When Morse and Morgan talked to VIP Director of Development Chris McGinty they determined that Chris Bendel had created the spreadsheet and was the author of the 100-percent underpaid calculation. That was a major factor in Respondent's decision to terminate Bendel (Tr. 380-381, 472). In this regard, John Simard, VIP's Chief Financial Officer, who effectively made the decision to terminate Bendel, testified:

> The problem was Chris was carrying a narrative and he was manipulating the worksheet to make that message to everybody that programmers are all underpaid, a hundred percent of them.
>
> And that's unacceptable.

(Tr. 497. Also see, Tr. 519-520.)

4. Neither Morse nor Morgan testified in this proceeding. It may have been McGinty, rather than Morse, who zeroed in on the 100 percent calculation (Tr. 471).

Appendix D

Either McGinty or Simard directed IT Manager Jeff Compo to investigate how the spreadsheet was disseminated and whether it was communicated outside of VIP.

Soon afterwards VIP disabled Bendel's work account and took down the spreadsheet. At about noon Chris McGinty called Bendel and told him that he was being terminated for his poor attitude in the past. McGinty gave Bendel no other reason for his termination.[5]

After that Kaleb Noble invited Bendel to join an instant messaging chat on a platform called Slack (R. Exh. 14). Besides Noble and Bendel, Swift, Dragoon, and a former VIP employee Colby Arcemont participated.

Among the relevant comments were:

> Bendel: I really do hope we can all leave within the next month or two.

Bendel and Swift discussed a fellow employee named Feng, who they considered underpaid. Bendel states: "let's make a pact that we bring him along wherever one of us ends up."

---

5. Respondent contends, based on a comment made by Bendel in a chat (GC Exh. 17, p. 4), that it had plans to terminate Bendel prior to its discovery of the spreadsheet. However, there is no credible evidence that VIP decided to terminate Bendel prior to discovering the spreadsheet. (R. Exh. 5) and McGinty's testimony at Tr. 307–310 establish the opposite.

Swift wrote "I told him all of us were already on the verge of quitting, so he should join us."

Swift also wrote: Can't wait for every SE2 to be making more than me as a Team Lead.

Dragoon wrote: What's fucked is our salaries compared to other companies.

Dragoon and Bendel disparaged the salary increase Dragoon had just received.

Swift disparaged the VIP HR director "Since C is garbage."

Swift wrote:

> Morse (his immediate supervisor) says he's making my case to McGinty every time he talks to him.
>
> But apparently McGinty can't get more money from Simard (VIP's CFO)
>
> Because he doesn't believe developers deserve money.
>
> Bendel: Wanna unionize.
>
> Dragoon: I would support how I can. But I'm trying to get out.

Appendix D

Swift: DON'T HIRE PEOPLE WITH EXPERIENCE

Bendel: the VIP way

Dragoon: Their entire plan is to hope for a recession and hope VIP is the only option in town

Swift: We'll make a union out of us yet.

At about 10:50 a.m. Bendel wrote: "Louise has entered the game."[6]

About a half hour later, Swift, Dragoon and Noble noticed that Bendel was locked out and learned that he had been fired. After Bendel was terminated the discussion continued on a different chat platform named Slack.

The next entries are critical in that Respondent relies on them heavily in justifying terminating Swift, Dragoon and Noble (R. Exh. 14 pp. 39-41.)

Dragoon: He [Bendel] was actually fired

Swift: What the fuck?

Swift: Well, that is extremely illegal

6. Louise Morgan, VIP's director of operations, accessed the spreadsheet at this time.

Swift: As linked in this spreadsheet.

Noble: If I drop you know what happened.

Dragoon: I think I need to follow up with Sam here.

Noble: His computer has been remotely locked.

Swift: Jesus fucking Christ

Dragoon: he might get a decent payout here.

Noble: Purge your computers boys

The chat then indicates that Noble tried to delete the "purge your computers" comment. At trial he testified that the Slack platform will not erase the original. This line, he testified, reflects when he attempted to edit his message or delete a duplicate message (Tr. 166-168.)

Noble: Assume all chats are public.

Swift: Especially these ones. They get inherited by your manager.

Dragoon: Eh we haven't said anything terrible.

Dragoon: Maybe somewhat rude.

Swift: Yeah, I don't care. If I'm already fired, what are they going to do?

Dragoon: I am still shocked.

Dragoon: Also appalled.

Dragoon: I knew that upper management were snakes.

Dragoon: But this is a new low.

Noble: The doc is down.

Kestrel: Fuck.

Swift: Did anyone download it.

Dragoon: Yep.

The next day, Kestrel Swift threatened to resign on account of the termination of Chris Bendel. Both Chris Morse and Chris McGinty were aware of this (R. Exh. 40, par. 30). Dragoon and Noble told their supervisor Sam Graefe how unhappy they were about Bendel's termination and tried to defend him (Tr. 240-241).

On February 17, while investigating employee communications relating to the spreadsheet, Jeff Compo, IT manager at VIP discovered the chat.

Appendix D

At about 8 a.m. on February 18, 2022, VIP managers, including CEO Dan Byrnes, Louise Morgan, HR Manager Cathy Courier, McGinty, Sam Graefe, and Morse met with CFO John Simard.[7] McGinty read excerpts from the chat and the participants discussed it. The meeting participants also looked at the performance reviews of the discriminatees. CFO Simard was particularly offended by Kestrel Swift's comment on his 2020 review regarding his loyalty to VIP (Tr. 488).

> "Loyalty" is not an "area of improvement." VIP promotes unhealthy practices and it's unhealthier to tacitly accept that by remaining silent. Even if I don't have the power to change anything, the more these things are voiced, the better the chances of someone who matters doing something to actually improve them. VIP will fire me without remorse the second it doesn't think it can squeeze more money out of me that (sic) it pays me. Why should I be loyal? This is a loveless exchange of labor for currency between two mutually selfish parties. If anything, the fact that I voice up problems I see in the company should indicate that I care more about it than I need to. I could sit down, shut up, and ignore all the areas of improvement that I see in the company, but I'm invested enough that I want to see it do better.

(GC Exh. 6.)

7. McGinty and Simard testified in this proceeding. The other attendees did not.

Appendix D

CFO Simard pushed hard for the termination of Noble, Swift and Dragoon. McGinty and possibly Morse and/or Graefe pushed for less severe punishment for the 2 team leads, Swift and Dragoon (Tr. 484-488). Simard thought McGinty advocated retaining Kaleb Noble, the author of the "purge your computers" comment. McGinty's affidavit (R. Exh. 40, par. 44), is consistent with Simard's recollection.

McGinty, in particular, was concerned that terminating the twoteam leads, Swift and Dragoon (and/or Noble), were the only VIP employees with a working knowledge of a couple of VIP's applications (Tr. 487). In the end, CEO Byrnes deferred to Simard and authorized him to terminate Swift, Noble, and Dragoon.

That the 100-percent calculation was material in this decision is established by the following testimony by Simard:

> So here are people that are functional and happy and love the culture. And that's all lost. They're all at home now. They're all working. They're all isolated. And you now, if you have one or two people poisoning that well and telling them this is a bad place, and they're underpaid, it starts to resonate when you hear it for some. And, you know, that's Chris' role. Chris Bendel.

(Tr. 489.)

Appendix D

On February 18, VIP's CFO John Simard called Kestrel Swift to inform Swift that he had been terminated. Simard told Swift that he was being discharged because he was unhappy at VIP. Swift told Simard he wanted to stay with the company. Simard responded that the things Swift wrote in the February 16 chat were inconsistent with his desire to stay at VIP. Simard gave the same explanation to Gordon Dragoon and Kaleb Noble when informing them that they were being terminated. He gave no other reason (Tr. 500). He did not tell any of the three that he was concerned about the security of VIP's data or systems.[8]

At the time Dragoon was terminated, he was 80 percent vested in the ESOP. In March 2022, he would have been 100 percent vested. Dragoon was planning on finding another job as soon as he was 100percent vested. He may have used another job offer to negotiate a raise at VIP.

The four discriminatees did not purge or delete any material from their computers. Respondent did not investigate whether or not they did so. Compo, the only VIP IT employee who testified, did not. I infer that had anyone else done an investigation, Respondent would have called them as a witness (Tr. 345). No member of management asked Kaleb Noble what he meant or

8. Similarly, Engineer Manager Michael Couillard, in explaining to his subordinates why the four discriminatees were terminated, did not mention any concern about sabotage (R. Exh. 22). His recap of an allhands meeting on February 18, indicates that neither Chris McGinty or Dan Byrnes mentioned such concerns to VIP employees.

intended when he wrote, "purge your computers" (Tr. 349, 357). Respondent does not have any knowledge that any of the 4 did anything to compromise any information at VIP (Tr. 359).

Analysis

Section 7 provides that, "employees shall have the right 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 or protection . . .*" (Emphasis added).

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

In order to establish a violation of Section 8(a) (3) and/or (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a "motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of

protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002); *General Motors,* 369 NLRB No. 127 (2020).

In this case there is no question that the General Counsel met its initial burden of showing that all four discriminatees engaged in concerted activity, that Respondent VIP was aware of that activity, bore animus towards it and terminated the 4 due to their concerted activity. The almost immediate taking down of the spreadsheet by itself establishes Respondent's animus towards the employees involved in disseminating it.[9]

The timing of the terminations and the lack of any credible evidence that Respondent planned to discharge any of the 4 prior to February 16, 2022, supports the inference of discriminatory discharge, *Case Farms of North Carolina,* 353 NLRB 257, 260-261 (2008). Respondent's reliance on the lack of discipline for others who entered data on the spreadsheet (R. Br. at 6), is misplaced. A discriminatory motive, otherwise established, is not disproved by an employer's proof that it

9. In addition to dissemination of the spreadsheet and ensuing chat discussion, the February 17, 2022, protests of Kestrel Swift about the Bendel termination to Chris Morse and Noble and Dragoon's protests to Sam Graefe are also protected activity. Respondent's brief at p. 41 establishes that the "displeasure" of all three discriminatees with Bendel's termination was a factor that VIP considered in terminating them.

did not retaliate against all those involved in the protected activity, *Nachman Corp. v. NLRB,* 337 F.2d 421, 424 (7th Cir. 1964); *McKee Electric Co.,* 349 NLRB 463, 464-465 fn. 9 (2007). Similarly, the discriminatees' motives for engaging in protected activity is irrelevant, *ABS Co.,* 269 NLRB 774, 774-775 (1984).

Section 7 protects concerted activity which in its inception involves only a speaker and a listener. Such activity is an indispensable preliminary to self-organization or other group action, *Whittaker Corp.,* 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB,* 330 NLRB 683, 685 (3d Cir. 1964). The creation and dissemination of the spreadsheet herein was clearly concerted and protected in that it was an indispensable step towards pressing VIP on wage transparency and/or consistency.

Assisting other employees affected by the employer's action or inaction falls within the Act's "mutual aid and protection" clause of Section 7, even if the assisting employee is not personally affected, *American Medical Response of the Mid-Atlantic,* 369 No. 125 (2020); *Richboro Community Mental Health Council,* 242 NLRB 1267, 1267-1268 (1979); *Delta Health Center,* 310 NLRB 26, 43 (1993); *Butler Medical Transport, LLC,* 365 NLRB 1095 (2017).

Chris Bendel in creating the spreadsheet was assisting Kaleb Noble in his quest for a comparable salary to Bendel's if he was promoted. This is protected activity. Respondent was aware that it was concerted via an

admitted agent, Chris Morse, who had discussed Noble's desire for a raise and a promotion with Noble.[10] Louise Morgan, when viewing the spreadsheet, was aware that it was a group effort pertaining to employees' compensation.

The General Counsel has not established that VIP has a policy prohibiting employees from sharing salaries. That, however, is beside the point. The complaint alleges that VIP terminated the four employees for creating and disseminating the spreadsheet.[11] VIP terminated Bendel for that very reason. He created and disseminated the spreadsheet in concert with Kaleb Noble.

The only question in the case is whether creating and disseminating the spreadsheet and the ensuing chat was protected by Section 7 and/or whether the four discriminatees otherwise forfeited the protections of the Act. Respondent appears to contend that they forfeited Section 7 protection because they were disgruntled and job-hunting. There is no support for such a proposition in Board law.

---

10. Swift wrote in his chat: "Morse [his immediate supervisor] says he's making my case to McGinty every time he talks to him." This is not hearsay pursuant to Federal Rule of Evidence 801(d)(2). Swift's assertion was not contradicted by Respondent. Morse's title is manager of applications (GC Exh. 9).

11. Moreover, an employer could well have no objection to two or three employees sharing salary information but still have animus to a concerted effort to have many employees share their salaries.

Appendix D

VIP terminated Noble, Swift and Dragoon for their instant messaging chats about the spreadsheet and Bendel's termination.[12] The reason for their terminations is inextricably linked to their roles in creating and disseminating the spreadsheet. Even if the complaint is deemed not to include the reasons for the Swift, Noble, and Dragoon discharges, the Board may find a violation in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's witnesses, *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F2d. 130 (2d Cir. 1990).

---

12. I do not put much or any weight on the June 2017 email from Manager Derek Punt to employee Justin Martin instructing Martin not to share payroll information with your peers. (R. Exh. 39.) It doesn't establish that Punt was acting pursuant to a VIP policy. On the other hand, it does establish that if VIP had a policy affirmatively allowing employees to share salary information, its managers and supervisors were not uniformly aware of it.

Although not fully developed by the parties, there is some question in my mind as to whether Respondent's review of the Slack Chat violated the Act. Respondent's brief at pp. 26-27 suggests the timing of Ms. Safar's litigation hold letter (R. Exh. 37 and Jeff Compo's perusal of the Charging Parties' chats was coincidental). I was under the impression that Respondent justified its investigation into the chats on the basis of the hold letter (R. Exh. 9. Tr. 440-444, 477-480). If the review of the chat constitutes surveillance of employees' protected activities, Respondent may not be entitled to rely on the contents of the chat in disciplining them, *Kidde Inc.,* 294 NLRB 840, 840 fn. 3 (1989).

I also find Respondent's reliance on Kaleb Noble's "purge your computers" to be pretextual. First of all, assuming that would be a basis for terminating Noble, Respondent has not explained how that would be a basis for terminating Dragoon and Swift. Assuming that "purge your computers" was unprotected, neither Dragoon nor Swift would have lost the protection of the Act merely by participating in an otherwise protected discussion in which other persons made unprotected statements, *Triple Play Sports Bar & Grill,* 361 NLRB 308, 312 (2014), enfd. 629 Fed.Appx. 33 (2d Cir. 2015).

That several managers opposed terminating several of the discriminatees establishes that fear of sabotage was not a real concern. Another indicium that this was pretextual is paragraph 44 of Chris McGinty's affidavit, which indicates that VIP was most hesitant to terminate Noble, the author of the "purge your computers" comment (R. Exh. 40).

More importantly, Noble's comment is open to many interpretations, the most logical is that he was afraid of management seeing the three programmers' comments disparaging VIP and its management. VIP made no effort to ask Noble what he meant. In any event, if genuinely concerned with sabotage, VIP's concerns could have been met by threatening to sue and possibly criminally prosecute the three if they sabotaged VIP's systems. Respondent's failure to give Noble, Dragoon, and Swift the opportunity to explain their alleged misconduct is evidence of pretext, *Lucky Cab,* 360 NLRB 271, 274 fn. 13 (2014).

Respondent has not met its burden that it would have terminated any of the 4 absent their protected activity. I discredit Respondent's testimony that other employees would believe the spreadsheet was an official VIP document or that employees would be coerced into completing it. I would note that Respondent introduced no rank-and-file employee testimony to support this assertion. A VIP employee would not likely think that VIP was asking them to fill out a spreadsheet asking for information that the company already possessed.

Among the reasons advanced for terminating Bendel, VIP contends that his spreadsheet was inaccurate. It has not established that it was materially inaccurate.[13] Bendel and others may have rounded up or down when they entered their salary. Moreover, the accuracy of the spreadsheet is immaterial to the test of its protected character, unless inaccurate statements are made with knowledge of their falsity or with reckless disregard for their truth or falsity. The mere fact that statements or representations are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue, *Desert Cab, Inc. d/b/a ODS Chauffeured Transp.* 367 NLRB No. 87 (2019); *Mas-Tec Advanced Technologies,* 357 NLRB 103 (2011); *Sprint/United Management Co.,* 339 NLRB 1012, 1018 (2003); *Valley Hospital Medical Center,* 351 NLRB 1230, 1252-1253 (2007).

13. I consider that "100% underpaid" is a statement of opinion, not an inaccurate statement of fact. The other "errors" appear to consist of employees slightly approximating their salaries.

Appendix D

Supervisory Status

Section 2(3) of the Act excludes supervisors, as defined in Section 2(11) from the definition of an employee who has rights under Section 7 of the Act. Section 2(11) defines a "supervisor" as a person who has the authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

Since Respondent claims that Dragoon and Swift are supervisors, it is its burden to prove that they were supervisors and thus not protected by the Act, *Smithfield Packing Co.,* 344 NLRB 1.(2004). It has not done so. The authority of team leads Swift and Dragoon to give members of their team assignments was routine and has not been shown to require the kind of independent judgment to make them supervisors, *Croft Metals, Inc.,* 348 NLRB 717, 718, 721-722 (2006); *Oakwood Healthcare,* 348 NLRB 686 (2006)

> The authority to 'assign' refers to 'the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant over all duties, i.e., tasks, to an employee. In sum, to 'assign' for purposes of Section 2(11) refers to the

> designation of significant overall duties to an employee, not to the ad hoc instruction that the employee perform a discrete task."

(348 NLRB at 721.)

Neither Swift nor Dragoon had the authority to hire, or to effectively recommend the hiring of a job applicant. As with every supervisory indicium, hiring or recommending hiring must be done with independent judgment before it is to be considered supervisory under Section 2(11). The record herein shows that Swift and Dragoon recommended hiring solely with respect to whether the applicant was capable of doing the job. This is insufficient to establish that Dragoon and Swift were statutory supervisors. There is no evidence that Swift or Dragoon were called upon to make a comparative assessment of different applicants' skills. They merely opined as to whether the applicant was capable of doing the job for which they applied, a routine task. The final hiring decision was not theirs and Swift's recommendation was, at least on one occasion, ignored.

As to the assignment indicia, Respondent has not established either Dragoon or Swift had the authority to do anything more than instruct another employee to do a discrete task.

Remedy

The Respondent, having illegally discharged Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon

must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay 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). Respondent shall compensate them for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 3 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey,* 363 NLRB 1324 (2016). Also, 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, file with the Regional Director for Region 3, a copy of the corresponding W-2 forms for Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon reflecting the backpay awards.

Also, Respondent must compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for all direct or foreseeable pecuniary harms that they suffered as a result of Respondent's unfair labor practices, regardless of whether these expenses exceed interim earnings, *Thryv, Inc.*, 372 NLRB No. 22 (2022). This shall

be calculated separately from taxable backpay with the rate of interest prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), *Crushin' It LLC,* 372 NLRB 100 (2023).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Vermont Information Processing, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending or otherwise discriminating against any employee for engaging in protected concerted activity.

(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.

---

14. 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.

Appendix D

(a) Within 14 days from the date of the Board's Order, offer Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, 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.

(d) Compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) Compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for all direct or foreseeable pecuniary harms that they suffered as a result of Respondent's unfair labor practices, regardless of whether these expenses exceed interim earnings.

(f) File with the Regional Director for Region 3 a copy of the corresponding W-2 forms for Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon reflecting the backpay awards as set forth in the remedy section of this decision.

(g) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon in writing that this has been done and that their discharges will not be used against them in any way.

(h) 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.

(i) Within 14 days after service by the Region, post at its Colchester, Vermont facility copies of the attached notice marked "Appendix.[15] Copies of the notice, on forms provided by the Regional Director for Region 3, after being

15. 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."

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, 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. In the event that, during the pendency of these proceedings, 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 February 16, 2022.

(j) Within 21 days after service by the Region, file with the Regional Director 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. July 31, 2023

Appendix D

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 the National Labor Relations Act 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 discharge, suspend or otherwise discriminate against any of you for engaging in protected concerted activity.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Appendix D

WE WILL, within 14 days from the date of this Order, offer Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file a report with the Regional Director for Region 3 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL compensate Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon for all direct or foreseeable pecuniary harms that they suffered as a result of our unfair labor practices, regardless of whether these expenses exceed interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful

discharges of Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon and we will, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL file with the Regional Director for Region 3, 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 the corresponding W-2 form(s) for Chris Bendel, Kestrel Swift, Kaleb Noble, and Gordon Dragoon reflecting the backpay award.

VERMONT INFORMATION PROCESSING, INC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-301055 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-1360
Consolidated with 24-1375
NLRB-03CA301055

VERMONT INFORMATION PROCESSING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

CHRISTOPHER BENDEL, *et al.*,

Intervenors.

Filed August 12, 2026

ORDER

BEFORE: Millett, Walker, and Pan, Circuit Judges

Appendix E

Upon consideration of petitioner Vermont Information Processing, Inc.'s petition for panel rehearing filed on July 10, 2026, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/_____
Daniel J. Reidy
Deputy Clerk

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 12, 2026

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-1360
Consolidated with 24-1375
NLRB-03CA301055

VERMONT INFORMATION PROCESSING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

CHRISTOPHER BENDEL, *et al.*,

Intervenors.

Filed August 12, 2026

ORDER

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

Appendix F

Upon consideration of petitioner Vermont Information Processing, Inc.'s petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/_____
Daniel J. Reidy
Deputy Clerk

APPENDIX G — LETTER OF THE NATIONAL LABOR RELATIONS BOARD, DATED AUGUST 18, 2026

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 03
11A Clinton Ave
Ste 342
Albany, NY 12207-2366

Agency Website: www.nlrb.gov
Telephone: (518)816-0909
Fax: (518)431-4157
Agent's Direct Dial: (518) 419-6257

Email address: Donald.Starr@NLRB.gov

August 18, 2026

Stephen D Ellis Esq.
Vermont Information Processing, Inc. (VIP)
Paul Frank and Collins P.C.
PO Box 1307
Burlington, VT 05402-1307
sellis@pfclaw.com

Re: Vermont Information Processing, Inc. (VIP)
Case 03-CA-301055

Dear Attorney Ellis:

Enclosed is a copy of the Judgment of the United States Court of Appeals for the District of Columbia Circuit that issued on August 12, 2026, enforcing the Board's November 5, 2024 Decision and Order in the above matter. The Court Judgment is in effect and has been assigned to me to secure compliance with its terms.

Please let me know as soon as possible, but by no later than September 01, 2026, whether Vermont Information Processing, Inc. (VIP), hereinafter referred to as Respondent, intends to comply with the terms of the Court Judgment. If Respondent does not intend to comply, this matter will be promptly referred to our Contempt, Compliance and Special Litigation Branch for contempt proceedings.

In anticipation of Respondent's willingness to comply, this letter discusses what Respondent needs to do to comply with the Court Judgment and sets forth deadlines for the return of documentary evidence and certifications demonstrating Respondent's efforts to comply. In corresponding with the Agency during the compliance phase, please be advised that the NLRB requires the electronic filing of all case documents via the Agency's e-filing portal at www.nlrb.gov.

Post Notice: Enclosed are printable copies of the official Notice to Employees.

- By **September 1, 2026,** Respondent must print the attached Notices in color on 8 1/2 by 14 inch legal-sized paper, making sure that each copy of the Notice retains the heading in blue lettering at the top of the Notice and the footer containing the Respondent's signature and the Region's contact information.

- The Notice consists of two 8 1/2 by 14-inch pages, labeled "Panel 1 of 2" and "Panel 2 of 2". The two

panels should be treated as one 17 by 14-inch document, with the panel labeled "Panel 1 of 2" posted first on the left and "Panel 2 of 2" on the right.

- Please have a responsible official of the Respondent, not Respondent's attorney, sign and date the Notices before posting them.

- By **September 1, 2026,** Respondent must post the signed Notices in conspicuous places, including all places where Respondent customarily posts notices to employees at Respondent's facility in Colchester, Vermont.

- Notices must remain posted for a period of 60 consecutive days after the initial posting.

- If hard copies of the Notice are required, please let me know.

Once posted, Respondent must take reasonable steps to ensure that the Notices are not altered, defaced or covered by other material. During the posting period, a member of the Regional Office staff may visit Respondent's facility to inspect the Notices.

Electronic Distribution: In addition to physical posting of paper notices, the Court Judgment requires Respondent to distribute electronically a signed and dated color copy of the Notice to employees, if Respondent customarily communicates with its employees by electronic means,

such as by email, posting on an intranet or an internet site, and/or other electronic means.

When distributing or posting the Notice electronically, Respondent may add the following message to the electronic distribution transmitted with the signed Notice: "We are distributing the Attached Notice to Employees to you pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board in Case 03-CA-301055".

Intranet or internet site postings should be continuously posted for 60 consecutive days from the initial date of posting.

To document its compliance with the electronic distribution requirement, Respondent will e-file a copy of its electronic distribution, with all the recipients' e-mail addresses/telephone numbers/user names visible, along with a copy of the signed Notice, via the Agency's e-filing portal at www.NLRB.gov. Respondent should also copy the undesigned at Donald.Starr@NLRB.gov at the time of the electronic distribution. Screenshots of electronic postings shall be submitted as evidence of compliance for electronic postings; temporary log-in information may also be provided to the Region's investigating agent for verification of intranet postings.

If the Respondent does not customarily communicate with its employees by electronic means such as by email or posting on an intranet or website, or other electronic

format, Respondent should so advise in writing on the Certification of Posting Form.

Mailine of Notice: If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent is required to 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 February 16, 2022.

Please submit evidence of the mailing of the Notice, including the date and method of mailing, and a list of names and addresses of employees/former employees to whom the Notices were mailed.

Please distribute the signed Notice by mail, e-mail, and any other electronic means by **September 1, 2026.**

Remedial Actions

Remedial Actions:

Reinstatement: The Court Judgment provides that Respondent, by **August 26, 2026,** offers full reinstatement to Christopher Bendel to his former job or, if that jobs no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

Production of Documents—Backpay: The Court Judgment provides that Respondent will make Christopher Bendel whole for any loss of earnings and other benefits,

and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in the Board's decision.

Further, the Court Judgment provides that Respondent will provide the necessary records: 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, to enable the Regional office to analyze the amount due pursuant to the Board's order. In this regard, it is requested that Respondent provide copies of the following documents to the undersigned by **September 1, 2026:**

- All payroll records, social security payment records, and timecards for Christopher Bendel for a period of one year prior to the date of Bendel's separation of employment at Respondent.

- All personnel records and reports for Christopher Bendel.

- Any documentation codifying fringe benefits paid and available to employees since February 2021 to date, including but not limited to insurance benefits, retirement benefits, paid time off, bonuses, holiday pay, premium pay, differential pay, profit-sharing, ESOP, etc. Please include a summary description of each benefit and the applicable eligibility requirements for each benefit and payment.

- Payroll records and documentation regarding any increases in pay rates, bonus payments, or other compensation, including ESOP and severance payments, for employees and former employees paid since February 2021.

You are also required to preserve and, within 14 days of this 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, any of the records listed above, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's Order.

Excess Tax Liability: The Court Judgment provides that Respondent shall compensate Christopher Bendel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, 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.

Report to Social Security Administration: Respondent shall e-file, as well as mail to the Regional Director for Region 3, a completed form, Report of Backpay Paid Under the National Labor Relations Act within 21 days of the date the amount of backpay is fixed, either by agreement or Board order.

W2 Forms: Respondent shall e-file, as well as mail to the Regional Director for Region 3, copies of the W-2 forms for Christopher Bendel reflecting the backpay award as set forth in the remedy section of the Administrative Law Judge's decision as amended by the Board, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order.

Document Removal: The Court Judgment further provides that, by **August 26, 2026,** Respondent will remove from its files any reference to the unlawful discharge of Christopher Bendel, and within 3 days thereafter, notify Bendel, in writing, that this has been done and that the unlawful discharge will not be used against him in any way. Respondent should e-file copies of the letter notifying Christopher Bendel of the document removal by **September 1, 2026.**

PLEASE CAREFULLY READ THE COURT JUDGMENT AND NOTICE, AS RESPONDENT WILL BE EXPECTED TO COMPLY WITH ALL PROVISIONS THEREIN.

Certifications of Compliance: Certification of Posting and Compliance Forms are enclosed. The Certification of Posting addresses all communication means by which Respondent has complied with the Court Judgment's requirement to inform employees of the signed Notice to Employees and should be completed and returned with a color copy of the signed and dated Notice to Employees **by September 1, 2026.**

Appendix G

The Certification of Compliance form addresses affirmative actions that Respondent is required to take pursuant to the Court Judgment and should be completed and returned by not later than **September 8, 2026.**

If the Certification of Posting and Compliance forms, and the signed Notice are returned electronically (via e-file, or e-mail if e-filing is not possible), no hard copies of these documents are required.

All evidence of compliance with the Court Judgment should be electronically filed as set forth in General Counsel's Memorandum 20-01, Electronic Filing of Documents. In order to electronically file documents with this office, please go to www.nlrb.gov, click on the "e-Filing" tab, and follow the detailed instructions, including entering the NLRB case number, 03-CA301055. Written instructions for using the Agency's e-filing system and the Agency's Electronic Filing Terms and Conditions have been posted on the Agency's website. The Agency's website also contains a video demonstration which provides step-by-step instructions for e-filing.

If e-filing case documents or any other evidence of compliance is not possible, please email those to the undersigned at Donald.Starr@NLRB.gov.

Closing the Case: When all of the affirmative provisions of the Court Judgment have been fully complied with and there are no reported violations of its negative provisions, you will be notified that the case has been closed on compliance. Timely receipt of the signed and

dated Notice and required sworn Certification of Posting and Compliance forms will assist the Region in closing this case in a timely manner.

Your cooperation in this matter will be appreciated.

Thank you,

/s/ Donald S. Starr
Donald S. Starr
Compliance Officer

Enclosures

- Court Judgment
- Notices to Employees
- Certification of Posting and Distribution Form
- Certification of Compliance Form

cc: Claudine C. Safar Esq.
156 Battery St
Burlington, VT 05401
csafar@msdvt.com

Chris Bendel, An Individual
165 Valley Field Dr
Colchester, VT 05466
chrissbendel@grnail.com

[CERTIFICATES OMITTED IN PRINTING]

APPENDIX H — EXCERPT OF THE COMPLIANCE STATEMENT OF VERMONT INFORMATION PROCESSING LLC, DATED SEPTEMBER 9, 2026

PAUL FRANK + COLLINS ATTORNEYS

STEPHEN ELLIS
sellis@pfclaw.com

September 9, 2026

VIA ELECTRONIC FILING / EMAIL
Regional Director
National Labor Relations Board, Region 3
130 S. Elmwood Avenue, Suite 630
Buffalo, NY 14202

Re: Vermont Information Processing LLC and Christopher Bendel/ Case **No. 03-CA301055/ Submission of Compliance Statement, Proposed Modified Appendix Notice, and Supporting Declaration**

Dear Regional Director:

On behalf of Vermont Information Processing LLC, formerly known as Vermont Information Processing, Inc. ("VIP"), we submit the enclosed Compliance Statement in connection with the Judgment filed August 12, 2026, enforcing the Board's Order as modified by the Court. The submission is made in good faith to identify the steps VIP will take to comply with the Judgment once the mandate

issues, provided no stay is in effect, while preserving VIP's compliance-phase positions concerning the lawful calculation, scope, timing, and implementation of any remedial obligations.

Enclosed with the Compliance Statement are VIP's proposed modified Appendix notice and the supporting Declaration of VIP's President, Dan Byrnes. VIP respectfully requests that Region 3 review and approve the proposed modified Appendix notice, or advise VIP of any alternative notice language the Region directs or approves before posting. Upon approval or direction from the Region, VIP will timely complete the required posting, electronic distribution, and certification steps as set forth in the Compliance Statement.

VIP also requests Regional direction concerning the process for resolving disputed compliance issues, including reinstatement feasibility, after-acquired evidence, backpay, mitigation, ESOP-related issues, tax allocation, W-2 reporting, and any claimed direct or foreseeable pecuniary harms. To the extent any of those matters cannot be resolved informally, VIP requests that the Region establish an orderly schedule for the exchange of records, calculations, position statements, and, if necessary, issuance of a compliance specification or other procedure for resolving disputed remedial facts.

Nothing in this submission is intended to waive VIP's right to raise compliance-phase defenses, request an evidentiary hearing, present and cross-examine witnesses, submit evidence, or seek further lawful review of any disputed

remedial determination. VIP remains prepared to comply with the Judgment and with any uncontested lawful compliance directives issued by the Region.

Please let us know if the Region requires any additional documents, information, or revised notice language at this stage.

Respectfully submitted,

/s/ Stephen D. Ellis
Stephen D. Ellis
Carl "Ott" Lindstrom
Paul Frank + Collins P.C.
One Church Street, Fifth Floor
Burlington, VT 05402
Tel: 802-658-2311
Counsel for Vermont Information Processing LLC
(formerly known as Vermont Information Processing, Inc.)

Enclosures:

1. Compliance Statement
2. Proposed Modified Appendix Notice
3. Declaration of Dan Byrnes and Exhibit A

cc: Donald S. Starr, Compliance Officer,
Donald.Starr@NLRB.gov (w/enc.)
Claudine C. Safar, Esq.,
csafar@msdvt.com (w/enc.)

Appendix H

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 3

Case No. 03-CA-301055

VERMONT INFORMATION PROCESSING LLC, FORMERLY KNOWN AS VERMONT INFORMATION PROCESSING, INC.,

Respondent,

and

CHRISTOPHER BENDEL,

Charging Party.

VERMONT INFORMATION PROCESSING LLC'S COMPLIANCE STATEMENT

Vermont Information Processing LLC, formerly known as Vermont Information Processing, Inc. ("VIP"), respectfully submits this Compliance Statement to confirm the steps it will take to comply with the Judgment filed August 12, 2026 (Doc. 2187787) (the "Judgment"), enforcing the Order of the National Labor Relations Board as modified by the Court (the "Order"), and to request that the Regional Director for Region 3 review and approve the attached proposed modified Appendix notice, or identify alternative notice language the Region directs or approves before posting. This Compliance Statement

is supported by the accompanying Declaration of VIP's President, Dan Byrnes. VIP acknowledges that, once the mandate issues, the Judgment is binding unless and until stayed, recalled, modified, or superseded by a court of competent jurisdiction. VIP will implement the Judgment as directed while preserving compliance-phase issues concerning the lawful calculation and implementation of the remedial provisions. VIP therefore identifies below the concrete steps it will take to comply, requests Regional Office direction concerning the Appendix language, and identifies the compliance positions it expects to present to the Region and, if necessary, to the Board. VIP will implement the following measures upon issuance of the mandate if no stay is in effect:

A. Compliance Statement

1. VIP will not:

a. Discharge, suspend or otherwise discriminate against any employee for engaging in protected activity; or

b. In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. VIP will take the following affirmative action necessary to effectuate the policies of the Act.

a. VIP will address the reinstatement provision of the Order through the compliance process and requests direction from the Regional Director on how that remedy should lawfully be implemented, or whether it remains appropriate, in light of the unresolved compliance-phase issues discussed below. Those issues include after-acquired evidence, the absence of Bendel's former position, the absence of any substantially equivalent position not requiring comparable privileged access to VIP's production systems, source code, confidential data, and IT infrastructure, and the equitable and practical limitations VIP preserves for compliance proceedings.

b. VIP will make Bendel whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the termination of his employment on February 16, 2022, in the manner set forth in the remedy section of the ALJ's decision as amended by the Board, subject to the limitations and defenses discussed below, including VIP's position that any backpay obligation should be cut off no later than September 1, 2022 and reduced or eliminated before that date by interim earnings, mitigation, benefits, and other lawful offsets.

c. VIP will compensate Bendel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, if any, and file with the Regional Director for Region 3, within 21 days of the

date this amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

d. VIP will file with the Regional Director for Region 3 a copy of the corresponding W-2 form(s) for Christopher Bendel reflecting the backpay award, if any.

e. Within 14 days from the date upon which the mandate issues on the Court's Order, VIP will remove from its files any reference to the unlawful discharge of Christopher Bendel, and within 3 days thereafter notify Bendel in writing that this has been done and that his discharge will not be used against him in any way.

f. VIP will preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 3 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 above terms.

* * *

VIP further contends that any net backpay available before the September 1, 2022, cutoff should be substantially reduced, and may be eliminated, as of the date Bendel began higher-paying interim employment, subject to compliance-phase proof concerning total compensation, benefits, mitigation expenses (or Bendel's failure to mitigate), interim earnings, and any required offset. VIP will seek discovery or documentation confirming the start date, compensation, benefits, mitigation, and any interim earnings relevant to the backpay calculation. VIP will also show that Bendel elected to take a distribution of the vested balance in his ESOP account. For the reasons discussed above, VIP contends that Bendel could not have remained employed by VIP beyond September 1, 2022, and therefore could not realize speculative long-term ESOP relief beyond any amount established by the plan documents and supported by compliance-phase proof. *See Phelps,* 313 U.S. at 197-200; *Seven-Up,* 344 U.S. at, 346-49; *Sure-Tan,* 467 U.S. at900-04. Any greater award would rest on the speculative premise that Bendel would have remained employed through later plan milestones despite his clearly stated intention to leave VIP, his subsequent higher-paying employment, and the independently terminable misconduct discovered on September 1, 2022.

5. The Availability and Scope of Any *Thryv* Remedy Remain Unresolved.

Thryv Remedies. VIP further disputes that any additional ESOP vesting, or any future increase in the value of Bendel's ESOP account, could be considered a direct or foreseeable pecuniary harm caused by the

February 16, 2022, discharge for purposes of *Thryv, Inc.*, 372 NLRB No. 22 (2022), or otherwise. Under *Thryv,* consequential monetary relief is limited to pecuniary harms that are direct or that the respondent knew or should have known would likely result from the unfair labor practice; the General Counsel must still prove the fact, amount, causation, and foreseeability of the claimed loss in compliance proceedings.[1] That compliance-process limitation is especially important now because in Memorandum GC 26-04, *Further Guidance Regarding General Counsel Priorities* (Aug. 26, 2026), the Board's General Counsel has stated that *Thryv* remedies "have yet to be tested in a compliance hearing," and identifies *Thryv as* a remedial precedent she intends to challenge, given the opportunity. GC Memo 26-04 therefore appears to invite, or at minimum recognize the appropriateness of, a compliance-stage vehicle for testing the lawful scope and enforceability of Thryv-based remedies.

Future ESOP vesting and account appreciation fail the "direct and foreseeable" standard here. Any additional vesting depended on Bendel's continued employment through future plan milestones, even though, before his

1. *Id.* at slip op. 6 ("[A]ny relief must be specifically calculated and requires the General Counsel to present evidence in compliance demonstrating the amount of pecuniary harm, the direct or foreseeable nature of that harm, and why that harm is due to the respondent's unfair labor practice. The respondent, in turn, will have the opportunity to present evidence challenging the amount of money claimed, argue that the harm was not direct or foreseeable, or that it would have occurred regardless of the unfair labor practice."

discharge, Bendel had stated that he was looking for other jobs, expected to leave within months depending on outside offers, and believed he could negotiate a signing bonus or compensation package to offset any missing vested ESOP percentage. Bendel also engaged in serious misconduct, on a VIP work platform, reflecting an egregious breach of trust that he must have known would result in his termination if discovered by VIP management, which occurred on September 1, 2022. Without conceding that any ESOP-related recovery is owed, VIP contends that any such recovery should be limited, at most, to the additional funds, if any, that would have been available for distribution or rollover based on any additional vesting on June 18, 2022, subject to the ESOP plan documents and compliance-phase proof. Any later growth in the ESOP account would depend on future company performance, plan valuation, allocation rules, and market or business conditions after Bendel's employment likely would not have continued in any event. Any claimed loss of future ESOP value therefore is not a foreseeable out-of-pocket consequence of the discharge, but a speculative request for the benefit of a hypothetical and counterfactual employment tenure Bendel did not intend, was not likely to complete, and would not have completed after VIP discovered the January 27 communication on September 1, 2022.

6. Summary of VIP's Compliance Position

For the reasons discussed above, VIP respectfully submits that the equitable make-whole remedial purposes of the Act would be amply satisfied by:

a. Backpay, if any, in an amount equal to the salary and benefits Bendel would have received from VIP during the period February 16, 2022 through September 1, 2022, reduced by an amount equal to compensation and benefits realized from other employment during that period, with no front pay after September 1, 2022;

b. Consequential monetary relief, if any, limited to verified direct and foreseeable pecuniary harms incurred before September 1, 2022, including any additional ESOP funds that would have been available for distribution or rollover based on any additional vesting between February 16, 2022 and September 1, 2022, subject to the ESOP plan documents and compliance-phase proof;

c. Interest at the federal statutory rate;

d. Additional compensation, if any, for the adverse tax consequences of receiving a lump-sum backpay award or any verified pre-September 1, 2022 ESOP-related amount that could not be rolled over into a tax-deferred vehicle.

7. VIP Preserves Its Right to an Evidentiary Hearing and Further Review.

To the extent the Regional Director, the Board, or any reviewing tribunal disputes VIP's compliance positions regarding reinstatement, after-acquired evidence, mitigation, waiver, ESOP vesting or valuation,

tax allocation, W-2 reporting, foreseeability, causation, alleged direct or foreseeable pecuniary harms, or the amount, form, timing, or duration of any monetary or nonmonetary remedy, VIP requests a full compliance-phase evidentiary hearing and an opportunity to present and cross-examine witnesses, introduce documents, offer legal argument, and know and meet the opposing claims before any contested remedial determination is made. That opportunity is required because disputed compliance facts—particularly facts not known to VIP and not adjudicated in the liability phase—should be resolved through the procedures provided for compliance proceedings and consistent with due process. *See Mathews* 424 U.S. at 333-35; *Goldberg,* 397 U.S. at 267-71; *Morgan* 304 U.S. at 18-19; *Brock.,* 481 U.S. at 26165. VIP preserves, to the extent not foreclosed by controlling precedent, all rights to seek further relief that may be available from the Court of Appeals, the Supreme Court of the United States, or the Board. Those preserved rights include, without limitation, any argument based on *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024), and any intervening authority concerning the scope of judicial deference to Board remedial determinations. Unless and until such relief is granted, VIP will comply with the Judgment as described in this Compliance Statement.

VIP likewise preserves the argument that any Thryv-based award of "direct or foreseeable pecuniary harms" beyond traditional backpay and lost employment benefits is unconstitutional, exceeds the remedial authority conferred by Section 10(c) of the Act, and is unenforceable in any event. Section 10(c) authorizes the Board to order

equitable, restorative relief—such as cease-and-desist relief, reinstatement, and backpay—but does not delegate to an administrative agency the power to impose tort-style consequential damages for collateral financial losses. To the extent *Thryv* authorizes an open-ended award of consequential monetary damages based on foreseeability, it converts an equitable make-whole remedy into legal damages of the kind historically adjudicated in Article III courts and, where applicable, by juries. Such a remedy raises serious constitutional concerns under Article III, the Seventh Amendment, and due process because it permits an executive-branch agency to impose unbounded compensatory damages without the procedural protections that ordinarily attach to legal damages. VIP's preservation of these objections in this compliance proceeding is consistent with GC Memo 26-04's recognition that *Thryv* remedies "have yet to be tested in a compliance hearing" and with the General Counsel's stated intent to challenge *Thryv* altogether, given the opportunity to do so. VIP will present any such issues, if necessary, through compliance proceedings, motion practice, or further appellate review, while continuing to follow the Judgment and lawful compliance directives.

VIP further preserves any structural or constitutional objection that may be available concerning the authority of the administrative adjudicator or the Board. VIP acknowledges that any such objection must be presented to the appropriate tribunal through lawful procedures and that, unless relief is granted, VIP remains bound to comply with the Judgment.

Nothing in this Compliance Statement waives VIP's right to dispute the amount, causation, foreseeability, legal availability, or enforceability of any claimed remedial component in compliance proceedings or in any further lawful review.

VIP's factual compliance positions are supported by the accompanying Declaration of VIP's President, Dan Byrnes. VIP will also provide or identify evidentiary support for its compliance positions, discussed above. VIP is prepared to present this evidence through the compliance-phase process, including by producing documents, examination and cross-examination of witnesses, presenting calculations and supporting records, and responding to any compliance specification, discovery request, or hearing procedure directed by the Region or the Board. VIP requests that the Regional Director establish a schedule for any additional production, exchange of calculations, or compliance hearing necessary to resolve disputed remedial issues.

REQUEST FOR REGIONAL DIRECTION AND APPROVAL

For the foregoing reasons, VIP respectfully requests that the Regional Director for Region 3 accept this Compliance Statement as VIP's good-faith compliance submission and direct the next steps necessary to implement the Order lawfully. Specifically, VIP requests that the Regional Director: (1) review and approve the attached proposed modified Appendix notice, or communicate any alternatively acceptable notice

language the Region determines should be posted; (2) confirm the timing, manner, and content of any physical posting, electronic distribution, certification, and related notice-compliance obligations; (3) determine whether the reinstatement remedy should be modified, substituted, tolled, or resolved through further compliance proceedings in light of the unresolved compliance-phase issues identified above; (4) establish a process and schedule for exchanging documents, payroll records, mitigation information, ESOP materials, calculations, and position statements necessary to resolve backpay, interim earnings, mitigation, ESOP, tax-allocation, W-2, and Thryv-related issues, including VIP's position that backpay should be cut off as of September 1, 2022 and reduced or eliminated before that date based on interim earnings and other offsets; (5) issue or direct any compliance specification, notice of hearing, or other procedure necessary to resolve disputed remedial facts; and (6) confirm that VIP's submission of this Compliance Statement,

* * *

APPENDIX I — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America (the "Constitution")

Amendment VII. Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

National Labor Relations Act ("the Act" or "the NLRA"), 29 U.S.C. § 151, et seq.

Section 2 of the Act (29 U.S.C. § 152) provides in relevant part:

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor,

or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right 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 or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

Appendix I

Section 8 of the Act (29 U.S.C. § 158) provides in relevant part:

(a) 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;

* * *

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(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, back pay 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.

* * * *