No. 26A____

IN THE
Supreme Court of the United States

VERMONT INFORMATION PROCESSING, LLC,

Applicant,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON EMERGENCY APPLICATION TO STAY IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMERGENCY APPLICATION FOR STAY

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PARTIES TO THE PROCEEDING

1. Vermont Information Processing, LLC (formerly Vermont Information Processing, Inc.) ("VIP") is the applicant; the petitioner and cross-respondent in the D.C. Circuit proceeding below; 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 Vermont Information Processing, Inc. (VIP) builds software and hosts data for the beverage industry. Until January 30, 2025, VIP was an employee owned company, 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.

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GLOSSARY

Abbreviation	**Definition**
ALJ	Administrative Law Judge Arthur Amchan
Act	National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*
Board	National Labor Relations Board
Board Br.	Board's 04/02/25 Brief of Respondent
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
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)
NLRB Opp.	Board's Opposition to VIP's Motion to Stay Mandate (D.C. Cir. Aug. 28, 2026)
JA	Joint Appendix

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rules 22 and 23, Applicant Vermont Information Processing, Inc. ("VIP") respectfully requests an order recalling and staying the mandate of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), pending this Court's disposition of VIP's forthcoming petition for a writ of certiorari. See *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); Sup. Ct. R. 22, 23.[1]

INTRODUCTION

A majority panel of the D.C. Circuit has enforced the so-called "*Thryv* remedy" against VIP, a category of NLRB relief that three circuits have held exceeds the Board's statutory authority and the Board itself has recently disavowed and expressed its intent to abandon. A divided panel of the D.C. Circuit declined to address *Thryv*'s legality on preservation grounds, despite VIP challenging, verbatim, *Thryv*'s "all direct or foreseeable pecuniary harms" remedy language before the Board. As a result, unless the mandate is recalled and stayed pending the resolution of VIP's upcoming petition for certiorari, VIP will be required to submit to a compliance proceeding in which it must defend against and, potentially, pay that challenged category of "direct or foreseeable pecuniary harms" which multiple circuits have found unlawful, the Board itself has disavowed, and which facially violates VIP's Seventh Amendment right to a jury trial.

[1] This petition solely applies to the D.C. Circuit's mandate as it concerns Christopher Bendel; VIP does not object to the mandate issuing as it concerns Kestrel Swift, Gordon Dragoon, and Kaleb Noble.

Contrary to the Board's characterization in its filings below, VIP does not merely object to incurring litigation expenses—the impending compliance proceeding itself is the injury, regardless of its cost or outcome, in light of the unconstitutional remedy at its core. In a stark and unexplained departure from the D.C. Circuit's prevailing preservation standard, the majority panel's erroneous decision that VIP had not preserved its challenge to the *Thryv* remedy has foreclosed VIP from even arguing this point, exposing it to constitutional injury without even despite VIP's explicit challenge to the "direct or foreseeable pecuniary harms" remedy in its exceptions before the Board.

A recall and temporary stay of the D.C. Circuit's mandate until this Court can rule on VIP's forthcoming petition for certiorari will preserve the status quo and safeguard VIP against this imminent and irrevocable constitutional harm, while imposing effectively no countervailing harm on the Board or any other parties in the interim. Considering the D.C. Circuit's unexplained departure from the prevailing preservation standard over a vigorous dissent, the stark circuit divide over the *Thryv* remedy, and the Board's own growing skepticism of the *Thryv* remedy, VIP respectfully asks that this Honorable Court recall and stay the D.C. Circuit's petition until its petition may be heard.

OPINIONS BELOW

VIP seeks a stay pending appeal of the D.C. Circuit's judgment and order entered on June 9, 2026 in *Vermont Information Processing, Inc. v. NLRB*, adopting an opinion issued on May 26, 2026. The judgment and order are available at 2026 WL

2333735, and reproduced herein as Exhibit A. The adopted opinion is available at No. 24-1360, 176 F.4th 690 (D.C. Cir. 2026), and reproduced herein as Exhibit B. The judgment and order upheld a portion of a decision of the National Labor Relations Board issued on November 5, 2024. The NLRB decision is available at 373 NLRB No. 131, 2024 WL 4707049, and reproduced herein as Exhibit C. The D.C. Circuit entered an order denying VIP's motion to stay the issuance of its mandate on September 2, 2026, a copy of which is reproduced herein as Exhibit D.

STATEMENT OF THE CASE

I. The NLRA and the *Thryv* Remedy

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). Based on this language, the Supreme 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).

In 2022, the Board departed from those limits. In *Thryv Inc.*, 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).

The *Thryv* remedy has been repeatedly challenged, with the reviewing courts largely skeptical of its validity. The Third Circuit characterized the remedy as "purport[ing] to grant broad compensatory relief" and held that it exceeds the Board's authority under the NLRA. *NLRB v. Starbucks Corp.*, 125 F.4th 78, 95-97 (3d Cir. 2024). The Fifth Circuit agreed, concluding that the remedy "operates as a compensatory damages order." *Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719, 728 (5th Cir. 2025). The Sixth Circuit rejected it as well, stating that "the Board seeks to grant monetary remedies at least partly designed to punish or deter employers acting unlawfully. That is the very definition of legal relief." *NLRB v. Starbucks Corp.*, 159 F.4th 455, 480 (6th Cir. 2025). Only the Ninth Circuit and, in the proceeding below, the D.C. Circuit have sustained the remedy, the former only over vigorous dissents, with six judges dissenting from the denial of en banc review, and the latter only upon the finding that VIP had not preserved its right to challenge the *Thryv* remedy. *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); *Vermont Information Processing, Inc. v. NLRB*, 176 F.4th 690, 703-707 (D.C. Cir. 2026). Individual judges of two other circuits have similarly concluded that *Thryv* remedies are unlawful legal damages. *See 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).

II. Facts and Procedural History

VIP is a Vermont software company serving the beverage industry. In February 2022, four VIP software engineers—Christopher Bendel, Kaleb Noble, Gordon Dragoon, and Kestrel Swift—created and circulated a spreadsheet in which employees could share salary information. Maj. Op. 3-4. VIP terminated Bendel the day the spreadsheet came to management's attention and terminated the other three employees the following day after reviewing their instant-message communications. Maj. Op. 4-6. The four employees filed a charge, the Board's General Counsel issued a complaint, and an administrative law judge ("ALJ") ruled against VIP, ordering reinstatement and make-whole relief that included 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." JA 1740-41. The ALJ explicitly attributed this remedy language to *Thryv*. JA 1741.

VIP excepted to the ALJ's proposed remedies. Under a heading stating that "[t]he proposed remedies are unreasonably burdensome and punitive," JA 1674, VIP quoted *Thryv*'s standard remedial language verbatim and objected that the ALJ "appears to have ordered remedies that impermissibly exceed make-whole remedies," that the award "is not a 'make whole' remedy authorized by the Act," and that it would "impose a punitive and unlawful penalty on VIP that is inconsistent with the remedial purposes of the remedies authorized by the Act." JA 1677. On November 5, 2024, the Board affirmed the ALJ's decision and ordered VIP to compensate the 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." JA 1734.

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. 13-18. 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. 18-27.

The majority did not defend the remedy on the merits, instead holding that VIP failed to preserve its "facial challenge" to *Thryv* under 29 U.S.C. § 160(e) and mischaracterizing VIP's objection before the Board as a case-specific "windfall" argument. Maj. Op. 23. It separately held VIP's Seventh Amendment challenge unpreserved. Maj. Op. 26-27.

Judge Justin R. Walker dissented. On preservation, he concluded that VIP "specifically objected in its exceptions" to the *Thryv* remedy and that VIP's verbatim quotation of *Thryv*'s remedial language, challenged as punitive, unlawful, and inconsistent with the Act, satisfied the D.C. Circuit's standard requiring only that the ground for an exception be "evident by the context in which it is raised." Dissent 10-12; *Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981); see *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090-91 (D.C. Cir. 2016). On the merits, Judge Walker explained that the *Thryv* "award for pecuniary harms is a compensatory-damages award" that "Congress did not authorize the NLRB to order," and he would have vacated the portion of the Board's order requiring VIP to compensate Bendel for all direct or foreseeable pecuniary harms. Dissent 10, 15.

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's deadline to file a petition for writ of certiorari is November 10, 2026. VIP is presently preparing its petition and shall file on or before that date.

REASONS TO GRANT THE APPLICATION

A four-part test governs the Supreme Court's grant of an application to stay pending disposition of a petition for writ of certiorari:

> First, it must be established that there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction . . . , the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous…Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay . . . And fourth, in a close case, it may be appropriate to 'balance the equities'—to explore the

> relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker, 448 U.S. at 1308; *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). VIP's forthcoming petition satisfies this standard.

I. There is a Reasonable Probability that this Court Will Grant Certiorari

Both VIP's preservation question and the underlying merits concerning the ultimate lawfulness of the *Thryv* remedy constitute substantial questions justifying appellate review by the Supreme Court. In relevant part, the Supreme Court will consider hearing cases where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter…or has so far departed from the accepted and usual course of judicial proceedings…as to call for an exercise of this Court's supervisory power[.]" Sup. Ct. R. 10(a). Both of VIP's questions for certiorari fall within Rule 10(a)'s enumerated categories.

A. The Preservation Issue

VIP's exceptions to the Board quoted *Thryv*'s standard remedial language word-for-word, and expressly challenged it as "punitive," unlawful, and "inconsistent with the remedial purposes of the remedies authorized by the Act". Pet. Reh'g 1. As Judge Walker noted, this challenge "put the NLRB on notice of [VIP's] objection to the *Thryv* remedy" under the D.C. Circuit's settled standard which "has not required a party to frame objections with exacting detail, technical precision, or citations to the precise precedent that it wants reconsidered." Dissent 11-12; see *Consol.*

Freightways, 669 F.2d at 794; *Camelot Terrace*, 824 F.3d at 1090-91. Yet the panel majority—despite directly quoting VIP's exception to the Board that "[t]he ALJ appears to have ordered remedies that impermissibly exceed make-whole remedies" and that the award of "all direct or foreseeable pecuniary harms" would "impose a punitive and unlawful penalty on VIP that is inconsistent with the remedial purposes of the remedies authorized by the Act"—nevertheless held that VIP had failed to preserve the argument for appeal. Maj. Op. 22. The majority's holding is an unexplained departure from the D.C. Circuit's applicable preservation standard articulated in *Consol. Freightways* and *Camelot Terrace*. In so holding, the majority "so far departed from the accepted and usual course of judicial proceedings" as to present a substantial question worthy of "an exercise of [the Supreme Court's] supervisory power[,]" thus justifying certiorari. Sup. Ct. R. 10(a).

Indeed, the Supreme Court frequently grants certiorari to review whether lower courts departed from established legal standards, as the D.C. Circuit did here. *E.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 493 (1984) (certiorari granted "to consider whether the Court of Appeals erred when it refused to apply the clearly-erroneous standard of Rule 52(a) to the District Court's 'finding' of actual malice.") (citation omitted); *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (certiorari granted where appellate court departed from the AEDPA's "highly deferential standard for evaluating state-court rulings"); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 663-664 (1989) (certiorari granted in relevant part to consider if the appellate court applied a "less severe" standard than the one applicable to defamation cases). This is the heart of the preservation question: the panel majority appears to have outright abandoned the governing preservation standard without justification. Under *Consol. Freightways* and *Camelot Terrace*, as Judge Walker correctly observed, the relevant question is whether the ground for the objection was evident from context. The majority nevertheless found VIP had not preserved the issue despite VIP's verbatim quotation of and direct challenge to the problematic *Thryv* remedy language, as well as its repeated assertions that the imposition of that remedy exceeded the Board's statutory authority and constituted an unlawful penalty. If a verbatim quotation of the challenged remedy language and an explicit challenge to the lawfulness of that remedy is insufficient to preserve that issue for appeal does not provide sufficient context to preserve, it is difficult to imagine what would suffice short of the sort of didactic preservation which neither *Consol. Freightways* nor *Camelot Terrace* require.

The preservation question also implicates decisions of other circuits which likewise faced questions of whether challenges to the *Thryv* remedy had been preserved, further cementing its status as a substantial question under the Supreme Court's own rules. In *Starbucks*, the Sixth Circuit held that Starbucks "fairly apprise[d]" the Board of its "intention to bring up the question of permissible remedies on appeal'" by arguing in the underlying administrative proceeding that the imposed remedy was "not an equitable concept but instead a legal principle typically preserved for juries in court," that the Board "does not have the authority to create or award additional types of compensatory relief," and that "if the [NLRA] is going to be expanded to include consequential damages, or any other form of pecuniary harm beyond that specified by the Act, that is a decision for Congress to make…." *Starbucks*, 159 F.4th at 468 (6th Cir.) (citations and internal quotation marks omitted). The Fifth Circuit went further still, excusing an employer's complete failure to challenge *Thryv* before the Board because doing so would have been futile in light of the Board's insistence that the *Thryv* remedies are valid. See *Harvard Maint., Inc. v. NLRB*, 165 F.4th 886, 897 (5th Cir. 2026). Under either approach, VIP's challenge would have been preserved and heard by the D.C. Circuit. Such divergent outcomes premised on comparable records of challenging the validity of the remedy (or, in the case of *Harvard Maint., Inc.*, a nonexistent record), especially in the context of the circuit split over *Thryv*, is itself worthy of the Supreme Court's attention.

Finally, this Court has repeatedly granted certiorari where a court of appeals' application of a preservation rule foreclosed review of an important underlying legal issue. For example, in *Holguin-Hernandez v. United States*, the Fifth Circuit held that a defendant forfeited his substantive-reasonableness challenge because he did not separately object after sentencing; this Court held that requesting a shorter sentence ordinarily preserved the objection to the longer sentence imposed. 589 U.S. 169, 173-75 (2020). Even more recently, in *Dupree v. Younger*, the Fourth Circuit dismissed an appeal because a purely legal issue resolved at summary judgment had not been renewed post-trial; this Court unanimously held that no such renewal was required. 598 U.S. 729, 734-38 (2023). Those decisions confirm that the correctness of a preservation ruling may itself warrant certiorari when that ruling is the sole barrier to reviewing an important legal issue. Here, the preservation ruling alone prevents review of a remedy that has produced an acknowledged circuit conflict and implicates statutory and constitutional limits on agency adjudication; there is, at minimum, a "reasonable probability that four Justices" will consider VIP's preservation question "sufficiently meritorious" to grant certiorari. *Rostker*, 448 U.S. at 1308.

B. The Merits Issue

The merits issue presents an equally substantial question and suffices to justify Supreme Court review on its own.[2] There is a clear circuit conflict on the validity of the *Thryv* remedy, a split which the Board itself has characterized as "lopsided." NLRB Macy's Br. 12. Indeed, at least three circuits have squarely held that the Board lacks statutory authority to award compensation for "all direct or foreseeable pecuniary harms." *Starbucks*, 125 F.4th at 94-97 (3d Cir.); *Hiran*, 157 F.4th at 725-29; *Starbucks*, 159 F.4th at 467-82 (6th Cir.). Only the Ninth Circuit and, now, the D.C. Circuit have sustained the remedy, the former over a panel dissent and a six-judge dissent from the denial of rehearing en banc. *Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39*, 155 F.4th at 1048. And though the D.C. Circuit ultimately upheld the remedy, Judge Walker's dissent adds a further reasoned voice to the growing chorus of judges who have concluded that *Thryv*

[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 completely bar 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.").

awards are legal damages that Congress never authorized. See Dissent 1-10; see also *3484, Inc.*, 137 F.4th at 1121-27 (Eid, J.); *Trader Joe's*, 167 F.4th at 801-02 (Oldham, J., dissenting).

In addition to the Circuits, the Board itself has cast doubt over the validity of the *Thryv* remedy. In *Macy's Inc. v. NLRB*, No. 25-627—the certiorari proceeding arising from the lone Ninth Circuit decision sustaining *Thryv*, on which the Board had expressly relied below—the Board declined to defend the remedy. It instead asked the Supreme Court to "vacate the judgment of the court of appeals and remand the case to the Board to allow for further consideration" of the remedy, explaining that two of the Board's then three sitting members were open to reconsidering whether *Thryv* remedies "are permissible under the Act," and describing the case as involving a "lopsided circuit split, concerning a discretionary remedy, that may soon be moot." NLRB Macy's Br. 12-16.[3]

Macy's is not the only case where the Board appears to have effectively disavowed *Thryv*. The Ninth Circuit enforced a *Thryv* remedy in *Int'l Bd. of Teamsters v. NLRB*, No. 23-2081, 2026 WL 1079297, at *10 (9th Cir. Apr. 21, 2026), *as amended*, 2026 WL 1952740, at *1 (9th Cir. July 1, 2026). After *winning* that ruling, the NLRB filed its own petition for rehearing calling *Thryv* "disputed" and

[3] This Court's recent denial of certiorari in *Macy's* does not materially alter this assessment. The respondent union represented there that no employee had suffered a *Thryv* harm and that there was "no chance" Macy's would face *Thryv* liability, leaving no live remedial controversy. Int'l Union Supp. Br. 2, *Macy's*, No. 25-627 (U.S. filed May 29, 2026). VIP, by contrast, is subject to an enforced order which directs compensation for direct or foreseeable pecuniary harms. Though the Board in its recent filings below attempted to downplay the likelihood of the *Thryv* remedy actually being imposed in the compliance proceeding, the threat of imposition remains and this case therefore presents the live controversy that *Macy's* did not.

"unsettled," and asking the court to "vacat[e] the portion of the Court's Judgment enforcing the *Thryv* remedy" on mootness grounds. *Int'l Bd. of Teamsters v. NLRB*, No. 23-2081, NLRB Pet. Reh'g 4-5 (filed May 28, 2026). The Ninth Circuit panel subsequently amended the decision to remove its approval of the *Thryv* remedy. *See* 2026 WL 1952740, at *1. Moreover, recent Board decisions show that two of the three members who have decided recent cases remain "open to reconsideration" of the permissibility of the *Thryv* remedy.[4] *E.g.*, *The Oil Man Corporation d/b/a Enright & Sons, Inc. and Inter. Ass'n of Sheet Metal, Air, Rain & Transp. Workers, Sheet Metal Workers Local Union #9*, 374 NLRB No. 136, 2026 WL 1831595 at *4, n. 3 (2026); *Lodi Volunteer Ambulance Rescue Squad, Inc., et al*, 374 NLRB No. 26, 2026 WL 266163 at *4, n. 3 (2026). Such uncertainty, fomented both by circuit splits and the agency itself, presents an archetypal "substantial question" warranting Supreme Court review. *See, e.g., Epic Systems Corp. v. Lewis*, 584 U.S. 497, 505 (2018) (granting certioriari to "clear the confusion" caused by circuit split and agency disagreement over Board position).

II. There is a Fair Prospect that this Court Will Reverse the D.C. Circuit's Decision

There is, at minimum, a fair prospect that this Court will reverse the judgment below because both the gateway preservation ruling and the underlying remedial question are seriously contestable. This standard does not require certainty. For example, in *Rostker*, Justice Brennan characterized reversal as a "fair" prospect

[4] At the time of filing, the Board is now up to four members, with the August 7, 2026 confirmation of James Macy.

where the case was "difficult and perplexing," the issues were the subject of "considerable debate," and the outcome could not "be predicted with anything approaching certainty." 448 U.S. at 1309; *see also, e.g., Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1308 (1974) (Powell, J., in chambers). This case fits that description.

On the preservation issue, Judge Walker explained in detail why VIP's exceptions satisfied the governing notice standard. Dissent 10-12. *Holguin-Hernandez* confirms the underlying principle: preservation ordinarily turns on whether a litigant communicated the action sought or objection made, not whether it later used a preferred formulation. *See* 589 U.S. at 173-75. VIP quoted *Thryv*'s remedial language word-for-word, challenged the award as exceeding make-whole relief, identified it as unauthorized by the Act, and called it punitive and unlawful. At minimum, Judge Walker's conclusion that VIP's challenge sufficed to preserve the issue establishes a fair prospect that this Court will reject the majority's departure from the applicable standard.

The merits provide an independent and, indeed, stronger basis for finding a fair prospect of reversal. Three circuits have held that *Thryv* exceeds the Board's statutory authority, and multiple judges in other circuits have reached the same conclusion. The considered analysis of courts on the other side of a conflict is evidence of a fair prospect of reversal. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Here, that analysis also includes Judge Walker's examination of the same order now enforced against VIP.

Taken together, Judge Walker's dissent, the inter-circuit disagreement over *Thryv*, the live remedial controversy, and this Court's decisions correcting preservation rules establish considerably more than a mere speculative possibility of reversal.

III. Absent a Stay, VIP Will Suffer Irreparable Harm

VIP's potential injury is neither speculative nor contingent. The Board's order imposes a final, binding obligation on VIP to compensate Bendel for "any other direct or foreseeable pecuniary harms . . . regardless of whether these expenses exceed interim earnings." JA 1734. The D.C. Circuit enforced that obligation and has now issued its mandate. Unless that mandate is recalled and stayed, VIP will be required to defend a compliance inquiry directed at an open-ended, damages-like category of relief that three circuits have held the Board lacks power to award, that Judge Walker would have vacated, and that the Board declined to defend on the merits before this Court in Macy's.

The Board argued below that Bendel's prompt reemployment reduces the likelihood of any Thryv award or complex compliance proceeding. NLRB Opp. 14. That prediction cannot eliminate the injury. The operative order authorizes the disputed remedy, and the compliance process exists to investigate and adjudicate whether Bendel incurred qualifying pecuniary harms. VIP's constitutional objection is that legal damages may not be adjudicated through that nonjury agency process. If that premise is correct, the injury occurs when VIP is subjected to the challenged mode of adjudication, not only when a final dollar amount is imposed.

Axon Enterprise, Inc. v. FTC supplies the closest analogy. In *Axon*, the Court explained that a party asserting a right not to undergo an unconstitutional administrative adjudication suffers a "here-and-now injury" from the proceeding itself, "irrespective of the proceeding's outcome," because that right is "effectively lost" if review of the challenged proceeding awaits its completion. 598 U.S. 175, 191-92 (2023) (internal quotation marks omitted). The Court in *Coinbase, Inc. v. Bielski* likewise recognized that lower proceedings should not continue during the pendency of Supreme Court review where doing so would effectively moot the claimed right to avoid the process under review—indeed, "it makes no sense" for the *Thryv*-focused compliance proceedings to begin while the Supreme Court "cogitates on whether there should be" compliance proceedings at all. 599 U.S. 736, 741-43 (2023) (citation omitted). In addition, the D.C. Circuit itself has long recognized that the loss of constitutional freedoms, even briefly, constitutes irreparable injury. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009). This is VIP's complaint and its injury: its loss of its Seventh Amendment right to a jury trial, a right which would be irrevocably lost if the compliance proceeding is permitted to continue while the Supreme Court considers the threshold question of whether the D.C. Circuit's preservation ruling wrongly foreclosed VIP's right to argue that the *Thryv* remedy is unlawful, as well as the fundamental, underlying merits issue of the *Thryv* remedy's lawfulness.

IV. The Balance of Equities Favors a Stay

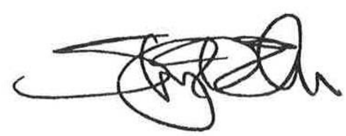
To the extent this Court finds VIP's application a close call, the balance of equities firmly favors a stay. Regardless of the ultimate outcome of the compliance proceeding, VIP faces the loss of its Seventh Amendment rights if it must submit to the compliance process before this Court can review its petition for certiorari. The countervailing harm is, by contrast, very limited. Bendel obtained new employment shortly after his discharge, Maj. Op. 20, and any backpay ultimately owed will include interest. The Board itself argued that Bendel's prompt reemployment—while, as discussed *supra*, importantly did *not* foreclose the imposition of the *Thryv* remedy—"reduces the likelihood that [Bendel] is entitled to *Thryv* remedies or that a complex compliance proceeding will ensue." NLRB Opp. 14. That concession substantially narrows any interest in immediately moving forward with the compliance proceedings. Nor can the Board identify a strong interest in immediate enforcement of a discretionary remedy it asked this Court to permit it to reconsider in *Macy's* and has repeatedly expressed the intent to reconsider. See NLRB Macy's Br. 12-16; *Oil Man*, 2026 WL 1831595, at *4 n.3; *Lodi*, 2026 WL 266163, at *4 n.3.

The public interest also favors a temporary stay. The stay would preserve the status quo while this Court considers two questions bearing on the orderly administration of federal review: whether the D.C. Circuit applied its established preservation standard, and whether the Board may impose this disputed category of monetary relief through agency adjudication. Proceeding immediately risks expending private and agency resources on a remedy that very well may be vacated, reconsidered by the Board, or held beyond the Board's authority. A limited stay avoids that risk without disturbing the undisputed portions of the Board's order or the mandate as to Dragoon, Noble, and Swift.

CONCLUSION

For the foregoing reasons, the Chief Justice should recall and stay the D.C. Circuit's mandate solely as to Christopher Bendel pending this Court's disposition of VIP's forthcoming petition for a writ of certiorari, including any proceedings on the merits. In the alternative, the Chief Justice should enter an administrative stay sufficient to permit the full Court to consider this application.

Respectfully submitted,



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September 9, 2026

Counsel for Vermont Information Processing, LLC

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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 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).

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

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

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

ENTERED:

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 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 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

[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-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]."

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

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.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2026, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ Ruth E. Burdick
Ruth E. Burdick
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 9th day of June 2026

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 15, 2025 Decided May 26, 2026

No. 24-1360

VERMONT INFORMATION PROCESSING, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

CHRISTOPHER BENDEL, ET AL.,
INTERVENORS

Consolidated with 24-1375

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

Stephen D. Ellis argued the cause for petitioner. With him on the briefs was *Carl "Ott" Lindstrom*. *Tillman J. Breckenridge* entered an appearance.

Gregoire Sauter, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Ruth E. Burdick*, Deputy Associate General Counsel, *Meredith Jason*, Assistant General Counsel, and *Usha Dheenan*, Supervisory Attorney.

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.

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.

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]

[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.

spreadsheet?" *Id.* After Noble agreed, Bendel created a spreadsheet and shared it with Noble, and Noble said that he would share it with two 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 they told Chief Financial Officer

[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

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

created the spreadsheet, Morgan and McGinty made no further effort to verify that Bendel authored the notation.

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

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[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 (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 (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. 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 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*

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[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.

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, 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.

[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."

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 (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

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[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. 12 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.

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]

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 (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"

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[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.

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]

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

[1] JA 1734.

[2] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901 (1984) (describing backpay awards under the National Labor Relations Act as "equitable"); *Curtis v. Loether*, 415 U.S. 189, 197 (1974) ("In Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution."); *see also Bowen v. Massachusetts*, 487 U.S. 879, 893 (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.

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.

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

[3] 372 NLRB No. 22, slip op. at 13 (Dec. 13, 2022).

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

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 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

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[5] *See Lucy v. Zehmer*, 196 Va. 493, 504 (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").

[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).

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.

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

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[9] JA 1734.

[10] *UAW-CIO v. Russell*, 356 U.S. 634, 643 (1958).

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

precedent.[12] It does not mention legal relief, whether damages or otherwise. So although these two specific equitable remedies do not *exhaust* the NLRB's remedial tools,[13] they

[12] *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187–88, 188 n.6 (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 (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 (2002) ("[N]ot all relief falling under the rubric of 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. That is enough for today.

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

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 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]

[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 (1945).

[16] *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 177 n.4 (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.

[17] *Phelps Dodge*, 313 U.S. at 197–98.

[18] *American Federation of Labor v. Watson*, 327 U.S. 582, 593 (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 (1976); *see also Phelps Dodge*, 313 U.S. at 194 ("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").

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 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

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[20] 29 U.S.C. § 160(c).

[21] *See, e.g.*, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849 (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 (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 ("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).

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

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[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.

[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*, 144 S. Ct. 2117, 2130 (2024). But VIP forfeited its argument that a *Thryv* remedy violates the Seventh Amendment by not raising that argument before the NLRB.

[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.

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 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*

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).

[30] *Id.* at 37.

[31] *Id.* at 38.

[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

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 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]

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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").

[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*,

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 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

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.

[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 . . .").

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]

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]

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[42] *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) ("We have said that the power to command affirmative action is remedial, not punitive.").

[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.

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

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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 before the NLRB and won on that point. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (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").

that exceeds its equitable make-whole 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 relief at all — a question no future factual development can affect.

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[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 (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.

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.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Vermont Information Processing, Inc. ***and*** **Christopher Bendel and Gordon Dragoon and Kaleb Noble and Kestrel Swift.** Case 03–CA–301055

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]

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] findings,[4] and conclusions[5] and to adopt the recommended Order as modified.[6]

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.

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[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.

[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.

[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 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.

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).

"(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 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

Lauren McFerran, Chairman

David M. Prouty, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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.

[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.

[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."

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, 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.

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.

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.

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 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.

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. 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

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

[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).

[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.

[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).

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.)

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."

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.
> 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: "L
> ouise 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
>
> 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

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[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.

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

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.

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.)

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.)

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 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

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

[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 all-hands meeting on February 18, indicates that neither Chris McGinty or Dan Byrnes mentioned such concerns to VIP employees.

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 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.

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).

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

[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.

[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.

[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).

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).

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

[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.

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.

(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 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

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

[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.

[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."

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 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.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-1360 **September Term, 2026**

NLRB-03CA301055

Filed On: September 2, 2026

Vermont Information Processing, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Christopher Bendel, et al.,
Intervenors

Consolidated with 24-1375

BEFORE: Millett, Walker, and Pan, Circuit Judges

O R D E R

Upon consideration of the motion to stay mandate pending the filing and disposition of a petition for writ of certiorari, the response in opposition thereto, and the motion to extend time, it is

ORDERED that the motion to extend time be dismissed as moot. It is

FURTHER ORDERED that the motion to stay mandate be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Ellie F. Kemper
Deputy Clerk