Nos. 16-2721 & 16-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER COMPANY,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB Case No. 08-CA-087155

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER/CROSS-RESPONDENT AND IN SUPPORT OF REVERSAL

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September 6, 2016

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Eighth Circuit Local Rule 26.1A, *Amici Curiae* Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and NFIB Small Business Legal Center disclose the following:

1) For non-governmental corporate parties please list all parent corporations:

   None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

s/ *Rae T. Vann*

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The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* contingent on the granting of the accompanying motion for leave. The brief urges the Court to reverse the decision of the National Labor Relations Board below and thus supports the position of Petitioner/Cross-Respondent Cooper Tire & Rubber Company.[1]

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 270 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly

[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

committed to the principles of nondiscrimination and equal employment opportunity.

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

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that

will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici are employers, or representatives of employers, subject to the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151 *et seq.*, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, as well as other laws and regulations governing the workplace. Because *amici's* members are potential defendants to claims of workplace harassment and discrimination, *amici* have a direct and ongoing interest in the issues presented in this appeal.

The National Labor Relations Board (NLRB or Board) incorrectly held that terminating the employment of an employee who hurls grossly offensive, racist insults at other employees while standing on a picket line amounts to a violation of the NLRA, rather than lawful application of anti-harassment measures aimed to comply with Title VII and other federal anti-discrimination laws. Because of their interest in the proper interpretation of the nation's equal employment opportunity and nondiscrimination laws, the issues presented in this case are extremely important to the nationwide business constituencies that *amici* represent.

Amici have filed numerous briefs as *amicus curiae* in cases before the U.S. Supreme Court, this Court, and others involving the proper scope, construction and interpretation of the NLRA, Title VII, and other employment laws and regulations.

Thus, they have an interest in, and a familiarity with, the issues and policy concerns involved in this case. *Amici* seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case.

Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Cooper Tire & Rubber Co. (Cooper) manufactures tires at three plants. *Cooper Tire & Rubber Co.*, Case No. 08-CA-087155 (N.L.R.B. Div. of Judges June 5, 2015), at 2. The Findlay, Ohio and Texarkana, Arkansas plants are unionized, while the Tupelo, Mississippi plant is a non-union facility. The conduct and actions at issue here all occurred in connection with a November 28, 2011 lockout and subsequent strike at the Findlay plant. *Id.* at 2, 3.

Cooper maintains a workplace harassment policy, which provides among other things that harassment "'will not be condoned nor tolerated under any circumstances, whether committed by Cooper employees, vendors, customers or other visitors.' … 'Cooper employees found to be harassing others will be subject

to disciplinary action, up to and including discharge.'" *Id.* at 6. The relevant collective bargaining agreement also contained a nondiscrimination provision, and separately provided that any employee who violated a term of the agreement "or who acts in a manner not in accord with the expressed purpose of this Contract, which is to promote cooperation and harmony with respect to the mutual well being [sic] of both parties, will be subject to disciplinary action." Addendum to Brief of Petitioner/Cross-Respondent at 21.

Prior to the expiration of its collective bargaining agreement on October 31, 2011, the Findlay plant had been continuously unionized for at least 70 years. *Cooper Tire* at 2. On November 28, 2011, the company locked the bargaining unit members out of the Findlay facility after efforts to negotiate a successor agreement failed. *Id.* at 2, 3. During the lockout, Cooper continued to operate the facility by bringing in nonunion and replacement employees, including many African Americans. *Id.* at 3.

For its part, the union set up picket lines, which the replacement workers were compelled to cross at the start and end of each work day. *Id.* at 3. In connection with its picketing activities, a union representative distributed a document entitled, "Picket Line Rules – Do's and Don'ts," which advised union members to, among other things, refrain from using "any racist, sexist or sexually

explicit language." Brief of Petitioner/Cross-Respondent, 26. Anthony Runion was a regular participant on the picket line. *Cooper Tire* at 3.

On the evening of January 7, 2012, a hog roast was held for striking employees and their families at the Union Hall located near the main gate of the Findlay plant. *Id.* The event was attended by Runion, his girlfriend, and her son, Collin. *Id.* Security video footage shows Runion, holding Collin's hand, walking from the Union Hall to the picket line. *Id.* at 4. As the vans carrying replacement workers arrived, Runion and two other employees are observed on the video shouting insults at them, such as "Piece of Shit!" and "Hope you get your fucking arm tore off, bitch!" *Id.*

At some point thereafter, Runion yells, "Hey, did you bring enough KFC for everyone?" (the "KFC" statement), which incites an unidentified worker to exclaim, "Go back to Africa, you bunch of fucking losers." *Id.* Runion is seen leveling a second racist taunt a few minutes later, saying, "Hey, anybody smell that? I smell fried chicken and watermelon" (the "fried chicken and watermelon" statement). *Id.* at 4-5. After investigating the incident and confirming that Runion made the "KFC" and the "fried chicken and watermelon" statements, Cooper fired Runion for gross misconduct in violation of its anti-harassment policy. *Id.*

Following Runion's termination, the union filed a grievance, and both parties submitted to arbitration. *Id.* at 6-7. The arbitrator found that Runion in fact

made both the "KFC" and "fried chicken and watermelon" statements, *id.* at 5, rejecting Runion's suggestion that his remarks were not intended to harm, but rather represented a mere "slip of the tongue." Brief of Petitioner/Cross-Respondent at 11. The arbitrator expressed considerable concern over Runion's racist speech, noting that "there was absolutely no reason for any of the picketers to inject race into the exchanges on the picket line, or to express their animosity toward African-American replacement workers by using racial slurs or demeaning racial comments." *Id.* at 14 (citation omitted). He concluded that Runion's use of racially demeaning comments directed specifically at African American replacement workers constituted a "clear violation" of Cooper's anti-harassment policies "which was so intolerable as to constitute [gross misconduct and was] just cause for his dismissal." *Id.* at 13.

At the union's behest, the NLRB Regional Director refused to defer to the arbitrator's award, and issued a complaint alleging that Cooper discharged Runion for engaging in union and/or concerted activities, in violation of Sections 8(a)(3) and (1) of the Act. *Cooper Tire* at 7. The complaint asserted that while Cooper "was entitled to be offended by Runion's racial comments, it was not privileged to discharge him" on that basis. *Id.* at 8.

An Administrative Law Judge (ALJ) agreed, ordering Cooper to reinstate Runion with full back pay. *Id.* at 21. He characterized the issue as whether

Runion's statements and conduct could "reasonably tend to coerce or intimidate employees in their rights protected under the Act or whether those statements raised a reasonable likelihood of an imminent physical confrontation." *Id.* at 11. Concluding that they could not, the ALJ found that Runion's discharge violated the Act. *Id.* at 16.

In a three-paragraph decision published on May 17, 2016, the Board affirmed the ALJ's decision. *Cooper Tire & Rubber Co.*, 363 N.L.R.B. No. 194, at 1 (2016). This administrative appeal ensued.

SUMMARY OF ARGUMENT

The Board concluded below that discharge of an employee for directing racially offensive remarks to African American employees while participating in picketing activities, in violation of both the company's nondiscrimination policies and the union's conduct rules, amounted to an unlawful labor practice under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* In doing so, it failed to adhere to its own precedents limiting the protections available under federal *labor* law for abusive workplace conduct, and also disregarded the expectation in federal *nondiscrimination* law that employers act reasonably to prevent and – where violations do occur – correct workplace harassment on the basis of race or other statutorily-protected characteristics. Because the Board's reasoning is irreconcilable with the broad remedial aims and purposes of laws prohibiting

workplace discrimination, and stands as a significant obstacle to compliance with those laws, it is erroneous and should be reversed.

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, makes it unlawful for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(1). The U.S. Supreme Court first held in *Meritor Savings Bank, FSB v. Vinson* that hostile environment sexual harassment is actionable under Title VII. 477 U.S. 57 (1986). Since that time, hostile environment claims have been recognized in other contexts as well, including harassment on the basis of race. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991); *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093 (8th Cir. 2001).

Employers have an affirmative duty to prevent and correct workplace harassment. "Workplace" in this context is not limited to an employee's physical work site, but also may include other places in which work-related business may take place or employees may gather. *See Dowd*, 253 F.3d at 1102; *see also Moring v. Ark. Dep't. of Corr.*, 243 F.3d 452 (8th Cir. 2001). Accordingly, as this Court has held, employers that disregard harassing conduct that occurs on or in proximity

to a picket line, which is directed at others on the basis of their race (or other statutorily-protected characteristics), rather than their union-related activities, do so at considerable peril.

The Board's decision ignores an employer's legal duty to exercise reasonable care in preventing, but also remedying, such conduct, and thus undermines the goals and aims of Title VII and other federal nondiscrimination laws. It also exposes employers to significant legal, business and reputational risk. Among other things, failure to remedy harassment that was or should have been known to the employer can result in substantial monetary liability under Title VII, including lost wages, attorney's fees and costs, as well as compensatory and punitive damages. It also can affect employee morale and productivity, and harm a business's reputation with prospective employees, clients and customers.

Employers must act especially decisively to address, through appropriate disciplinary action, the kind of deeply offensive, racist language at issue here, which was directed only to a particular subset of workers crossing a picket line – African Americans – because of their race and not their purported anti-union activity. While employers must respect the right of workers to exercise NLRA-protected rights, the language used in this case – which included insults such as, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon" – did not convey any pro-union message and

plainly was not said in opposition to anti-union conduct. Rather, it amounted to nothing more than racist hate speech aimed to personally offend and dehumanize.

Because the Board's decision strongly implies that employers must subordinate their EEO responsibilities to the NLRA whenever the subject of a misconduct investigation may implicate, however remotely, employee rights under the Act, it is inconsistent with federal nondiscrimination law, wrong-headed, and should be reversed.

ARGUMENT

I. THE BOARD'S DECISION IS INCOMPATIBLE WITH THE PURPOSE AND UNDERLYING AIMS OF FEDERAL ANTI-DISCRIMINATION LAW

Even while acknowledging the obligation of employers to comply with federal anti-harassment and nondiscrimination requirements, the NLRB has grown increasingly over-protective of employee misconduct implicating those requirements if it believes the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, even arguably may be triggered. The Board's summary adoption of the ALJ's order below reinstating – with back pay – an individual who, without provocation and in direct contravention of both company *and* union policy, spewed deeply offensive, racist remarks purportedly in the name of pro-union activism, represents a troubling extension of the Board's already-expansive interpretation of the NLRA's reach.

Because it fails to acknowledge and reconcile the tension between the Board's construction of the NLRA and federal employment nondiscrimination laws, interferes unreasonably with employer obligations to proactively prevent and promptly correct workplace harassment, and is antithetical to sound business, EEO and ethical principles, the decision below should be reversed.

A. The Decision Below Disregards Well-Established Legal Principles Regarding The Obligation Of Employers To Exercise Reasonable Care To Prevent And Correct Harassment

1. Title VII prohibits racial harassment from the picket line

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, makes it unlawful for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court ruled that a "plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. 57, 66 (1986). *See also Dowd v. United Steelworkers*, 253 F.3d 1093 (8th Cir. 2001) (citations omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

The Supreme Court has further held that Title VII's prohibition against workplace harassment extends beyond the sexual harassment context, and also

encompasses harassing conduct based on race, color, religion, and/or national origin. *See Meritor*, 477 U.S. at 66; *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) ("[r]acial harassment in the course of employment is actionable under Title VII's prohibition against discrimination in the 'terms, conditions, or privileges of employment'"), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991). This Court also has held that a discriminatory hostile work environment is actionable under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, *see Shaver v. Independent Stave Co*., 350 F.3d 716, 719 (8th Cir. 2003), as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* *See Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056 n.6 (8th Cir. 2004).

In addition, federal EEO laws do not limit liability for harassment to conduct occurring only at an individual's regular place of work, *i.e.*, the precise physical location in which the employee's work ordinarily is performed. In *Dowd v. United Steelworkers of America*, for instance, this Court upheld a jury verdict against a union for unlawful racial harassment in violation of Title VII. 253 F.3d at 1102. There, the plaintiffs were subjected to racially abusive comments and conduct while crossing a picket line. Those comments began with vulgar statements such

as "scab," "fucking scab," and "motherfucking scabs," but soon devolved to include "nigger scab" and "black fucking scab." *Dowd*, 253 F.3d at 1097.

In rejecting the union's suggestion that picket line harassment is beyond Title VII's reach, this Court observed:

> The union places too much importance on the time and place of the offensive conduct instead of the nature and manner of the offensive conduct. The touchstone for a Title VII hostile environment claim is whether "the workplace is permeated with 'discriminatory intimidation, ridicule and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"
>
> ***
>
> Moreover, the union construes "working environment" too narrowly. The offensive conduct does not necessarily have to transpire at the workplace in order for a juror reasonably to conclude that it created a hostile working environment. … Here, the offensive conduct was in physical proximity to the plant, and, arguably, perpetrated with the intention to intimidate and to affect the working atmosphere inside the plant. Thus, we hold a reasonable juror could have determined that the racial abuse hurled at the plaintiffs as they attempted to go to and from work was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

Id. at 1101-02 (citations omitted). *See also Moring v. Arkansas Dep't. of Corr.*, 243 F.3d 252 (8th Cir. 2001) (supervisor's sexual advance in hotel room during overnight business trip sufficiently severe to constitute actionable harassment). Accordingly, the concept of "workplace" under federal EEO laws is broader than the Board acknowledges.

2. Employers have a legal duty to act in the face of actual or constructive knowledge of potential harassment

> Under Title VII, an employer's liability for [ ] harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a 'supervisor,' however, different rules apply.

Vance v. Ball St. Univ., 133 S. Ct. 2434, 2439 (2013). Under either scenario, however, employers are expected to *do something* when faced with conduct that could give rise to a hostile work environment claim.

In its dual holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court established an affirmative defense to liability for harassment perpetrated by supervisors. The first of two necessary elements of the defense is that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The Court later described the defense as "a strong inducement [for employers] to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability." *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 278 (2009) (citation omitted).

In the case of workplace harassment perpetrated by a non-supervisor, however, the employer will be held vicariously liable if it knew or reasonably

should have been aware of the harassing behavior and "failed to take proper action." *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1195 (8th Cir. 2006).

As this Court has explained:

> The promptness and adequacy of an employer's response will often be a question of fact for the factfinder to resolve. Factors in assessing the reasonableness of remedial measures may include the amount of time that elapsed between the notice and remedial action, the options available to the employer, possibly including employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and whether or not the measures ended the harassment.

Carter v. Chrysler Corp., 173 F.3d 693, 702 (8th Cir. 1999) (citations omitted).

These precedents reinforce the principle that employers must make a meaningful effort to prevent workplace harassment. Where an employer has not been successful at prevention, it needs to act quickly to remedy the situation, regardless of the supervisory status of the perpetrator or victim. Because employers are subject to potential Title VII liability for failing to affirmatively act when faced with actual or constructive notice of suspected harassment, employers understandably take this duty seriously.

3. The Board's decision interferes with basic, federal nondiscrimination compliance principles

In this instance, Cooper had a policy that prohibited harassment (which employees, including Runion, received and signed). It also monitored employees' behavior for compliance with the policy, and disciplined Runion when he violated

the policy by directing unprovoked, racially offensive remarks at replacement employees, many of whom also work for Cooper. Had Cooper not acted swiftly to address Runion's conduct, it could well have been the defendant in a Title VII suit by the replacement employees against the company.

At the very least, failure to act may have been construed by other employees as tacit approval of Runion's behavior. That, in turn, may have deterred other employees from complaining about such conduct in the future and/or signal that such language is tolerated. Although Runion's statements alone may not have been sufficient to state such a claim, they could have served as evidence of a pattern of the company's failure to protect employees from harassment, had Cooper not taken decisive action.

Here, the Board sanctioned conduct that not only was expressly barred by Cooper's EEO policy, but also triggered its compliance obligations under Title VII – all out of a misplaced concern that Runion's actions amounted to NLRA-protected activity. In doing so, it effectively declared that, whenever pro-union activists engage in harassing conduct directed not at another worker's union-related views or activities, but rather at statutorily-protected, personal characteristics such as race, sex, religion, national origin, disability, or age, employers may not punish the perpetrators.

Indeed, the underlying administrative complaint confirms as much, asserting that Cooper "was entitled to be offended[,]" *Cooper Tire & Rubber Co.*, 363 N.L.R.B. No. 194, at 5 (2016), but not to discipline Runion for his actions – a notion squarely rejected by the arbitrator, but fully embraced by the ALJ and the Board. Their conclusions rest on unsound legal principles, under both the NLRA and federal employment nondiscrimination laws, and therefore must be rejected by this Court.

4. The EEOC has expressed concern over the conflict between current Board policy and federal EEO laws

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing Title VII, the ADA, and the ADEA, as well as the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and Title II of the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq*. To that end, the agency has published extensive regulatory and sub-regulatory guidance on workplace discrimination issues, and from time to time will respond to inquiries from the public regarding EEO compliance questions.

In one such inquiry, the EEOC was asked to comment directly on whether Title VII and other "EEOC-enforced laws conflict with the National Labor Relations Act … as construed in *Cooper Tire*." EEOC Informal Discussion Letter, "Title VII and Other EEOC Enforced Laws: Harassment/Striking

Employees/NLRA" (Sept. 15, 2015)[2]. The EEOC responded, in relevant part, as follows:

> The Commission has not considered this matter as your letters define it. The relevant Title VII questions, which include union liability under Title VII, merit careful consideration. … We recognize the importance of this issue and appreciate your focusing our attention on it.

Id. Recently, the EEOC has been more explicit in acknowledging the serious EEO compliance problems created by the Board's current policy position. In its June 20, 2016 Select Task Force report on workplace harassment, for instance, the agency expressed the need for the EEOC and the Board to "confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA." EEOC Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic 42 (June 2016).[3]

A number of the Report's recommendations reinforce the importance of proactive harassment prevention. Released to coincide with the 30th anniversary of the Supreme Court's landmark ruling in *Meritor*, the EEOC's Report outlines possible causes for the persistence of workplace harassment on the basis not only of sex, but also race, disability, religion, and other protected bases, and

[2] *Available at* https://www.eeoc.gov/eeoc/foia/letters/2015/title_vii_harassment_09_11.html.
[3] *Available at* https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

recommends a number of preventive actions aimed at correcting conditions in which harassment tends to fester.

Among other things, the EEOC advises employers to consider holding supervisors and managers accountable for failing to support company prevention efforts, and to foster a work environment that allows victims of harassing behavior to come forward without fear of unfair retaliation. It also suggests that where harassing conduct is confirmed, employers should take swift disciplinary action that is "proportionate to the behavior(s) at issue and the severity of the infraction. [D]iscipline [should be] consistent, and [should] not give (or create the appearance of) undue favor to any particular employee." EEOC Select Task Force Report at 43, 68.

"[Title VII]'s 'primary objective' [with respect to employment discrimination] is 'a prophylactic one,' . . . aim[ing], chiefly, 'not to provide redress but to avoid harm.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (citations omitted). A harassment "prevention" program can hardly be considered effective or meaningful if it does not restrict behavior that, if left unaddressed, could foster or contribute to a hostile work environment. Nor can the employer's response be viewed as "proportionate" or "consistent" if those engaging in racially harassing conduct *outside* of a union setting are properly

disciplined, but those *within* a union setting are shielded, under the Board's rationale, from punishment.

B. The Board's Intransigent Position Encourages Hate Speech, While Impeding Meaningful Workplace Discrimination Prevention And Remedial Efforts

The Board's decision and the rationale underlying it encourage opprobrious behavior and severely impair employer efforts to combat harassment in the workplace. By casting a broad cloak of protection over any employee who can claim to have been engaging in protected concerted activity, the NLRB has tied employers' hands and prevented them from taking any action against those who engage in even the most blatant, deeply offensive, racist conduct.

It is not mere hyperbole to describe Runion's remarks as bordering on, if not exemplifying, racist hate speech. *See* AnnMarie Ruegsegger Highsmith, *When He Hollers, Do We Have To Let Him Go*?, 27 Beverly Hills B. Ass'n J. 27, 28 (1993) (hate speech refers to "verbal or written words, and symbolic acts, that convey grossly negative assessments of particular persons or groups based on race, gender, ethnicity, religion, sexual orientation, or disability") (footnote omitted). Workplace hate speech can, and typically does, have a lasting, negative effect on targeted employees, as well as bystanders. In a nutshell, as this Court observed, "[l]aughing or smirking at racist jokes, as well as failing to report, investigate, or punish known racist remarks of others, can make up an 'accumulation of abusive

conduct' which poisons the work environment. *Ellis v. Houston*, 742 F.3d 307, 320 (8th Cir. 2014) (citation omitted).

Here, Runion twice associated African-American replacement employees, on their way into work, with fried chicken and watermelon. The racially offensive nature – and intent – of those statements are entrenched in American culture. "Associations between blacks and certain foods, specifically watermelon and fried chicken, gained cultural currency since before the Civil War as they appeared regularly as props in blackface minstrel shows, a form of popular entertainment based on racist humor. Generally, courts encountering such associations recognize them as racially derogatory." Gregory S. Parks & Danielle C. Heard, *"Assassinate the N**ger Ape[]": Obama, Implicit Imagery, and the Dire Consequences of Racist Jokes*, 11 Rutgers Race & L. Rev. 259, 289–90 (2010) (footnotes omitted). As one commenter explained:

> [T]he stereotype that African Americans are excessively fond of watermelon emerged for a specific historical reason and served a specific political purpose. The trope came into full force when slaves won their emancipation during the Civil War. Free black people grew, ate, and sold watermelons, and in doing so made the fruit a symbol of their freedom. Southern whites, threatened by blacks' newfound freedom, responded by making the fruit a symbol of black people's perceived uncleanliness, laziness, childishness, and unwanted public presence. This racist trope then exploded in American popular culture, becoming so pervasive that its historical origin became obscure. Few Americans in 1900 would've guessed the stereotype was less than half a century old.

William Black, "How Watermelons Became a Racist Trope," *The Atlantic* (Dec. 8, 2014).

This Court itself has acknowledged the damaging effect of insults based on the racially insensitive and stereotypical association of eating "fried chicken" and "watermelon" with African Americans.[4] *See Ellis*, 742 F.3d at 322 (describing numerous racist comments directed at African American officers, including "smells like fried chicken" and "they are serving watermelon today, I'm sure you guys are happy"). Cooper made every effort to address and minimize any lasting impact that Runion's racist comments may have had not only on African-American replacement workers, but on any other employees, guests, or members of the general public who may have been exposed to and offended by them.

> [R]acist hate messages, threats, slurs, and epithets convey messages of inferiority that hit the gut of those in the target groups. Victims who attempt to avoid such negative messages may be restricted in their personal freedom as they quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor.

Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 Ind. L.J. 963, 966 (2009) (citations and internal quotations omitted). And yet without as much as one sentence of legal analysis or explanation, the Board

[4] Stereotypes have been described as "crude generalizations and distortions, which 'so permeate the society that they are not noticed as contestable.'" Jane Caputi, *Character Assassinations: Hate Messages in Election 2008 Commercial Paraphernalia*, 86 Denv. U. L. Rev. 585, 601 (2009) (footnotes omitted).

acquiesced in such behavior, ordering Runion's immediate reinstatement with back pay. Because the Board's decision is antithetical to the unassailable, decades-old, national public policy supporting the eradication of workplace race discrimination, it should be reversed.

II. EMPLOYERS FORCED TO CHOOSE BETWEEN COMPLIANCE WITH CURRENT BOARD POLICY AND FEDERAL EEO LAWS FACE SIGNIFICANT LEGAL, ORGANIZATIONAL, AND REPUTATIONAL RISKS

A. The Monetary And Non-Monetary Consequences For Failing To Comply With Federal EEO Laws Are Substantial, And Eclipse Typical NLRB-Imposed Penalties

Title VII authorizes courts to award a range of damages for unlawful discrimination. For instance, a court:

> [M]ay enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1).

Prior to 1991, the only statutory remedy available to Title VII litigants was back pay and injunctive and declaratory relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). With the passage of the Civil Rights Act of 1991 (CRA), 42 U.S.C. § 1981a, however, Congress greatly expanded the remedies available under Title VII by permitting the award of compensatory and punitive

damages in cases of intentional discrimination, in addition to statutory attorney's fees and costs. 42 U.S.C. § 1981a(a)(1). In particular, a Title VII plaintiff may be awarded punitive damages where he or she proves that the defendant intentionally discriminated "with malice or with reckless indifference" to the individual's federally protected rights. 42 U.S.C. § 1981a(b)(1); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). In contrast, the remedies available under the NLRA for an unfair labor practice typically are limited to reinstatement, back pay and notice posting, and do not include compensatory and punitive damages.[5] *See, e.g.*, NLRB, Memorandum 99-97 (Nov. 19, 1999) (explaining that the 1991 CRA added compensatory and punitive damages to Title VII, the original provisions of which were modeled after the NLRA, but not to the NLRA itself).

An employer cannot fulfill its obligation to exercise reasonable care, and thus avoid potentially substantial liability for workplace harassment, if employees

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[5] Section 10 of the Act provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter.

29 U.S.C. § 160(c).

claiming that their harassing conduct was in furtherance of NLRA rights are judged immune from disciplinary action. There is no such thing in EEO law as an "NLRB affirmative defense" under which employers may avoid legal liability for failing to remedy confirmed workplace harassment by an individual purportedly engaged in legitimate union activities. Neither Congress nor the Supreme Court has recognized such a perverse interpretation of Title VII or the NLRA, and the resulting statutory conflict is a clear indication that the NLRB has misinterpreted the NLRA.

B. Permitting Certain Classes Of Employees To Evade Punishment For Workplace Hate Speech Harms Employer-Employee Relations And Devalues Efforts To Encourage Workplace Civility And Respect For Others

Failure to respond to employee conduct of a blatantly hostile, racially harassing nature can result not only in legal liability, but also can have deleterious consequences from a business and employee relations standpoint. As noted, workplace harassment can have a negative impact on employee productivity and organizational culture, as well as affect a company's brand and reputation. Even employees who witness but do not personally experience workplace harassment tend to be more likely to experience negative psychological effects than those in a harassment-free environment. One study found that more than 2 million professionals, including managers, quit each year due to workplace incivility, costing employers $64 billion annually. *See* Level Playing Field Institute, *The*

Corporate Leavers Survey: The Cost of Employee Turnover Due Solely to Unfairness in the Workplace 04 (2007).[6]

Of particular concern to employers is the understandable, if false, perception that inaction (as mandated by the Board) in the face of racially offensive actions and conduct reflects a company's lack of commitment to EEO and discrimination prevention, or worse, its tacit acceptance of such behavior. Not only does such a perception damage employee morale – prompting good employees to leave and talented applicants to look elsewhere – but it also can have a chilling effect on EEO reporting, That, in turn, prevents employers from correcting issues that if left to fester could seriously damage a firm's organizational culture, reputation, and liability risk management efforts.

III. THE CONDUCT AT ISSUE IN THIS CASE WAS NOT PROTECTED IN ANY EVENT

Finally, *amici* observe, as Cooper has argued, that Runion's conduct was not protected at all. For this reason as well, his discharge for gross misconduct did not violate the Act, and the Board's decision to the contrary should be reversed.

As a threshold matter, there was nothing about Runion's comments – which were directly *only* to African-American replacement workers – that can reasonably be viewed as advancing the purpose of collective bargaining. As the arbitrator

[6] *Available at* http://www.lpfi.org/wp-content/uploads/2015/05/corporate-leavers-survey.pdf.

below pointed out, Runion's actions targeted the replacement workers' personal protected *traits*, not their (or the company's) purported anti-union *activity*, a conclusion consistent with this Court's holding and rationale in *Dowd*. "Words such as "b_ _ _ _ _d," a "redneck son-of-a-b_ _ _h," and other words of similar import, are devoid of substantive content and of meaningful value that could convey a message of grievance or concern. They are simply words of offense." *Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4th Cir. 2005); *see also Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 294 (9th Cir. 2011). Indeed, careful examination of Runion's "words and actions could only lead to one conclusion: his derogatory attacks were merely a manifestation of his personal sentiments …, not an expression of Union opinion. Such personal missions are not the sort of concerted activity which the statute protects." *Media Gen. Operations*, 394 F.3d at 212.

In addition, it is well established that neither locking out striking employees, nor hiring replacement workers to cross the picket line, constitutes an unfair labor practice. *See N.L.R.B. v. Brown*, 380 U.S. 278 (1965). Finally, to the extent that the Board's decision rests, at least in part, on the non-physical nature of Runion's conduct, it is "at odds with its own precedents, which recognize that an employee's offensive and personally denigrating remarks alone can result in loss of protection." *Plaza Auto*, 664 F.3d at 293–94.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and NFIB Small Business Legal Center respectfully urge that the National Labor Relations Board's decision below be reversed.

Respectfully submitted,

s/ *Rae T. Vann*

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September 6, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that the BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER/CROSS-RESPONDENT AND IN SUPPORT OF REVERSAL complies with:

[X] 1. The type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,450 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

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