UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THRYV, INC. and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1269	Case Nos. 20-CA-250250 and 20-CA-251105

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

PHILIP A. MISCIMARRA
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber submits this brief in response to the Notice and Invitation to File Briefs in this case, which asks whether—and if so, how—the National Labor Relations Board ("NLRB" or "Board") should "modify its traditional make-whole remedy . . . to include relief for consequential damages." 371 NLRB No. 37, slip op. at 1 (Nov. 10, 2021). This question is of significant concern to the Chamber, many of whose members are subject to the National Labor Relations Act ("NLRA" or "Act"). As one of the largest representatives of employers in the United States, the Chamber has a vital interest in ensuring that federal labor law remains faithful to the statutory framework that Congress adopted in the NLRA.

SUMMARY OF ARGUMENT

The language, structure, and purposes of the NLRA preclude any award of monetary damages beyond backpay and benefits (*i.e.*, compensation that the employer discontinued and would otherwise have provided to the employee) for unfair labor practices. Even when employees are discharged or suspended—the most severe adverse actions that can result from unlawful conduct—Section 10(c) specifies that the available remedies are reinstatement "with or without back pay." The statutory text shows that even the remedy of "back pay" is not

automatically warranted in every case, and further specifies that an award of "back pay" is prohibited whenever the discharge or suspension was supported by cause. 29 U.S.C. § 160(c).

It is equally well-established that the Board lacks authority to create, impose, or award additional monetary damages merely because the Board may believe that additional damages are desirable in a particular case. Congress did not "vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940). Instead, "affirmative action to 'effectuate the policies of th[e] Act' is action to achieve the remedial objectives which the Act sets forth." *Id.* at 12. And for unlawfully discharged or suspended employees, the Act specifies "back pay" as the only recoverable category of damages, which functions to "make good to the employees what they had lost *through the discriminatory discharge*." *Id.* at 13 (emphasis added). Nothing in the Act permits the Board to create, impose, or award additional monetary damages that exceed elements of compensation that the employer would otherwise have paid to the affected employees. This conclusion is the only way to read the text of Section 10(c), including the Taft-Hartley Act's 1947 amendments, which underscored that reinstatement and backpay are the remedies that the Board has authority to award to unlawfully discharged or suspended employees.

This conclusion also respects Congress's choice not to "establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *UAW v. Russell*, 356 U.S. 634, 643 (1958). Congress did not create a private right of action for injured individuals, nor did it establish the Board for the "adjudication of private rights." *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940). It instead empowered the Board to prevent persons from engaging in unfair labor practices, 29 U.S.C. § 160(a), and to issue

"cease and desist orders" when it finds merit to a complaint, *id.* § 160(c). In this way, "[t]he Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *Nat'l Licorice Co.*, 309 U.S. at 364. Because the Board asserts public (not private) rights, it is not surprising that Congress did not authorize the award of full compensatory damages.

The Act's history reinforces the above conclusion that the statute does *not* vest authority in the Board to create, impose, or award additional types of compensatory relief. The drafters of the 1935 Wagner Act deliberately rejected an early proposal that would have broadly empowered the Board to order violators "to pay damages" or to impose other remedies that would "achieve substantial justice." S. 2926, 73d Cong. § 205(c) (1934). They instead authorized reinstatement and back pay, knowing that this specificity narrowed the remedies available. And as the Supreme Court has explained, the language that Congress ultimately adopted for the NLRA served as the model that Congress used when it chose *not* to authorize "consequential damages," including damages for an unlawfully discharged employee's "ruined credit rating," in the original remedial provision of Title VII of the Civil Rights Act of 1964. *United States v. Burke*, 504 U.S. 229, 239-40 & n.10 (1992). Congress later had to enact new legislation, the Civil Rights Act of 1991, to make such relief available in Title VII cases. *Id.* at 241 n.12; 42 U.S.C. § 1981a.

In short, when employees experience discharges or suspensions, Section 10(c) authorizes a potential award of "back pay" damages, nothing more. As with Title VII, Congress would need to enact new legislation to make consequential damages available as a remedy for unfair labor practices. Notably, these types of NLRA amendments—although proposed—have never been enacted into law. Without such legislative action, the Board lacks independent authority to

create, impose, or award additional monetary damages under the NLRA, regardless of the label ("consequential," "compensatory," or "punitive" damages) that it uses to describe such new remedies.

ARGUMENT

A. The Language Of Section 10(c) Does Not Authorize Consequential Damages.

By its terms, Section 10(c) identifies "back pay" as the only monetary relief that the Board can award to employees who suffer harm from an unfair labor practice. On finding that a person has committed an unfair labor practice, the Board "shall issue . . . 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 [the Act]." 29 U.S.C. § 160(c). That language has been present and unchanged since the Wagner Act's adoption in 1935. *See* National Labor Relations Act, Pub. L. No. 74-198, § 10(c), 49 Stat. 449, 454 (1935). And this language "indicates that the remedy of 'backpay' is intended *only to supplement* 'reinstatement of employees.'" *Pac. Beach Corp.*, 361 NLRB 709, 726 (2014) (Member Miscimarra, concurring in part and dissenting in part), *enforcement denied in part and enf'd in part sub nom. HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016); *see also, e.g.*, *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665 (1954) (describing the back pay remedy as a "minor supplementary" form of compensation). The language of Section 10(c) even makes clear that the remedy of "back pay" is not automatically warranted, because the statute contemplates the award of reinstatement "*without* back pay" in some cases. 29 U.S.C. § 160(c) (emphasis added).

This conclusion is underscored by two relevant changes that Congress made to Section 10(c) in the Taft-Hartley Act (or Labor Management Relations Act ("LMRA")). First, the Taft-Hartley Act added language to Section 10(c) reiterating that "where an order directs

reinstatement of the employee, *back pay may be required* of the employer or labor organization." Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136, 147 (codified at 29 U.S.C. § 160(c); emphasis added). And second, Congress directed that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *Id.* This language reflects Congress's understanding that the available monetary relief for an unlawfully discharged or suspended employee is limited to "back pay" (to supplement the prescribed non-monetary relief of "reinstatement").

The first addition noted above, which affirms the Board's power to require back pay from unions and employers, would be glaringly underinclusive if the Board's reinstatement orders could include other forms of monetary relief. If Congress intended to make other monetary remedies available, then it surely would have said that "back pay *or other relief* may be required" of unions or that "monetary relief" more generally was available. Worse yet, the second addition would have a huge loophole if the Board could order monetary relief besides back pay. On that reading, even in cases of for-cause discharges, the Board could order all sorts of additional "non-back pay" monetary damages to the discharged employee, so long as the Board avoided awarding "back pay." Such an interpretation makes no sense.

Rather, Congress acted on the understanding that other sorts of payments were not generally available in such cases. The legislative history confirms as much: Congress adopted the "cause" restriction in Section 10(c) to limit the Board's authority to award any damages (at the time deemed *only* to include "back pay") when a discharged employee "was guilty of gross misconduct," and where the Board nevertheless inferred an unlawful motive and deemed the discharge unlawful. H.R. Rep. 80-245, at 27, 42 (1947), *reprinted in* 1 NLRB, LEGISLATIVE

HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 318, 333 (1948) [hereinafter "LMRA HIST."]. Equally clear is that the Taft-Hartley Act's limitation on the Board's reinstatement and back pay authority was not a minor technical amendment of the Act, but a significant provision that President Truman specifically highlighted when he vetoed the LMRA, and that Senator Taft addressed in opposing President Truman's veto.[1] Nothing in the legislative history—or Board's contemporaneous practice—suggests that the Board was regarded, at any time, as having the authority to impose or award monetary damages other than "back pay."

Although Section 10(c) does not expressly prohibit monetary damages beyond "back pay," nothing in the Act or its legislative history gives the Board authority to award monetary damages beyond compensation and benefits that the employer discontinued which would otherwise have been provided to the employee. And importantly, "[t]he absence of a prohibition is not . . . equivalent to an authorization." *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 804 (D.C. Cir. 1997) (holding that Section 10(c) does not authorize attorney's fees). This conclusion is further compelled, as discussed below, by the design and history of the Act.

B. The Act's Design And History Preclude Any Inference That Consequential Damages Are Generally Available To Discharged Or Suspended Employees.

From the start, the NLRA has been understood as authorizing the Board to adjudicate public rights in the public interest, not private rights for the benefit of private parties.

[1] 93 Cong. Rec. 7501 (June 20, 1947), *reprinted in* 1 LMRA HIST. 917; 93 Cong. Rec. A3233 (June 21, 1947), *reprinted in* 2 LMRA HIST. 1627; *see Babcock & Wilcox Constr. Co*., 361 NLRB 1127, 1144 (2014) (footnotes omitted) (Member Miscimarra, concurring in part and dissenting in part), *petition for review denied sub nom. Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017). The LMRA was enacted over President Truman's veto when two-thirds majorities in the House and Senate voted to override the veto. 93 Cong. Rec. 7504 (June 20, 1947), *reprinted in* 1 LMRA HIST. 922-23 (reflecting two-thirds majority vote in the House); 93 Cong. Rec. 7692 (June 23, 1947), *reprinted in* 2 LMRA HIST. 1656-57 (reflecting two-thirds majority vote in the Senate).

Soon after the Act's passage, the Supreme Court resolved this question in several disputes about the participation of employees and unions in Board proceedings. The Court held that charging parties have no power under the Act to prosecute their charges or to seek judicial enforcement of Board orders sustaining their charges. Instead, "[t]he Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 265 (1940). Likewise, the Court held that procedural rules governing joinder of necessary parties are inapplicable to Board proceedings because such proceedings are "so narrowly restricted to the protection and enforcement of public rights." *Nat'l Licorice Co.*, 309 U.S. at 363. When the Board seeks to enforce its orders, it does so "as a public agent, not to give effect to a 'private administrative remedy.'" *Amalgamated Utility Workers*, 309 U.S. at 269. Board proceedings are "not for the adjudication of private rights." *Nat'l Licorice Co.*, 309 U.S. at 362. This principle is reiterated in the Act's legislative history:

> No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal.

H.R. REP. NO. 74-1147, at 24 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3074 (1949) [hereinafter NLRA HIST.]. In short, "the primary objective of Congress in enacting the National Labor Relations Act" was "stability of labor relations," not private rights of action. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949).

The Act's focus on the public interest was central to its passage because the Constitution prohibits delegations of judicial or legislative functions to administrative agencies. These constitutional principles condition the extent of the Board's power. First, Congress generally cannot bestow the federal "judicial Power" on adjudicatory bodies that are not Article III courts. U.S. CONST. art. III, § 1; *see, e.g.*, *Stern v. Marshall*, 564 U.S. 462, 484 (2011). There is an exception to this constitutional restriction, however, for cases involving "public rights." Those are cases "arising 'between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,'" in contrast to "matters 'of private right, that is, of liability of one individual to another under the law as defined.'" *Stern*, 564 U.S. at 489 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)); *see also* U.S. CONST. amend. VII (recognizing a right to trial by jury).

And, second, while Congress was considering the Wagner Act legislation in 1935, the Supreme Court invalidated the National Industrial Recovery Act ("NIRA"), and the industry advisory committee that it established, as "an unconstitutional delegation of legislative power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 537-42 (1935). Members of the Court took issue with the creation of broad-based, "roving commission" authority to "inquire into evils and upon discovery to correct them." *Id.* at 551 (Cardozo, J., concurring). The Wagner Act's supporters were keenly aware of this constitutional issue and deemed it essential for the Board to focus on the adjudication of public rights, with limited discretionary authority, and to avoid acting as a "roving commission." The Act's legislative history contains pervasive references to the importance of limiting the Board's authority, in contrast with what the Supreme Court held was unconstitutional in *Schechter*. S. Rep. 73-1184, *reprinted in* 1 NLRA HIST. 1102 (1934) ("(1) The Board is to enforce the law as written by Congress; and (2) the Board acts only

when enforcement is necessary."); S. Rep. 74-573, *reprinted in* 2 NLRA HIST. 2308 (1935) ("Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair."); H.R. Rep. 74-969, *reprinted in* 2 NLRA HIST. at 2932 ("section 11 . . . grants no roving commission, but is limited to the exercise of powers and functions embodied in sections 9 and 10"); *id*. at 2933 ("The Board is to be solely a quasi-judicial body with clearly defined and limited powers" and "[i]ts policies are marked out precisely by the law") (minority view of Rep. Marcantonio) (emphasis added); 2 NLRA HIST. 3207 (same); *see also* H.R. Rep. 74-972, *reprinted in* 2 NLRA HIST. 2965-66, 2978-79 (1935); H.R. Rep. 74-1147, *reprinted in* 2 NLRA HIST. 3059, 3076, 3077 (1935).

Against the backdrop of these constitutional concerns, the 1935 Congress rejected earlier versions of Senator Wagner's legislation that would have granted the Board broader authority. For example, the Senate's first proposal expressly authorized awards of "damages":

> If upon all 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 an appropriate order directed to such person. The order may require such person to cease and desist from such unfair labor practice, or to take affirmative action, ***or to pay damages***, or to reinstate employees, or to perform any other acts that will achieve substantial justice under the circumstances.

S. 2926, 73d Cong. § 205(c) (1934) (emphasis added), *reprinted in* 1 NLRA HIST. 6. This feature of the proposal was subject to harsh criticism at committee hearings. One witness objected, for example, that "no rule [was] established" to constrain the Board's ability to "require the employer to pay damages," arguing that this raised "due process" concerns. *To Create A National Labor Board: Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. 362 (1934) (statement of James A. Emery, General Counsel, National Association of Manufacturers), *reprinted in* 1 NLRA HIST. 396. The bill reported out of committee omitted the

reference to damages, instead authorizing "an order requiring such person to cease and desist from such unfair labor practice, or to take affirmative action or to perform any other acts that will achieve substantial justice under the circumstances." S. 2926, 73d Cong. § 8(c) (as reported by S. Comm. on Education and Labor, May 10, 1934), *reprinted in* 1 NLRA HIST. 1091.

The following year, a new legislative proposal authorized the Board's cease-and-desist orders to also require "such affirmative action, including restitution, as will effectuate the policies of this Act." S. 1958, 74th Cong. § 10(d) (1935), *reprinted in* 1 NLRA HIST. 1302. A Senate Committee memorandum explains the change:

> The broad term 'restitution' is used in S. 1958 to take in the host of varied forms of reparation which the National Labor Relations Board has been making in its present decisions, to suit the needs of every individual case. An effort to substitute express language such as reinstatement, back pay, etc., necessarily results in narrowing the definition of restitution, which may include many other forms of action.

STAFF OF S. COMM. ON EDUC. & LABOR, COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) SEN. COMM. PRINT 34 (Comm. Print 1935), *reprinted* in 1 NLRA HIST. 1360. But the broad term "restitution" was subject to criticism as well. Industry groups again voiced constitutional objections, arguing that authorizing the Board "to assess damages, require restitution, and make its findings of fact in such regard conclusive upon the courts" violated Article III, the Seventh Amendment, and due process because such "restitution or redress in civil damages" amounted to deciding "private rights" rather than "public rights." *National Labor Relations Board: Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. 244, 848-53 (1935) (statement of James A. Emery, General Counsel, National Association of Manufacturers), *reprinted in* 2 NLRA HIST. 1630, 2234-39; *see also id.* at 445-46, 448 (statement of Robert T. Caldwell, Attorney, American Rolling Mill Co.) (raising Seventh

Amendment objections to the Board's "power to make reparations"), *reprinted in* 2 NLRA Hist. 1831-32, 1834.

In the end, Congress substituted the more specific and narrower formulation of "reinstatement with or without back pay" in place of the broader term "restitution," which itself replaced the even broader term of "damages." 29 U.S.C. § 160(c). As this history shows, the move by Congress to specifically refer to reinstatement and back pay necessarily narrows the available relief in these cases. 1 NLRA HIST. at 1360. Even as "the remedial power of the Board is 'a broad discretionary one,'" *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969) (citation omitted), Congress purposely made the Board's remedial power narrower than it could have been, particularly with respect to monetary relief. In particular, Congress "did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Russell*, 356 U.S. at 643. Instead, the Board's "power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Id.* at 642-43; *see also* 29 U.S.C. § 160(a); *Amalgamated Utility Workers*, 309 U.S. at 269-70 ("Both the [Board's] order and the [court's] decree [of enforcement] are aimed at the prevention of the unfair labor practice.").

It is true, of course, that back pay orders "restore to the employees in some measure what was taken from them because of the Company's unfair labor practices," and in this respect "somewhat resemble compensation for private injury." *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943). And courts have occasionally applied damages-like concepts like "actual losses" and "mitigation of damages" to the Board's authority to order back pay. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). But rightly understood, these concepts *constrain* the Board's authority. The Board can order back pay to restore that type of loss because back pay is

one of "the remedial objectives which the Act sets forth." *Republic Steel Corp.*, 311 U.S. at 12. And the concepts of actual loss and mitigation prevent the Board from awarding windfall monetary relief when, for example, a discharged employee makes a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp.*, 313 U.S. at 199-20; *see also id.* at 198 n.7 (approving the Board's longstanding practice, since *Crossett Lumber Co.*, 8 NLRB 440 (1938), *enf'd*, 102 F.2d 1003 (8th Cir. 1938), of deducting only "net earnings" to allow "for the expense of getting new employment which, but for the discrimination, would not have been necessary").

None of these judicial acknowledgments of back pay's relationship to restitution or actual loss can change the Board's primary mission: vindicating the public interest in stopping unfair labor practices. *See, e.g.*, *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 363 (1946) ("The purpose of [Section 10(c)'s] 'back pay' allowance is to effectuate the policies of the Labor Act for the preservation of industrial peace."). The Board cannot order a remedy merely because it thinks that remedy "would effectuate the policies of the Act." *Republic Steel Corp.*, 311 U.S. at 11; *see also NLRB v. Community Health Servs.*, 812 F.3d 768, 783 (10th Cir. 2016) (Gorsuch, J., dissenting) ("The Supreme Court long ago rejected Board efforts to use its remedial backpay authority to pursue policy ends other than those specified by the NLRA.").

C. A Comparison Of The NLRA With Other Statutory Schemes Confirms That Consequential Damages Are Not Generally Available.

It is a basic principle of statutory interpretation that "[w]here Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." *Alcoa Steamship Co. v. Fed. Maritime Comm'n*, 348 F.2d 756, 758

(D.C. Cir. 1965).[2] Comparing the NLRA with *other* statutes buttresses the conclusion that Congress did *not* give the Board authority to award monetary damages beyond back pay.

The clearest example is Title VII of the Civil Rights Act of 1964. "Title VII's remedial scheme was expressly modeled on the backpay provision of the National Labor Relations Act." *Burke*, 504 U.S. at 240 n.10 (citing 29 U.S.C. § 160(c)); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975). In relevant part, the statute as originally enacted provided:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include 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).

Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (codified as amended at 42 U.S.C. § 2000e-5(g)(1)).

Like NLRA Section 10(c), Title VII's provision has been characterized as having a "make whole" purpose. *See Albemarle Paper*, 422 U.S. at 419. Courts have recognized that Title VII's remedy "consist[ed] of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination." *Burke*, 504 U.S. at 239. But courts have also acknowledged the limits to Title VII's remedial scheme. Specifically, Title VII did *not* empower courts to award remedies to make employees whole in other respects because Congress "declined to recompense Title VII plaintiffs for anything beyond the wages properly due them." *Id.* at 241. "Nothing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to

[2] *See also* 2A J. NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 53:3 (7th ed. 2011) (same).

reputation, or other consequential damages (*e.g.*, a ruined credit rating)." *Id.* So too with Section 10(c) of the NLRA.

Another example is the Age Discrimination in Employment Act of 1967 ("ADEA"). It "provides for 'such legal or equitable relief as may be appropriate to effectuate the purposes of [the statute]," plus recovery "of wages lost and an additional equal amount as liquidated damages." *Comm'r v. Schleier*, 515 U.S. 323, 325 (1995) (citations omitted). But as with Section 10(c) and Title VII, the ADEA provides no compensation for "consequential damages." *Id.* at 336 (quoting *Burke*, 504 U.S. at 239). That is true even though the ADEA (unlike the NLRA) specifically authorizes liquidated damages in addition to lost wages. *See id.*

The "circumscribed remedies" of Title VII, the NLRA, and the ADEA "stand in marked contrast" to other federal statutes that grant much broader remedial authority or authorize consequential damages expressly. *Burke*, 504 U.S. at 240. For example, the Fair Housing Act of 1968 broadly provides that courts "may award to the plaintiff actual and punitive damages." 42 U.S.C. § 3613(c)(1); *see Burke*, 504 U.S. at 240 (contrasting Title VII with the Fair Housing Act). And the Family and Medical Leave Act of 1993 provides that when an employee has no lost wages, salary, benefits, or other compensation, he or she may recover "any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care." 29 U.S.C. § 2617(a)(1)(A)(i)(II). Notably, however, the Supreme Court has been unwilling to infer the availability of consequential damages where Congress did not expressly authorize consequential damages or actual damages more broadly. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250, 254 (2008) (Employee Retirement Income Security Act of 1974); *Schweiker v. Chilicky*, 487 U.S. 412, 426 (1988) (due process violations).

Should Congress wish for consequential damages to be available under the NLRA, it must say so. And it has not. Again, Title VII provides an instructive example. In the Civil Rights Act of 1991, Congress passed new legislation to permit a much broader range of "compensatory and punitive damages" in Title VII cases, including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(a)(1), (b)(3).[3] Congress would need to take similar affirmative measures to enable consequential damages under the NLRA.

Indeed, right now, Congress is considering a bill that would do just that. The Protecting the Right to Organize Act of 2021 would amend Section 10(c) by expressly adding:

> [I]f the Board finds that an employer has discriminated against an employee in violation of paragraph (3) or (4) of section 8(a) or has committed a violation of section 8(a) that results in the discharge of an employee or other serious economic harm to an employee, the Board shall award the employee back pay without any reduction (including any reduction based on the employee's interim 14 earnings or failure to earn interim earnings), front pay (when appropriate), ***consequential damages***, and an additional amount as liquidated damages equal to two times the amount of damages awarded.

H.R. 842, 117th Cong. § 106 (2021) (emphasis added); *see also* H.R. 2474, 116th Cong. § 2(f) (2019) (same). Although the House has passed the bill, the Senate has not taken it up. Unless this proposal, or similar legislation, is enacted into law, the Board should not act as though Section 10(c) in its current form permits the same awards of consequential damages beyond the traditional back pay relief. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (noting that Congress had "squarely rejected proposals to give the FDA jurisdiction over tobacco," among other reasons for concluding that the FDA lacked authority to regulate tobacco products).

[3] Even then, however, Congress capped the total amount of compensatory and punitive damages (not counting backpay) in the range of $50,000 to $300,000. *Id.* § 1981(b)(3).

D. If The Board Seeks To Authorize Consequential Damages, It Should Limit Their Availability To Exceptional Cases.

For the reasons expressed above, the Board lacks authority to award monetary damages other than backpay and benefits. But if the Board concludes otherwise, then at a minimum, such damages should be limited to exceptional cases for both legal and practical reasons.

First, under any reading of Section 10(c) of the Act, the Board's authority remains "remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 236 (1938). Setting aside the textual limitations of the Act discussed above and focusing only on the purposes underlying the Act, any possible justification for consequential damages in a particular case would still have to be directly connected to the Board's overarching mission of preventing unfair labor practices in the public interest. Because the Act is *not* intended to protect private rights (and because the Constitution prohibits the Board from adjudicating private rights), the Board cannot make consequential damages available to address the range of *private* economic injuries that may occur after an individual experiences an unlawful discharge or suspension. In other words, any award of consequential damages by the Board must serve a public purpose, such as removing potential obstructions to industrial peace. *See* 29 U.S.C. § 151. But it is hard to imagine scenarios when awards of consequential damages would further the *public* interest in that sort of way. It would surely be the exceptional case in which such an award was warranted.

Second, the Board suggests that it is considering allowing consequential damages "only upon findings of egregious violations." 371 NLRB No. 37, slip op. at 1 (Nov. 10, 2021). This proposed limitation highlights the problem with consequential damages by treating such

damages as punishment for severe violations of the Act. Such an approach contradicts the well-established principle that the Board's remedial "authority to order affirmative action does *not* go so far as to confer a *punitive jurisdiction* enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consol. Edison*, 305 U.S. at 235-36 (emphasis added). It makes no difference that such a remedial approach might "have the effect of deterring persons from violating the Act"; "[t]hat argument proves too much" and could justify any sort of penalty. *Republic Steel Corp.*, 311 U.S. at 12. Rather than cabining consequential damages to bad actors, the Board should recognize that its authority does not support such a remedy in the first place.

Third, the Board should consider the practical hurdles that come with awarding consequential damages. Unlike back pay awards, which are relatively straightforward and often made by the parties' mutual agreement, calculations for consequential damages are notoriously uncertain and demand significant resources. As the Board's Notice acknowledges, consequential damages require an assessment of foreseeability and proximate causation, which are murky standards. These assessments would be particularly difficult to establish for the types of consequential damages that General Counsels and Members of the Board have suggested might be appropriate, including damages sustained as a result of medical bills, credit card bills, or missed loan payments. *See, e.g.*, *Voorhees Care & Rehab. Ctr.*, 371 NLRB No. 22, slip op. at 4 n.14 (Aug. 25, 2021); GC Memorandum 21-06 (Sept. 8, 2021); OM Memorandum 16-24 (July 28, 2016). Courts, which regularly face these issues, have often denied requests for these sorts of consequential damages because of insufficient evidence that they were foreseeable at the relevant time or proximately caused by the defendant's unlawful conduct. *See, e.g.*, *Marland v. Safeway,*

Inc., 65 F. App'x 442, 448 (4th Cir. 2003) (loss-of-credit and lost-profit damages were not foreseeable or proximately caused by defendant); *Rosas v. U.S. Small Bus. Admin*., 964 F.2d 351, 359 (5th Cir. 1992) (loss-of-credit damages were "unsupported"); *Maalouf v. Salomon Smith Barney, Inc.*, No. 02-cv-4770, 2004 WL 2008848, at *5 (S.D.N.Y. Sept. 8, 2004) (loss-of-credit and loss-of-health damages were "entirely speculative"), *aff'd sub nom. Maalouf v. Citigroup Glob. Markets, Inc.*, 156 F. App'x 367 (2d Cir. 2005). And courts have historically denied consequential damages when the plaintiff's own actions are a significant cause of the injury, with medical injuries and property losses often fitting within that category (even when the defendant's conduct was also a but-for cause of the injury). *See, e.g.*, 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §§ 126a, 127, at 237-39, 245 (1891). So it is far from obvious, under traditional principles, that a defendant who unlawfully discharged an employee would be responsible for the employee's "emergency surgery" or loss of car or home after a missed loan payment. *Voorhees Care*, 371 NLRB No. 22, slip op. at 4 n.14. Proving an entitlement to consequential damages, in sum, is tremendously more difficult than proving an entitlement to back pay and would give rise to protracted disputes.

* * *

If the Board decides to abandon its traditional approach to make-whole relief for the first time in its long history, such a decision will prompt legal challenges and scrutiny of the Board's powers. The text and legislative history of the NLRA, bolstered by the constitutional constraints on agencies' adjudicatory authority, confine the Board's monetary remedial power to awards of back pay, not consequential or compensatory damages. And the Board's history of not awarding consequential damages, especially when coupled with Congress's consistent refusal to grant express authority, strongly suggests that the statute as written does not authorize consequential

damages. *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (citation omitted)). The Board should consider the statute's text and history alongside the practical difficulties discussed above, and it should refrain from creating this new form of monetary relief in its unfair labor practice cases.

CONCLUSION

The Board should adhere to its traditional remedy for unlawful discharge or, at a minimum, should limit awards of consequential damages to exceptional cases where they are nonpunitive and are strictly necessary to further the Board's public-oriented statutory mission.

Respectfully submitted,

PHILIP A. MISCIMARRA
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of **BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA** was served upon the following counsel via email and e-filing on the date set forth below.

Arthur Telegen
Jason J. Silver
Seyfarth Shaw LLP
Seaport East
Two Seaport Lane, Suite 1200
Boston, MA 02210-2051
email: atelegen@seyfarth.com
email: jsilver@seyfarth.com

Harry Esquivel
Karen Gowdy
Stefen Guthrie
International Brotherhood of Electrical Workers, Local 1269
870 Market Street, Room 479
San Francisco, CA 94102
email: harry@ibew1269.org
email: kareng@ibew1269.org
email: stefen@ibew1269.org

Min-Kuk Song
Counsel for the General Counsel
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
min-kuk.song@nlrb.gov

/s/ Philip A. Miscimarra
PHILIP A. MISCIMARRA

Dated: January 10, 2022