No. 16-72963, consolidated with 16-73186 & 16-73279

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ORGANIZATION UNITED FOR RESPECT AT WALMART (OUR WALMART),

Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

WAL-MART STORES, INC.,

Intervenor.

WAL-MART STORES, INC.,

Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ORGANIZATION UNITED FOR RESPECT AT WALMART (OUR WALMART),

Intervenor.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent,

ORGANIZATION UNITED FOR RESPECT AT WALMART (OUR WALMART),

Intervenor.

On Appeal from the National Labor Relations Board
Cases 32-CA-090116, 32-CA-092512, 32-CA-092858, 32-CA-094004, 32-CA-094011, 32-CA-094381, & 32-CA-096506

WAL-MART STORES, INC.'S COMBINED ANSWERING BRIEF/OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for Wal-Mart Stores, Inc. ("Walmart") states that no parent corporation or publicly held corporation owns 10 percent or more of Walmart's stock.

s/ Douglas D. Janicik

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Federal Statutes

Other Authorities

INTRODUCTION

In this case, the National Labor Relations Board ignored 70 years of Supreme Court-approved, black-letter law holding that the retail sales floors of America warrant special protection in the labor context to ensure a pleasant, comfortable, and non-confrontational shopping experience for the consuming public. Indeed, the retail sales floor is off limits under the National Labor Relations Act for even a few-second solicitation by one employee of another for union support, because labor-related solicitation can give rise to confrontation and distraction as between employees, which in turn can detract from the customers' shopping experience. Accordingly, the Act *presumes* disruption from any such sales-floor solicitation, however brief. The Board has never wavered from that customer-focused rule—ever.

It should go without saying then that the Act does not give employees the right to confront customers on the retail sales floor with a nearly hour-long protest just inside the front door of a Walmart store during a grand reopening event. But the two-member majority of the Board panel held just that, contrary to 70 years of precedent protecting customers from much, much less egregious conduct, as emphasized by the panel's dissenting member. Here, the panel majority held for the first time in the history of labor law that the Act *protected* employees who participated in an "Occupy"-style, sales-floor protest, where the demonstrators

blocked product displays and access to the customer service counter with shoulder-to-shoulder massed bodies, complete with an eight-foot banner, protest signs, and demonstration t-shirts. So, according to this Board, an employer can lawfully discharge an employee for taking 10 seconds (on or off-duty) to ask a co-worker to sign a union authorization card at the customer service counter (because that solicitation *might* create a confrontation that could disturb the shopping experience), but the same employer cannot give the same employee even a written warning for joining in a demonstration that *actually* confronts customers in that same customer service area. Those irreconcilable conclusions defy explanation, and the Board made no attempt to explain the contradiction—not one word. Simply put, the Board majority was not at liberty to summarily ignore 70 years of Supreme Court-approved "retail sales floor" law to reimagine the scope of the Act as it did.

Moreover, the Board had no authority to apply a 10-factor, ad-hoc balancing test that includes "denial of access" and "seizure of property" factors. The Supreme Court held long ago that employees have no right to seize any part of an employer's property—denying the employer access to or use of that property—to further a labor objective. *There is no such thing as a "reasonable" property seizure under the Act*, and thus, this Court should reject the Board's 10-factor test as a matter of law because it could result in just that: a "protected" seizure of private property. Any decision flowing from the Board's application of that flawed

analytical test cannot stand, regardless of how the Board weighed or viewed any particular factor of the test in this case.

In the end, the Board majority not only failed to apply the proper legal authority and then applied a fatally flawed test, it also relied on a factual fiction that cannot withstand scrutiny. It found that the Act protected employee participation in the sales floor demonstration because the majority (i) did not see customers in the customer service area during the period when the demonstrators occupied that area (as recorded on security video), and (ii) concluded that the absence of customers during the occupation meant there was no seizure, denial of access, or disruption. That conclusion defies logic and common sense. In fact, the absence of customers *proves* Walmart's point: the demonstrators blocked access to products and the customer service desk, seizing that area for their own use and denying customers use of that area. A picture speaks a thousand words:

No prior Board and no court has ever held that the Act protects labor-related demonstrations on the sales floors of America. And for good reason: the more than

two million brick-and-mortar retail stores in America, which account for $800 billion of the national economy (ER 45), depend on a pleasant and comfortable shopping experience to keep operating. No one wants to push through a group of protesters to try and get to the milk. Thus, while federal courts often give deference to Board decisions, this is not one of those cases. This decision cannot be enforced.

STATEMENT OF JURISDICTION

This Court has jurisdiction over Walmart's Petition for Review pursuant to 29 U.S.C. § 160(f),[1] because the Board's August 27, 2016 Decision was the Board's "final" decision in this matter. Walmart filed a timely Petition for Review on September 7, 2016; the Act contains no time limit on the institution of proceedings to review or enforce Board orders.

For the reasons explained in Section V.A (*infra* at 58), however, this Court lacks jurisdiction to review the arguments in Organization United for Respect at Walmart's ("OWM") Opening Brief regarding its request for two extraordinary (and unwarranted) remedies, because the Board did not address either remedy in its decision. OWM concedes that this Court cannot grant it any relief, in so far as it

[1] Section 10(f) of the Act provides that "[a]ny person aggrieved by a final order of the Board … may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside."

asks only for a remand so that the Board can consider the two extraordinary remedy requests. (ECF 31 at 21 ("We recognize this court is not empowered to order the remedy.").)[2] A remand is unnecessary, however, for the reasons explained in Section V.B below, *infra* at 59.

STATEMENT OF THE ISSUES PRESENTED

Walmart's Opening Brief in 9th Cir. No. 16-73186:

1. Since the 1940's, the Board has time and time again upheld employer bans on union solicitation on the sales floor during shopping hours. In interpreting the scope of the NLRA, the Supreme Court and circuit courts, including this Court, have endorsed the Board's precedent prohibiting solicitation on the sales floor. Nevertheless, the Board in this case held that Walmart cannot discipline six employees who participated in a labor demonstration that blocked access to the customer service area *inside* the store. Should this Court refuse to enforce the Board's decision as contrary to Supreme Court precedent and/or more than 70 years of the Board's own precedent?

2. The Supreme Court held long ago that the NLRA does not permit employees to seize their employer's property during a work-stoppage protest. Nevertheless, in "balancing" Walmart's property rights against its employees' right to engage in concerted activity under the Act, the Board applied a 10-factor test

[2] All "ECF" cites are to 9th Circuit Case No. 16-72963.

that includes as two factors whether the employees seized their employer's property and whether they blocked access or otherwise deprived the employer of use of its property.

a. Should this Court refuse to enforce the Board's decision as contrary to Supreme Court precedent because the employees in this case illegally seized Walmart's customer service area?

b. Even if this Court concludes that there was no seizure, should this Court nonetheless require the Board to redo its analysis of whether the Act protects the sales floor demonstration in this case, because the Board lacks the authority to use a 10-factor test that could legitimize an otherwise unlawful seizure?

c. Even if the Board had authority to create its 10-factor test, does that test have any applicability where, as here, the employees refused management's offers to discuss their grievances and the stated goal of the employees' "work stoppage" was for the union to generate a media blitz for its messaging campaign?

3. Should this Court decline to enforce the Board's decision because there is not substantial evidence supporting its conclusion that the 10 factors weigh in favor of extending the Act's protections to the employees' sales floor demonstration?

4. If this Court enforces the Board's decision on the merits, should this Court decline to enforce the Board's requirement that Walmart post a notice, in all of its nearly 200 stores in California, that its 2010 dress code violated the Act, where Walmart replaced that dress code with a new one in 2013, which provisions are the subject of a separate Board proceeding?

Walmart's Answering Brief to OWM's Opening Brief in 9th Cir. No. 16-72963:

5. OWM's petition seeks two remedies that it never asked the Administrative Law Judge to award, that the Board did not address in its decision, and that the Board awards only in extraordinary circumstances, if at all—a statewide posting of an alleged violation that occurred at only one facility and an employer's forced confession of the details of that violation. OWM concedes this Court lacks jurisdiction to award the remedies, but asks for a remand so that the Board can consider its remedy requests. Should this Court deny OWM's petition and not remand this case to the Board, because OWM waived its right to seek the two extraordinary remedies and, in any event, there is no factual basis on which to award them?

STATEMENT OF THE CASE

A. OWM recruits activists and plans a demonstration at a Walmart store in Richmond, California.

OWM is a labor organization supported by the United Food and Commercial

Workers International Union ("UFCW"). (ER 21; SER 750-52.)[3] Over the past five or so years, OWM has engaged in an anti-Walmart, "area-standards" campaign to "raise the bar" by trying to force Walmart to adopt various benefits, working conditions, and workplace policies. (ER 21.)[4] OWM has focused its so-called "Making Change at Walmart" campaign messaging on the media and public through periodic, high-profile demonstrations at Walmart stores in over 30 states in partnership with various outside organizations. (ER 21.) This "area standards" campaign, however, has nothing to do with collective bargaining; OWM expressly disclaims—and has repeatedly disclaimed since January 2013—any interest in organizing Walmart associates or serving as their bargaining representative.[5] (ER 21; *see also* http://www.united4respect.org.)

In mid-October 2012, several UFCW/OWM paid organizers began planning a demonstration at the Walmart store in Richmond, California. (ER 26.) At the time, the store was under renovation; the grand reopening was scheduled for

[3] "ER" refers to the Excerpts of Record that OWM submitted with its Opening Brief. (ECF 32.) "SER" refers to the Supplemental Excerpts of Record that Walmart submits with this Consolidated Answering/Opening Brief.

[4] In the labor context, an "area standards" campaign is "a form of consumer publicity" that unions use to purportedly "protect the wage standards of its members who are employed by competitors of the picketed employer." *Red Food Stores*, 296 NLRB 450, 452-53 (1989) (union publicizing its "'Be American. Shop American' campaign on picket signs, in handbills, and in the media as an informational protest directed at customers").

[5] Walmart refers to its employees as "associates."

November 2, 2012. (ER 27.) OWM/UFCW decided to hold their demonstration on the day of the Richmond grand reopening, because it was "a good opportunity for [OWM] to state its cause." (*Id*.) It was, as OWM put it, "perfect timing," because "the public would be there and just everybody would be there." (SER 358:3-11.) An associate working on the remodel, Misty Tanner, worked as a UFCW organizer and recruited associates to participate in the demonstration. (SER 244:7-17.) None of the Richmond associates who participated played a role in selecting the date for the November 2 demonstration. (SER 296:15-20 ("I just went with it."), 355:1-10 (Q: Did you participate in any planning sessions for the sit-in? A: No.").)

B. A Walmart HR Manager goes to the Richmond store to address the remodel associates' complaint about one of their supervisors.

Certain remodel associates felt that Art Van Riper, a field project supervisor for the renovation, treated them disrespectfully, and they wrote a letter with their complaints. (ER 2, 26.) On October 31, 2012, Janet Lilly, Walmart's Market Human Resources ("HR") Manager over the Richmond store (ER 26), received the letter, and "cleared [her] calendar" to travel to the Richmond store as soon as possible to conduct Open Door (grievance) meetings with the associates who had signed the Van Riper letter.[6] (SER 524:23-25, 525:16-526:7.)

[6] The Board found that Walmart "did not reply" to the Van Riper letter, but that finding is obviously wrong, as just one paragraph later, the Board finds that Lilly came to the Richmond store to "interview employees about their complaints." (ER 2.) Moreover, the Government argued at trial that "associates submitted a

Lilly and Paul Jankowski, a fellow market manager who came to assist Lilly, arrived at the Richmond store on November 2, 2012, at 3 a.m. (ER 2, 27.) Lilly and Jankowski introduced themselves to the associates who had signed the Van Riper letter, and began conducting Open Door meetings. (SER 528:13-21.) Remodel associate Markeith Washington met with Lilly and Jankowski first for around 45 minutes (ER 2, 27); Washington did not ask for other associates to be present for his Open Door session (SER 533:1-5), even though Tanner barged in at one point to "check on" him (ER 27). Lilly and Jankowski intended to continue the Open Door meetings with other remodel associates, but as Lilly looked for the next associate, she was interrupted by news that several remodel associates were staging a "sit-in" at the customer service desk. (ER 27 n.20; SER 537:24-538:16.)

C. Six remodeling associates team up with outside protestors and take over the customer service desk, refusing managers' requests that they leave.

At 5:24 a.m., Tanner and Washington, along with remodel associates Semetra Lee, Raymond Bravo, Timothy Whitney, and Demario Hammond (collectively, the "associate-demonstrators"), stopped working and, *without clocking out*,[7] congregated at the customer service desk. (ER 2, 27.) The customer

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letter to management on October 31st, 2012, though the letter is dated October 17th." (SER 20:23-24.)

[7] This fact alone stripped the associate-demonstrators of the Act's protection. *See NLRB v. Local 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 476 n.12

service desk is right inside the front entrance of the store, and it has "primary visibility to the customer as soon as they come into the store." (SER 541:15-19.) The customer service area contains a long counter with three computers/cash registers (for exchanges and returns) and a few seats for customers. (ER 27 n.22.)

While the associate-demonstrators waited for the OWM-planned sales floor event to begin (the store opened at 6 a.m.), they stood around and chatted, took pictures of themselves, and made calls on their cell phones. (*E.g.*, SER 755 (video clips), 737-39 (photos).) Lilly offered to meet with each associate to discuss their concerns, but Tanner (a UFCW organizer) spoke for the group and said "they did not want to utilize [the Open Door] individually." (ER 27; SER 540:1-22.) Lilly explained that Walmart's policy of individual Open Door meetings protected associates' confidentiality, but the associate-demonstrators insisted on group meetings. (ER 27; SER 909-15.)

Around 30 minutes later, just as the store opened to customers, Lilly again approached the six associate-demonstrators; they refused to go back to work, however, and refused to meet with Lilly in individual Open Door meetings. (ER 27.) After the store opened, around 10-12 *non*-associate OWM demonstrators rolled in, carrying signs and a large (around eight-feet long), neon-green banner

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(1953) ("An employee can not work and strike at the same time…. He can not collect wages for his employment, and, at the same time, engage in activities to injure … his employer's business.").

that said "Stand Up Live Better forrespect.org." (ER 27-28; SER 740-43 (photo) & 755 (video clip.) At least one news reporter accompanied the non-associate demonstrators into the store. (SER 782.) At one point, associate-demonstrators Lee and Hammond went outside to give a pre-arranged news interview, because "[t]hat's a part of the sit-in [and] … getting our point across."[8] (ER 28; SER 261:16-21, 267:15-21, 307:2-14.)

For around 50 minutes, the demonstrators occupied the customer service area. (ER 2-3.) They posed for photos and posted them on OWM's social media sites, and milled around in a circle carrying the eight-foot banner. (SER 740-743, 755; *supra* at 3 (photos).[9]) An associate working nearby described the demonstrators as "noisy." (ER 29.) In fact, the customer service desk telephone rang several times, but the attending associate did not answer it because of the noise. (SER 433:19-23.) The demonstrators blocked the area such that customers could have gotten to the service desk only by jostling their way through the crowd. *All this occurred on the sales floor, during a time the store was open to customers*.

At around 6:30 a.m., the associate-demonstrators and several non-associate

[8] Pre-arranged media camera crews and trucks arrived at 5:50 a.m. to cover the demonstration. (SER 754, 781-82.) While the in-store "sit-in" was going on, additional OWM demonstrators were parading around outside the store entrance, carrying signs and banners. (ER 3 n.9, 29; SER 872-73.)

[9] The aerial photo in the Introduction (*supra* at 3) is a still-shot taken at the 6:33:53 a.m. mark of a video submitted as J. Ex. 26(a), clip 3, at trial. (SER 755.)

demonstrators amassed in the store's "Action Alley"—the main customer walkway through the store, located 10 to 20 feet from the main entrance. (ER 3, 28.) They stood directly in front of—and blocked—the first set of product displays that a customer would encounter upon entering the store.[10] (*Id.*; SER 744-45; *supra* at 3.)

During the sit-in, Jankowski told the demonstrators that "they could not take photos, that they couldn't have their signs, [and] that they were blocking the customer service area and disrupting business"; he told the non-associate demonstrators that they "needed to leave the store." (ER 28; SER 359-60, 693-94.) The demonstrators ignored Jankowski's instructions. (SER 694:6-11.) When the gaggle of demonstrators paraded out to Action Alley to even more blatantly confront customers, Lilly told them they were blocking customers and had to move. (ER 28.) Lilly also instructed the associate-demonstrators to go back to work "or clock out and leave." (ER 28; SER 361:5-9.) The associate-demonstrators ignored those instructions. Around five minutes later, the group of demonstrators finally returned to the customer service area. (SER 548:13-16.)

D. Law enforcement steps in to restore order.

At around 6:37 a.m., two police officers, responding to Jankowski's request to intervene, spoke with the demonstrators in the customer service area. (ER 3, 28.)

[10] During the demonstration, 53 customers entered and 21 customers exited the store through the door adjacent to the demonstrators. That count does not include customers entering the store through its other entrances. (ER 11, 15.)

After some internal discussion, they told the police that they would leave *after* the associate-demonstrators clocked out, shortly before the end of their scheduled shifts (7 a.m. for all of them, except Bravo, whose shift ended at 8 a.m.). (ER 28.) Over the next 10 or so minutes, the associates clocked out; all the while, the demonstrators continued the demonstration in the customer service area. (*Id.*) Finally, at 6:52 a.m., the demonstrators—including the associates who participated—left the store, and Lee and Bravo joined up with the crowd outside to continue the demonstration, which did not end until just after 9 a.m. (ER 3 n.9, 28, 29.) According to OWM, the outside demonstration was a planned continuation of the in-store demonstration and sit-in. (ER 28.)

E. Walmart disciplines the six associate-demonstrators.

After the demonstration, five of the six associate-demonstrators returned to their next scheduled shift without incident; they also gave management the UFCW's generic return-to-work "strike" letter. (ER 29; SER 746-49.) Tanner, a paid organizer, did not return to work after the demonstration (ER 30), having accomplished her goal of organizing the November 2 sit-in demonstration.

Walmart issued written discipline, called a "coaching," to all six associates who participated in the sit-in demonstration. (ER 3, 30.) The coachings cited the associates' disruption of business and customer service operations "during key Grand Opening event" and their "[c]reat[ion] [of] a confrontational environment in

[the] store with customers and co-workers at a time when [Walmart was] trying to make a crucial first impression with potential long term customers." (ER 30.)

On November 7, 2012, Lilly continued her investigation into the remodel associates' complaints about Van Riper. (SER 756-61.) She met individually with, among other individuals, associate-demonstrators Hammond and Whitney; associate-demonstrators Lee and Bravo declined to participate in an Open Door meeting. (*Id.*) As a result of Lilly's investigation, Walmart disciplined Van Riper.[11] (SER 762-63.)

F. The Board concludes that Walmart violated the Act by disciplining the six associate-demonstrators.

1. The Board finds that 9 of 10 factors weigh in favor of the associate-demonstrators.

In its August 27, 2016 decision, with one Member dissenting, the Board upheld the Administrative Law Judge's ("ALJ") findings that Walmart's discipline of the six associate-demonstrators was unlawful because they were engaged in protected activity under section 7 of the Act.[12] (ER 1-8.) The two-member majority

[11] The Board also found that Walmart violated the NLRA based on allegedly harassing statements that Van Riper made to certain associates and an allegedly anti-union statement that an assistant manager at the Placerville, California store made to an associate there. (ER 1-2 nn.4 & 6.) Walmart does not seek review of either of those findings.

[12] Section 7 of the NLRA, 29 U.S.C. § 157, recognizes the right of employees to form, join, or assist labor organizations, to bargain collectively with their employer, to engage in activities toward those ends, or to refrain from such activities. Section 8 makes it an unfair labor practice for an employer "to interfere

jumped right into "striking an appropriate balance" between the associates' section 7 rights to engage in concerted activity and Walmart's property rights, relying on *Quietflex Manufacturing Co.*, 344 NLRB 1055 (2005). (ER 3.) In *Quietflex*, the Board identified ten factors that it considers "in determining which party's rights should prevail in the context of an on-site work stoppage." *Id*. at 1056-57.[13] As the Board here noted, it has applied *Quietflex* in a variety of settings—a hotel cafeteria for employees, an oil refinery, and public streets (ER 3); however, the Board had never applied *Quietflex* to a retail sales floor when the store is open for shopping.

The Board found that nine of the factors weighed in favor of protection under the Act, and that one factor was "neutral, at best." (ER 4.) Specifically, the Board found that the associate-demonstrators stopped work to "draw attention to what they viewed as abusive treatment by supervisor Van Riper," as their "prior

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with, restrain, or coerce employees in the exercise of" this right, 29 U.S.C. § 158(a)(1), or "by discrimination in regard to ... any term or condition of employment to encourage or discourage membership in any labor organization," *id*. § 158(a)(3).

[13] The 10 factors are: "(1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged." 344 NLRB at 1056-57.

attempts to communicate with management were largely ignored" (factor 1: the reason for the work stoppage),[14] that there is no evidence that the sit-in demonstration was "unruly" or "confrontational" (factor 2: whether the work stoppage was "peaceful"), that the associate-demonstrators were never warned that they would face discipline for failing to leave the customer service area (factor 5: a warning that they may face discharge), that the work stoppage was "short in duration" (factor 6), that the associate-demonstrators did not remain on the premises after their shift (factor 8), and that Walmart disciplined the associate-demonstrators for engaging in a work stoppage, not because they disrupted business on the sales floor (factor 10: reasons for discipline).[15] (ER 4-6.)

As to factor 3, "whether the work stoppage interfered with production, or deprived the employer access to its property," 344 NLRB at 1057, the Board found that the demonstrators "largely confined themselves to a small enclosed customer service area to the side of the front store entrance" (not true, given demonstrators' incursion onto Action Alley where they confronted customers and blocked access to products), that video footage shows that "no customers attempted to access the

[14] Factor 1 addresses whether the employees "had protected concerns as their core justification for their concerted work stoppage," and whether those concerns "were pressing" such that the work stoppage was warranted. (ER 4.)

[15] Under *Quietflex*, if the reasons for the discipline or discharge are "directly related to the work stoppage" (e.g., abandoning work), that weighs in favor of protection under the Act. (ER 6.)

customer service area during the brief time that employees were engaged in protest there," and that "one employee [was] … easily able to go behind the customer service desk." (ER 4-5.) Relatedly, as to factor 9, the Board said there was no "seizure" during the sit-in, as employees and customers "enjoyed continuous access to the customer service desk" during the demonstration.[16] (ER 6.)

As to factors 4 and 7, which both relate to the employees' ability to present grievances to management, the Board found (agreeing with the ALJ) that Walmart's Open Door policy "provided [associates] with a forum to discuss their grievances," but found (disagreeing with the ALJ) this fact was "accord[ed] less weight" because the policy "barred group grievances." (ER 5.) Oddly, the Board then found that factor 7, i.e., "whether employees were represented or had an established grievance procedure," weighed *against* Walmart, because associates "enjoyed no procedure for group grievances." (ER 6.) The Board concluded:

> Having considered all the factors, we conclude that the relatively small, brief, peaceful and confined work stoppage during the early morning hours of a multi-story department store's opening did not lose the protection of the Act.

(ER 7.)

[16] Remarkably, the Board actually said that the associate-demonstrators "immediately left the customer service area when directed to do so by police." (ER 6.) Again, not true—they refused to leave until the associate-demonstrators had clocked out, and it took over 10 minutes from the time the police gave their command for all the demonstrators to leave the store. (*Supra* at 14.)

2. The dissenting Board Member concludes that *Quietflex* does not apply.

Member Miscimarra issued a nine-page dissent, arguing that under prior Supreme Court and Board precedent, the Board had no authority to apply *Quietflex*'s balancing test to a "work stoppage within active retail space in the presence of customers." (ER 12.) He framed the issue as the legality of a "modern day sit-down strike" (ER 8), which even the dissenting member in *Quietflex* recognized is not protected activity. 344 NLRB at 1061 & n.3 (Chairman Liebman, dissenting) (noting that "[t]he Supreme Court long ago held that sit-down strikes were unprotected" and that, in contrast,"[a] *parking lot* assembly is not a sit-down strike" (emphasis added)).

At the outset, Member Miscimarra correctly pointed out that the Board "'has traditionally acknowledged the necessity for applying different [and "special"] rules to retail enterprises from those to manufacturing plants,'" explaining that the Board "'has recognized that the nature of retail establishments … requires that an atmosphere be maintained in which customers' needs can be effectively attended to.'" (ER 11 (quoting *Rest. Horikawa*, 260 NLRB 197 (1982) (emphasis omitted)).) "As a result," he went on to explain, "the Board has allowed retail establishments to impose no-solicitation rules which *preclude soliciting* in areas frequented by customers so as *to prevent* disruption of the customer-salesperson relationship." (*Id.* (emphasis added, quotations omitted & citing *Marshall Field &*

Co., 98 NLRB 88 (1952)).) The Board majority said nothing about that precedent.

Noting that the associate-demonstrators blocked the customer service desk, Member Miscimarra also cited *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), which held that the "right to strike plainly contemplates a lawful strike" but does not protect employees "who occupy an employer's premises to *prevent their use by the employer*." (ER 14 (quotations omitted).) As Member Miscimarra put it, the Act "confers important employee rights, but it does not give employees carte blanche to do whatever they want, wherever they want." (ER 14.) He concluded that the balancing conducted in *Quietflex* "has no application or justification where, as here, the employee-participants engaged in a work stoppage in a retail setting, inside the store, in the presence of customers." (ER 13.)[17]

3. The Board also finds that a prior version of Walmart's dress code was unlawful.

Separate from Walmart's discipline of the six associate-demonstrators, and without any explanation, the Board affirmed the ALJ's finding that a 2010 version of Walmart's dress code violated the Act because its prohibition on logos or graphics on clothing items was "overbroad and unduly infringe[d] on the rights of associates to wear union insignia." (ER 1 n.4 ("We also adopt the judge's

[17] Alternatively, Member Miscimarra concluded that the *Quietflex* factors weighed in favor of finding that the Act did not protect the sit-in demonstration. (ER 14-17.)

additional [29 U.S.C. § 158(a)(1)] findings."); ER 32 ("I find that Walmart's July 2010 dress code is facially unlawful ….").) The ALJ also found, and the Board affirmed, that Walmart replaced its 2010 dress code with an updated dress code that took effect in February 2013. (ER 22.)

Although the 2010 dress code is obsolete, the Board ordered Walmart to post a notice of the dress code violation at all its California stores. (ER 19.) The Board also ordered Walmart to "[r]escind" the 2010 dress code (ER 8), even though it does not exist anymore. Finally, the Board ordered Walmart to furnish its California associates with "inserts" for its dress code (presumably the version that went into effect in 2013) that either advises them the 2010 dress code has been rescinded or provides "the language of a lawful policy." (*Id.*)[18]

SUMMARY OF ARGUMENT

For three independent reasons, this Court should refuse to enforce the Board's decision regarding the legality of the Richmond sit-in demonstration. First, the two-member majority erroneously concluded that the Act prohibited Walmart from disciplining the six associates who participated in the demonstration in the

[18] The ALJ also found that the 2013 dress code violated the Act, but before its decision in this case, the Board severed and consolidated that issue with another case (No. 13-CA-114222) that involves the same issue. (ER 1 n.1; SER 1 (granting motion to sever and consolidate related cases).) Thus, the Board specifically refrained from ruling on the ALJ's finding regarding the 2013 dress code (ER 7-8 (Board's cease and desist order)), although the Board's proposed statewide posting for all California stores inadvertently references the 2013 dress code (ER 19).

customer service area during the store's grand reopening event. There is no way to reconcile their conclusion with decades of Board precedent—which the Supreme Court has held to be the proper interpretation of the Act—that permits an employer to discipline an employee for taking even a few seconds on the sales floor to solicit another employee for union support. In that regard, the sales floor is strictly off limits, regardless of whether the employer proves actual disruption from the momentary solicitation. *Disruption is presumed as a matter of law*, and for good reason: the Board and the courts recognize that our country's "brick and mortar" retail industry hinges on creating and maintaining a safe, friendly and non-confrontational shopping experience for the consumer. Allowing protestors to crowd *inside* a store and confront customers with their messaging, using banners and signs on sticks, is the very antithesis of such an experience. When the Board contradicts Supreme Court precedent, or its *own* precedent without any explanation (the Board did both), this Court owes no deference to the Board's decision.

Second, the result in this case is foreclosed by Supreme Court precedent that prohibits employees from seizing their employer's property under the guise of labor-related activity. And seizure is *not* limited to scenarios where a mob of angry protestors with locked arms threaten passersby and can only be removed by force. A "seizure" includes blocking access or otherwise depriving the employer of use of *part* of its property. That is exactly what happened here: for nearly 50 minutes, 19

or so demonstrators milled around shoulder-to-shoulder in a compact customer service area, preventing any customer or working associate from entering the area. And whether or not this Court views this illegal sit-down strike as a seizure, the Board's "10-factor" test is fatally defective because it includes attempts at seizure and denial of access as factors, giving the Board the power to legitimize otherwise illegal seizures if, in an exercise of *ad hoc* "balancing," it decides other factors weigh in favor of protection. That interpretation of the Act allows for unconstitutional "takings" of employer property, and for that reason alone, this Court can and should reject the 10-factor test and send this case back to the Board to develop a constitutionally permissible test.

And even if the Board's 10-factor test were a permissible interpretation of the Act (it isn't), the test has no application here. As the Board has made clear, work stoppages on an employer's property may be protected where employees have a pressing—and *sincere*—need to present grievances to management. The UFCW-led sales floor demonstration at the Richmond store was all about grabbing the media's and customers' attention so that OWM could create a "buzz" and advance its area standards campaign against Walmart, as evidenced by the fact that two of the associate-demonstrators left the sit-in to do a TV interview outside the store. This media event had nothing to do with sitting down with management; indeed, Market HR Manager Lilly was willing and able to meet with the associate-

demonstrators on the spot, but they refused to do so time and time again.

A third independent reason the Board's decision fails is because there is no substantial evidence to support its findings on the 10 factors. Indeed, the evidence before the Board compelled a finding that the sit-in demonstration was not protected under the Act. This Court should grant Walmart's petition.

This appeal also involves several remedy issues, but there is no need to consider them if the Court rules in favor of Walmart on the merits. Otherwise, this Court should hold that the Board exceeded its authority by ordering Walmart to post a notice of violation—in all of its nearly 200 California stores—regarding its 2010 dress code. It is undisputed that Walmart replaced its 2010 dress code in 2013 (over four years ago), and there is no evidence that Walmart has any inclination to bring it back. And the relevant provisions in the 2013 dress code are the subject of a separate Board proceeding. Thus, any statewide posting about a long-obsolete policy serves no remedial purpose and is purely penal, especially where (i) there is no evidence that any associate from any store besides Richmond and Placerville (where notices would already be posted, if the Board's decision is enforced) is even aware of what happened in this case, and (ii) there is an adequate remedy, i.e., prohibiting Walmart from bringing back the 2010 dress code.

Finally, this Court has no jurisdiction to grant the two extraordinary remedies that OWM wants (but the Board did not address). And a remand is a

waste of time—the Board would find that OWM waived its right to seek those remedies, or alternatively, that there is no basis in the record to justify them.

ARGUMENT

I. The Board majority ignored controlling Supreme Court and Board precedent that insulates the retail sales floor from labor-related solicitation, peaceful or not.

There was no need to balance any factors in this case (let alone 10), or weigh one or two particular factors against certain others. This was a black-and-white case of conduct that the NLRA does not protect, based on Supreme Court rules of engagement for section 7 activity on an employer's property. One such rule is that an employer may prohibit one employee from soliciting another employee for union support on the sales floor, no matter how quickly or quietly it is done, and regardless of whether the employees are on or off duty.

All the Board had to do was apply this straightforward rule; it failed to do so, however. Thus, its decision cannot stand, because it contradicts Supreme Court precedent and 70+ years of Board precedent without even giving a nod to—let alone explaining its 180-degree turn from—the long-standing special protection afforded the sales floor.

A. This Court owes no deference because the Board contradicted Supreme Court case law.

The Supreme Court, along with numerous federal circuit courts—including this Court—have recognized that the sales floor is "king" and that employers can

prohibit even a momentary solicitation for union support on the sales floor. It is against that backdrop that this Court must review the Board's decision in this case. "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) ("Before we reach any issue of deference to the Board, however, we must first determine whether [its decision] … is consistent with *our* past interpretation of § 7." (emphasis added)). There is no deference to the Board where, as here, its interpretation of Act is "precluded by Supreme Court precedent." *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007) (quotations omitted).

1. The Supreme Court endorsed the Board's ban on retail floor solicitation.

When it comes to the retail sales floor, any required "balancing" of property rights and employee rights was done long ago. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Supreme Court made clear that the "purpose [of the Act] is the right of employees to organize for mutual aid without employer interference," but that the Board must adjust that right to "the equally *undisputed* right of employers to maintain discipline in their establishments." *Id.* at 798 (emphasis added). This accommodation between employees' right to organize and

employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The locus of the accommodation between the legitimate interests of both the employer and employee "may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 504 (1978) (quotations omitted).

Some accommodations, however, are firmly established. For example, "[w]orking time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." *Republic Aviation*, 324 U.S. at 803 & n. 10. By contrast, no-solicitation rules applicable to *non*working times and areas are presumptively invalid absent a showing of special circumstances showing the rule is necessary to maintain discipline and production. *Id.* at 803 & n. 10, 804-05.

Those are long-accepted presumptions. But this case involves something more—a long-accepted *rule* that the retail sales floor is off limits when it comes to union solicitation. And there are no exceptions. As early as 1944, the Board concluded that there was "reasonable ground for prohibiting union solicitation *at all times* on the selling floor." *May Dep't Stores Co.*, 59 NLRB 976, 981 (1944)

(emphasis added). Over the following decades, the Board has reaffirmed this rule in numerous decisions. *E.g.*, *Meier & Frank Co.*, 89 NLRB 1016, 1017 (1950) (department store may prohibit union solicitation on its selling floors at all times); *Honda of Mineola*, 218 NLRB 486, 486 n.3 (1975) ("broad proscription of union activity within the selling areas of … [a retailer]'s premises is not unlawful"); *The Times Publ'g Co.*, 240 NLRB 1158, 1159 (1979) ("The Board has consistently found such an exception [regarding solicitation and distribution] to exist in cases involving retail establishments …."); *J.C. Penny Co.*, 266 NLRB 1223, 1224 (1983) ("It is equally well settled that in the case of retail establishments an employer may prohibit solicitation in the selling areas of a retail store even when employees are on their own time.").

The courts have followed in lockstep, firmly entrenching the sales-floor-is off-limits rule into the fabric of labor-management relations in the U.S. Thus, in 1978, the Supreme Court stated that "[i]n the case of retail marketing establishments … solicitation and distribution may be prohibited on the selling floor *at all times*." *Beth Israel*, 437 U.S. at 493, 506 (emphasis added) (holding that, in contrast, a per se ban on solicitation and distribution did not apply to cafeteria area of hospital infrequently visited by patients). By doing so, the Supreme Court made this sales floor rule the law of the land.

As this Court put it, "certain rules have been developed with respect to the

exercise of employee organizational rights under Section 7." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 582 (9th Cir. 1980). One such rule is that bans on "*all* employee solicitations, even during an employee's nonworking time, in the selling areas of stores and restaurants," are valid. *Id.* (emphasis added); *see also, e.g.*, *Hughes Props., Inc. v. NLRB*, 758 F.2d 1320, 1322 (9th Cir. 1985) ("Thus, the Board repeatedly has upheld a ban on solicitation, even during non-working hours, when the solicitation occurs on the selling floor of a department store or restaurant."); *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889, 893 (6th Cir. 1965) ("In view of the public nature of such a business, the NLRB has upheld company 'no-solicitation' rules applicable not just to working time but also to all company property in the public areas of the store concerned."); *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 645 (2d Cir. 1952) ("The Board, however, has allowed retail department stores the privilege of prohibiting all solicitation within the selling areas of the store during both working and non-working hours.").

2. The sales floor ban requires no showing of harm.

The sales floor ban on union solicitation has its genesis in the Board's (and courts') recognition that it is necessary to *prevent* disruption to the customers' shopping experience. "Brick-and-mortar" retail stores "literally exist for the sole purpose of providing a positive in-store experience for customers. Otherwise, customers have ample opportunities to shop elsewhere, including an ever-

increasing proliferation of online retailers." (ER 11 n.8.) Labor protests, however, are inherently adversarial; as the Supreme Court observed, union solicitation invites controversy. *Beth Israel*, 437 U.S. at 503, 506. Thus, the ban on *any* union solicitation on the sales floor (whether a momentary request to sign a union authorization card or full-blown sit-in) is not dependent on any actual showing of disruption, because disruption is *presumed*. *E.g.*, *id.* at 506 ("Employee solicitation [on the selling floor], *if* disruptive, necessarily would directly and substantially interfere with the employer's business." (emphasis added)); *Silver Spur*, 623 F.2d at 582 (rules against all solicitation on sales floor are upheld "on the theory that such activity *may tend* to drive away customers" (emphasis added)); *May Dep't Stores Co.*, 59 NLRB at 981 ("the solicitation, if carried on on the selling floor, where customers are normally present, *might conceivably* be disruptive of the respondent's business." (emphasis added)), *enf'd*, 154 F.2d 533, 537 (8th Cir. 1946).[19] In short, "[b]ans on solicitation … on the selling floors of retail stores,

[19] *See also Marshall Field & Co. v. NLRB*, 200 F.2d 375, 380 (7th Cir. 1952) ("The Board has approved the prohibition of union solicitation and discussion on the selling floors and related traffic facilities of department stores even when the employees are off duty. The Board pointed out in that case that solicitation in such areas *may* unduly interrupt or disturb the customer-salesperson relationship with a detrimental effect upon the employer's business." (emphasis added & internal citation omitted)); *Goldblatt Bros., Inc.*, 77 NLRB 1262, 1264 (1948) (solicitation "carried on in any other portion of the store in which customers are present … is *apt* to disrupt the Respondent's business" (emphasis added)); *Times Publ'g*, 240 NLRB at 1159 (in retail stores, solicitation on the sales floor "*could* interfere with the employer's main function" (emphasis added)).

have generally been upheld on grounds that the primary nature of a … retail business is serving customers, and employee solicitation in areas where customers are being served *could* substantially disrupt the employer's operations even if carried out during the employees' nonworking time." *Federal Labor Law: NLRB Practice* § 5.8 (2017) (emphasis added). The Board had no reason to evaluate the extent of disruption that the six associate-demonstrators (along with the outside groups) caused, though they caused a lot. (*See infra* at 50-52.) That the Board delved into such an evaluation confirms that, right from the start, its approach to this case was wrong.

Enforcing the sales floor ban has significant ramifications for the U.S. consumer market. In the labor context, rules of engagement between employers and employees exist in part to foster labor peace. *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) (noting that another "underlying purpose of this statute is industrial peace"). Given the inherently confrontational nature of labor activity, the bright-line rules that the Board and courts have developed over the past 70 or so years provide an easily ascertainable standard upon which employers can rely so as to avoid fact-specific conflicts each time they enforce their policies. Consistent application of the Act fosters predictability, and thus industrial stability, providing clear boundaries on the conduct of employers and employees alike. This Court should grant review to maintain those boundaries.

B. This Court owes no deference because the Board radically departed from its prior precedent without any explanation.

At the very least, the Board's decision is unreasonable and unenforceable because it failed to address 70 years of it *own* precedent. *See NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1290 (9th Cir. 1989) (Board is owed deference if its interpretation of Act is "reasonable"). Walmart's brief to the Board laid out the Board's decades of case law enforcing the ban on solicitation on the sales floor; in fact, Walmart's Statement of the Case to the Board led off with "*Seventy Years of Board Law Establishes Special Protection for the Retails Sales Floor*." (ER 45.) Quoting case after case (ER 73-74), Walmart pointed out that the ALJ did not even mention the Board precedent that allows retail employers to prohibit even a momentary union solicitation on the sales floor during customer sales hours "because of the mere *risk* or *possibility* of interference with the customer shopping experience" (ER 46-47 ("*no actual interference or disruption need be shown*") (citing *May Dep't Stores*, 59 NLRB at 981)). Moreover, Walmart teed up the dispositive legal issue for the Board when it asserted

> *Quietflex* provides a 'balancing of interests' test for situations where a balance between an employee's Section 7 rights and an employer's property rights must be struck on a case-by-case basis. Here, the Board struck that balance in the retail sales floor context long ago, giving priority to the employer's 'immediate need' to provide an inviting, hospitable, and customer-focused shopping environment.

(ER 48.) "To adopt the ALJ's view of the retail sales floor as no different from a

parking lot or break room," Walmart went on to argue, "would create an irreconcilable – and inexplicable – conflict with the Board's long-standing sales-floor jurisprudence." (*Id.*) For his part, Member Miscimarra repeated many of these arguments in his dissent. (*Supra* at 19-20.)

The Board majority's decision, however, never even mentions the sales-floor line of cases. Walmart even pointed out that the Board had never applied *Quietflex* or its factors to a work stoppage on the sales floor (ER 47, 70-71 & n.5 (citing 11 prior Board decisions)); still, the Board did not acknowledge that fact.

If nothing else, this Court must remand the Board's decision for additional analysis and findings. "[T]he Board must, to avoid abuse of its discretion, either adhere to or explain its departure from earlier clearly articulated criteria constituting self-imposed limits on its discretion." *Airport Parking Mgmt. v. NLRB*, 720 F.2d 610, 615 (9th Cir. 1983). The Board has "a duty to explain departures from established agency policy." *NLRB v. Albert Van Luit & Co.*, 597 F.2d 681, 686 n.3 (9th Cir. 1979) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (recognizing that "[a] settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress" and that "[f]rom this presumption flows the agency's duty to explain its departure from prior norms")).

In other words, "the Board cannot ignore its own relevant precedent but

must explain why it is not controlling." *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1236 (D.C. Cir. 2012) (quotations omitted) (petition for review granted; "[w]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious" (quotations omitted)).

Significantly, "where, *as here*, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (emphasis added). Further, "[t]he need for an explanation is particularly acute when an agency is applying a *multi-factor test* through case-by-case adjudication." *Id*. (emphasis added) (cautioning against "open-ended rough-and-tumble of factors").

Pacific Northwest Newspaper Guild, Local 82 v. NLRB, 877 F.2d 998 (D.C. Cir. 1989), is illustrative. There, the circuit court refused to enforce a Board decision that failed to reconcile "hopelessly irreconcilable" precedent on the meaning of "periodic dues and assessments" under the Act. *Id*. at 1001 (quotations omitted). The court held that the Board could not invoke *Chevron*[20] deference due to the litany of conflicting case law on the issue. *Id*. at 1003 (requiring "a coherent reconciliation of [Board's] own precedent"; "[o]therwise, we sanction

[20] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

impermissible 'ad hockery' … which is the core concern underlying the prohibition of arbitrary or capricious agency action"). Similarly, there is no *Chevron* deference due in this case.

II. The Board majority's multi-factor balancing test ignored Supreme Court precedent that prohibits employees from unlawfully seizing their employer's property.

A. The demonstrators seized the customer service area because they blocked access to, and denied Walmart use of, that area.

The Board's decision is fatally flawed for a second independent reason, assuming a decision can die twice: it sanctioned a seizure of property, contradicting (again) controlling Supreme Court precedent. In *Fansteel*, the Court held that the Act does not require reinstatement of employees who were discharged because of their unlawful conduct in seizing the employer's property during a "sit-down" strike. 306 U.S. at 253-54, *supra* at 20. The group's strike shut down the employer's normal operations in two buildings. *Id*. at 248. Eventually, law enforcement had to intervene and arrest the employees, who refused to leave despite repeated instructions to do so from management. *Id*. at 248-49. The employees enjoyed no protection under the Act:

> We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,[] to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work.

Id. at 255. "Apart from the question of the constitutional validity of an enactment

of that sort," the Court reasoned, "it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in [section 7 of the Act]." *Id*.

That the employer in *Fansteel* had violated the Act by refusing to bargain with the employees' union was irrelevant. The employer's violation did not "deprive[] it of its legal rights to the possession and protection of its property." *Id*. at 253. "[I]n its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods." *Id*. "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." *Id.*

This Court should call the associate-demonstrators' sit-in for what it was: a physical takeover, i.e., a seizure, of Walmart's customer service desk. The demonstrators huddled together in the customer service area and prevented customers and Walmart associates from accessing the customer service desk. (SER 740-42, 755; *supra* at 12.) The Board equates blocking access with "seizure." *Quietflex*, 344 NLRB at 1058 (applying factors and noting "[t]here is no allegation or evidence that [employees] blocked ingress or egress to the [employer]'s facility … or sought to deprive [it] of the use of its property"). The D.C. Circuit, the only

appellate court to review any aspect of *Quietflex*, treats "blocking access" and "seizure" as one and the same. *Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1300 (D.C. Cir. 2011) ("the seizure question may amount to the same thing as whether the employees deprived the employer of access to its property" (quotations omitted));[21] *see also Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (pre-*Quietflex*) (sit-down strike on plant floor was protected activity; "[t]here is no evidence suggesting that the employees seized any portion of the petitioner's property, engaged in acts of violence, caused any property damage, or *interfered with … the business of the employer*" (emphasis added)); *NLRB v. Pepsi-Cola Bottling Co. of Miami, Inc.*, 449 F.2d 824, 829 (5th Cir. 1971) (same; "[w]e find no facts … tending to show that the employees were claiming to hold the premises in defiance of the owner's right of possession"); *Golay & Co., Inc. v. NLRB*, 371 F.2d 259, 262 (7th Cir. 1966) (noting that a strike "amount[s] to seizure of control" where mine workers "blocked mine entrances" (quotations omitted)); *Atl. Scaffolding Co.*, 356 NLRB 835, 838 (2011) (applying *Quietflex* factors and finding there was no attempt "to deny anyone access to the property").

Again, the retail sales floor is for shopping. *Beth Israel*, 437 U.S. at 506 ("In

[21] The D.C. Circuit did not address the Board's authority to develop the *Quietflex* test. *Fortuna Enters.*, 665 F.3d at 1300 ("Although the sort of multi-factor balancing 'test' suggested in *Quietflex* may be incapable of predictable application, we shall assume its validity." (internal citation omitted)).

the retail marketing and restaurant industries, the primary purpose of the operation is to *serve customers*, and this is done on the selling floor of a store or in the dining area of a restaurant." (emphasis added)). Thus, once employees usurp part of the sales floor for *their* purposes, they have necessarily denied the employer *its* right to use that area for its sole purpose—shopping and serving customers. Denying a property owner use of her property for its intended purposes is the textbook definition of a seizure. *Fansteel*, 306 U.S. at 256 ("It was an illegal seizure of the buildings in order to prevent *their use* by the employer in a lawful manner." (emphasis added)); *Atl. Scaffolding*, 356 NLRB at 836-37 (no protection where employees "occupied their employer's property in the face of the employer's order to leave and *deprived the employer of the use of its property* for an unreasonable period of time" (emphasis added)); *see also U.S. v. Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., dissenting) ("The owner of property, of course, has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes."); ER 11 (until associate-demonstrators left, they "prevent[ed] the store from being used for the sole reason it exists, which is to provide customers a positive, carefully cultivated in-store experience." (Miscimarra, dissenting)). The Board's observation that there were no customers in the customer service area merely confirms the obvious: the wall of demonstrators prevented any customer from getting to the customer service counter.

A physical occupation of the customer service desk area is no less a seizure just because other areas of the store are free and clear of protestors. *See Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (city allowed "army of trespassers" to use "*part of*" private land as a public trail; noting that seizures can be "temporary or partial" and rejecting argument that no seizure occurred because plaintiff was not "completely deprived of her possessory interests" (emphasis added, alteration & quotations omitted)). The Board majority, however, saw it as an all or nothing proposition—they decided that Walmart was not really deprived of use of its property because the demonstrators "largely confined themselves to a small enclosed customer service area" of a large, two-story department store. (ER 4.) But a seizure is a seizure, no matter how small the piece of property is.

B. The Board had no authority to use a "balancing test" to legitimize otherwise unlawful seizures of property.

Even if this Court does not consider the associate-demonstrators' sit-in a "seizure" under *Fansteel*, the two-member majority still had no authority to apply *Quietflex*'s 10-factor test. *Quietflex* impermissibly considers an unlawful seizure of property as a "factor" to be balanced against a host of other factors, which could legitimize the seizure (which happened here) under the guise of section 7 activity. Any interpretation of the Act that allows for "reasonable" seizures of property raises Fifth Amendment taking issues. If this Court is going to give the Board a second crack at this case (it shouldn't), it should reject *Quietflex* and instruct the

Board to start over on its analysis of sales floor demonstrations like this one.

1. Two *Quietflex* factors contradict the Act.

Both the majority and dissent in *Quietflex* correctly cite *Fansteel* for the proposition that the Act does not protect sit-down strikes that seize an employer's property. *Quietflex*, 344 NLRB at 1057 n.12 ("illegal trespass found where employees seized and retained possession of the employer's plant"); *id*. at 1061 n.3 ("The Supreme Court long ago held that sit-down strikes were unprotected."); *see also NLRB v. Am. Mfg. Co*., 106 F.2d 61, 68 (2d Cir. 1939) (noting that a "sit-down strike … permit[s] the termination of the employee relationship"). Inexplicably, however, the *Quietflex* majority goes on to include "denial of access" (factor 3) and "attempts to seize property" (factor 9) as factors in the Board's 10-factor balancing test.

Thus, applying *Quietflex* factors 3 and 9 could lead to a finding (as it did here) that a sit-down strike that denied access to property was *protected*, because *other* factors weighed in favor of protection (e.g., lack of grievance procedures, lack of violence, the relatively short duration of the work stoppage). For example, where approximately 100 employees amassed in an oil refinery's parking lot for nearly two hours and refused to return to work, the Board held that the work stoppage was protected: "Because there was no *meaningful* impairment of property rights, there is nothing to balance against the employees' rights under the Act." *Atl.*

Scaffolding, 356 NLRB at 837 (emphasis added). In other words, *had* there been a "meaningful" impairment of property rights (whatever that means) in that case, a weighing of the other *Quietflex* factors could still have favored protection for the employees' work stoppage.[22] Any such result is irreconcilable with *Fansteel.*

Just as there are no "reasonable" trespasses under the Act, even under "reasonable regulations established by the Board," *Lechmere,* 502 U.S. at 537 (quotations omitted),[23] there are no "reasonable" seizures under the Act; if a seizure occurred (it did), that is the end of the story—there is no protection under the Act. *Fansteel*, 306 U.S. at 252. As explained below, either the taking of an entire "stick" or the taking of *part* of all the "sticks" (e.g., a portion of the sales floor, *supra* at 39) from a property owner's bundle violates the Fifth Amendment. *See Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982) (right to exclude is one of the "most treasured strands in an owner's bundle of

[22] Indeed, applying factor 3 of *Quietflex* (access to property), the Board majority noted it "takes account of *the degree*, if any, to which an employer was actually impeded in its ability to do business." (ER 5 n.17 (emphasis added).)

[23] In *Lechmere*, the Court explained that its prior reference to "'reasonable' attempts [at accessing employees] was nothing more than a commonsense recognition that unions need not engage in *extraordinary* feats to communicate with inaccessible employees—*not* an endorsement of the view (which we expressly rejected) that the Act protects 'reasonable' trespasses." *Id.* at 537. As explained in Section II.C below, there were obviously no extraordinary circumstances in this case, given that the associate-demonstrators were able to reach the public by demonstrating outside the store and HR Manager Lilly offered to meet with them about their grievances.

property rights").

2. The "avoid constitutional issues" canon of statutory interpretation applies.

Interpreting the Act to allow for "reasonable" seizures of an employer's property rights in the name of employee concerted activity triggers the Fifth Amendment's takings clause.[24] Where governmental action results in "a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 433-35 (government required to pay fair market value for an easement for even minimal invasions like installation of cable-box on exterior of private property). Under *Loretto*, any government-imposed physical invasion of private property will effect a *per se* taking. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015).

Thus, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court found an unconstitutional taking where a state agency conditioned a development permit for private beachfront property on plaintiffs consenting to a public easement across a portion of their property for public beach access. That action qualified as a "permanent physical occupation," because "individuals are

[24] The Fifth Amendment provides that private property shall not be taken, but upon payment of just compensation. U.S. CONST. amend V.

given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832; *see also Hendler v. U.S.*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) ("concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted"). This Board decision is even *more* of a taking: it allows employees to sit down and station themselves smack in the middle of the sales floor for significant periods of time, blocking customer access to goods and services.

This Court should avoid any interpretation of the Act that would allow such a taking under the Fifth Amendment. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quotations omitted)). "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Id*. ("The courts will therefore not lightly assume that Congress

intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."). It does not matter that section 7 of the Act may have the best of intentions or is a legitimate exercise of Congress' authority—the Takings Clause "presupposes that the government has acted in pursuit of a valid public purpose." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005); *see Kaiser Aetna v. U.S.*, 444 U.S. 164, 174 (1979) ("In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the [beach marina] if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question.").

The bottom line is that *Quietflex* cannot survive constitutional scrutiny because two of its factors—whether employees attempted to seize the employer's property (factor 9) and whether the work stoppage deprived the employer of access to its property (factor 3)—authorize a taking of private property. Thus, assuming this Court does not grant review based on the long-standing ban on solicitation on the sales floor and agrees with the Board that there was no seizure of property in this case, a remand is still necessary because the *Quietflex* test is contrary to the Act and thus invalid. *See Lechmere*, 502 U.S. at 539 ("We cannot accept the Board's conclusion," because its application of one factor in three-factor test

"rest[s] on erroneous legal foundations" (quotations omitted)).[25]

C. Even if a seizure were permissible in some cases, this is not one of them.

Even if the Board had authority to develop a *Quietflex*-like balancing test for seizure of property in circumstances where employees could not otherwise present their grievances to management, it could not apply that balancing test here because the associate-demonstrators refused to speak to management. Lilly and Jankowski were right there in front of the associate-demonstrators, ready and willing to meet with each of them, but the associate-demonstrators had no interest in Open Door meetings to present their grievances. *See, e.g.*, *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 452 (4th Cir. 1969) (sit-in not protected where employees "were not interested in being heard").

Instead, the associate-demonstrators were bent on grabbing the attention of the media outside the store and confronting customers inside the store with their large OWM signs. Indeed, the outside activities and media coverage were "part and parcel" of the planned demonstration that day (SER 182:10-24 (inside and outside activities "were in conjunction with another")), and two associate-demonstrators even conducted a media interview outside the store during the sit-in.

[25] The Board's application of *Quietflex*'s "seizure of property" and "deprivation of use of property" factors cannot be viewed as "harmless error," because the Board found *against* Walmart on both counts.

The whole event "was accompanied by media arranged by [OWM]." (ECF 31 at 14 (OWM's Opening Brief).) "[I]t is abundantly clear that the [associates] had the option of engaging in a work stoppage and conveying their message to other [associates], customers and the public … outside the store." (ER 13 (Miscimarra, dissenting).)

Quietflex is designed solely to weigh the employer's property rights against the employees' right to present grievances to the employer, *not* to the public at large or even to fellow coworkers. *See Fortuna Enters., L.P.*, 360 NLRB 1080, 1083 (2014) (stopping work and remaining on employer's property for a reasonable period of time protected activity *if* there is "*sincere* effort to meet with *management* over workplace grievances" (emphasis added & quotations omitted)); *see also Roseville*, 882 F.2d at 1359 ("employees may remain on an employer's property in a sincere effort to meet with management concerning a protest over wages" (quotations omitted)). "The purpose of the [A]ct was not to guarantee to employees the right to do as they please …." *NLRB v. Draper Corp.*, 145 F.2d 199, 202-03 (4th Cir. 1944) (no violation where employer discharged striking employees for "the insubordinate conduct of standing around the plant [for two hours] and refusing to go to work when ordered").[26]

[26] *See also Cone Mills*, 413 F.2d at 454 (employer did not violate Act by discharging employees who stopped work, "made their point and had registered their complaint," remained standing in the corridor between machines (some of

That Walmart's Open Door Policy allows only one-on-one meetings, not group meetings, does not justify what the associate-demonstrators did. First, in any Open Door meeting, associates can (and did) discuss *group* grievances, not just individual grievances. (*E.g.*, SER 764-78, 886-905; ER 27.) Second, in a non-unionized setting like this, the Board cannot force employers to meet with employees in a group setting. *Fortuna Enters.*, 665 F.3d at 1302-03 (upholding open door policy whereby company meets with employees individually, because policy allowed an individual to raise group complaints); *Waco, Inc.*, 273 NLRB 746, 746, 750 (1984) (lunch room sit-in unprotected where employees continued their occupation after manager "told them that he would not meet with them as a group and that they must choose either to get up and go back to work, in which case he would meet with them individually, or to punch out and leave the premises"). In the Board's own words, the Act "specifically allows an employer to deal with employees on an individual basis." (SER 866-67 ("longstanding precedent" holds that "an employer is under no obligation to meet with employees or entertain their grievances upon request where there is no collective-bargaining

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which were still running), and refused a manager's orders to return to work or leave the premises); *Advance Indus. Division-Overhead Door Corp. v. NLRB*, 540 F.2d 878, 884 (7th Cir. 1976) ("The employees' refusal to leave the premises, their failure to express their questions to the management representatives present, and their demand that a management representative of their choice come to the plant at night … show a complete lack of respect for their employer's property rights. We do not believe Congress intended to countenance such actions.").

agreement with an exclusive bargaining representative requiring it to do so" (citing *Charleston Nursing Ctr.*, 257 NLRB 554, 555 (1981))).

The Board majority should never have used *Quietflex*, because the associate-demonstrators had neither interest in using—nor any pressing need to use—the sit-in as a vehicle to present grievances to Walmart. In fact, they repeatedly refused to do so.

III. Even if the *Quietflex* factors apply, the Board majority's conclusion that they weigh in favor of protecting the associate-demonstrators' sit-in on the sales floor is not supported by substantial evidence.

Assuming this Court concludes the Board had authority to apply the *Quietflex* factors, this Court should still grant review because there is not substantial evidence supporting the Board's findings on the ten factors. *See Lucas v. NLRB*, 333 F.3d 927, 931 (9th Cir. 2003) (Board's factual findings are reviewed for substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Instead, as explained below, the evidence before the ALJ established that seven of the factors weigh heavily in favor of Walmart and that the other three factors are neutral or weigh in Walmart's favor. Weighing all the factors together, then, there was but one outcome possible: the associate-demonstrators' sit-in was not protected activity under the Act.

A. The associate-demonstrators' goal was to drum up publicity for OWM, not address their grievance with management.

Factor 1 weighs in favor of Walmart. As explained above, the associate-

demonstrators did not seek to draw management's attention to their concerns; if that was in fact their intention, they would have met with Lilly, who repeatedly offered to meet with each of them.

The associate-demonstrators stopped working on November 2 because the UFCW planned, coordinated, and led a "Grand Reopening" campaign event that day. The UFCW picked that day because it thought it was "a good day to publicize their concerns and OUR Walmart's goals to a large audience." (ER 37.) The UFCW picked the customer service area just inside the front entrance to maximize the demonstration's impact on the *customer*. The UFCW even orchestrated media interviews with associate-demonstrators during the sit-in.

The associates didn't plan this big publicity event; they just "went with it." (*Supra* at 9.) And Tanner proudly touted that she could call off the whole thing (seven hours in advance) if Walmart guaranteed regular jobs for all remodel associates, which had nothing to do with their Van Riper complaints. (ER 27.) Not one of the protest signs said anything about Van Riper. There was no "sincere" desire to meet with management about Van Riper.

The record is clear: the UFCW orchestrated the customer service desk sit-in and outside demonstration to deliver a message to Walmart's customers and the public (through the media), seeking to pressure Walmart to improve "area standards." That's what "Stand Up, Live Better," one of OWM's favorite slogans,

is all about. Under the Act, however, employee rights to communicate to the public (and customers) is given much less weight *inside* a retail store because employees can do that *outside* without impacting the employer's right to control his property and operations. "Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities *directed at consumers* represent weaker interests under the NLRA than activities directed at organizing employees." *UFCW, AFL-CIO, Local No. 880 v. NLRB*, 74 F.3d 292, 298 (D.C. Cir. 1996). Thus, "[u]nder the § 7 hierarchy of protected activity imposed by the Supreme Court," activity in which "the targeted audience was not [an employer's] employees but its customers … warrants even *less* protection than non-employee organizational activity." *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994); *see also Roundy's Inc. v. NLRB*, 674 F.3d 638, 649–50 (7th Cir. 2012) ("[A]rea-standards handbilling may warrant less protection than even nonemployee organizational activity under Section 7."). The UFCW's Richmond media event had nothing to do with the concerns underlying *Quietflex*.

B. The associate-demonstrators interfered with store operations, blocked access, and deprived Walmart of its use of the customer service area.

Factors 2, 3 and 9 also weigh in favor of Walmart. The UFCW intended the demonstration to constitute unlawful trespass, including blocking access to areas of the store, which carries with it the seeds of violence. *Sears, Roebuck & Co. v. San*

Diego Cty. Dist. Council of Carpenters, 436 U.S. 180, 202 (1978) (recognizing that trespass in defiance of owner's demands to leave the premises "involve[s] a risk of violence"). Thus, the demonstration was hardly "peaceful," as the Board found. Had Walmart managers not acted calmly and professionally in response to the UFCW's flagrant misuse of its sales floor, the situation could have easily spiraled out of control.

The demonstration also disrupted the shopping experience, denied Walmart the use of its customer service area for approximately 50 minutes, and as the video and photo evidence shows, blocked access to a major product display as customers entered the store. (*Supra* at 3, 12-13.) In addition, the sit-in demonstration interfered with an associate who was trying to cover the customer service counter. (SER 428:15-18, 430:2-5, 433:3-12 ("I just couldn't do my job.").)

The Board assumed that, because customers did not bear down and push their way through the demonstrators to access the customer service desk, there was no disruption. It also assumed that the lack of evidence of customers fighting for a box of cereal from the product display meant no disruption. Similarly, the Board assumed the lack of formal customer complaints about the sit-in demonstration meant no disruption. (ER 4-5, 6.)

Those assumptions (1) fly in the face of the video and photo evidence showing the demonstrators holding signs and a banner and wearing demonstration

T-shirts designed to attract the attention of customers, working associates, and the media; and (2) ignore the common sense reality underlying 70+ years of Board precedent that an employer cannot, as a practical matter, prove the negative of what "might have happened" in the absence of distracting labor activity on the sales floor. It is impossible to quantify the number of customers who were turned away or told another to do so because of the blocking and demonstration messaging going on in the customer service area.

C. The associate-demonstrators had ample opportunity to use the Open Door Policy.

Factors 4 and 7 weigh in favor of Walmart. The associate-demonstrators presented their "group" Van Riper grievance to Walmart in writing before the November 2 sit-in demonstration began, and Walmart responded by giving them multiple chances before and during the demonstration to discuss their complaints. The offers fell on deaf ears.

The Board erred in finding that the associates "submitted" the October 17, 2012 Van Riper to Walmart on that same day. (ER 2.) No record evidence supports that finding. Thus, any suggestion that the associates were justified in staging an on-site work stoppage on the sales floor to get management's attention is a non-starter. To the contrary, the only record evidence shows that Walmart received the letter on October 31, and had two high-ranking managers at the Richmond store to address the Van Riper issues within 48 hours. (*Supra* at 9-10.)

The following passage from a prior Board decision encapsulates the associate-demonstrators' misconduct in this case:

> Of critical importance to the court in finding the [work stoppage] discharges lawful was the fact that the union steward had communicated the employees' grievance to the employer and received a response, albeit not one the employees were happy with. On these facts, the court found that the employees had made their point and ... registered their complaint, but *they were not interested in being heard.* They had *planned in advance* to stop production for thirty minutes in protest ….

Fortuna Enters., L.P., 360 NLRB 1080, 1086 (2014) (emphasis added & quotations omitted) (discussing *Cone*, *supra* at 45). Similarly, the six associate-demonstrators had every opportunity to present their concerns to management before the demonstration began; in fact, one of them met with Lilly beforehand. But they had their media-event marching orders from the UFCW, and they were going to complete them, no matter what.

D. Management conveyed the possibility of discipline if the associate-demonstrators did not leave the sales floor.

Factor 5 weighs in favor of Walmart. Walmart told the demonstrators they were disrupting store operations and blocking customer access—patently discipline-worthy offenses—and told them to leave on three occasions, but the demonstrators (including the participating associates) refused to comply. The risk of discipline associated with insubordination (ignoring the managers' instructions) was embedded in the instruction itself, as with any day-to-day refusal to follow

instructions. "Some things are too obvious to require an explicit statement." (ER 16 (Miscimarra, dissenting).)

E. The work stoppage was not short in duration, and continued after the associates' shift ended.

Factor 6 weighs in favor of Walmart, as there is no allowable duration for a demonstration on the sales floor. Thus, Walmart tolerated the demonstration for 50 minutes longer than it needed to in an effort to maintain calm and prevent a confrontation between demonstrators and customers (or other associates). If there is any duration analogy, it is that of *Restaurant Horikawa*, 260 NLRB 197 (1982), where the Board approved the discharge of an employee who engaged in a disruptive demonstration inside the restaurant for 10-15 minutes. The sit-in demonstration here lasted three-to-four times that long.

Factor 8 also weighs in favor of Walmart. The associate-demonstrators' sit-in at the customer service desk was only one piece of the UFCW's campaign messaging puzzle that day. The exterior demonstration continued long after the associates' shifts ended. (*Supra* at 14.)

F. Walmart disciplined the associate-demonstrators because of the disruption they caused.

Finally, factor 10 weighs in favor of Walmart. On its face, the coaching form that each associate-demonstrator received states that they "physically occupied a central work area," "joined with a pre-coordinated flash mob during Grand

Opening to further take over, occupy, and deny access to the main customer pathway," and "[r]efused to stop/leave when told to do so." (ER 30.) The form also notified the associates that, as a result of that behavior, they "[d]isrupted business and customer service operations." (*Supra* at 14-15.)

Lilly also testified that the Richmond store had a uniformly enforced and pre-existing rule against in-store disruptive activity. (ER 30; SER 563:23-564:25.) Neither OWM nor the Government offered any evidence to rebut that point. Thus, not only is the Board's contrary finding (i.e., that the associate-demonstrators were disciplined for the work stoppage) refuted by the plain language of the coaching forms, the only on-point testimony establishes that the work stoppage had nothing to do with the discipline imposed.

IV. It is pointless to require a posting at Walmart stores across California regarding a dress code that became obsolete over four years ago.

Regardless of how this Court rules on the merits of the Board's decision, this Court should not enforce the remedy requiring Walmart to post a notice that its 2010 dress code violated the Act at each and every store in California. As the ALJ recognized, Walmart replaced its 2010 dress code in February 2013, *before* this case even went to trial. (ER 22.) For over four years now, the 2010 dress code has been irrelevant, and the legality of the dress code that replaced the 2010 dress code is not at issue in this case. (*Supra* at n.18.) Thus, the only reason for requiring such a broad notice posting about the long-obsolete 2010 dress code is to punish or

embarrass Walmart, not to remedy an ongoing violation (or even a threat of one) of the Act. The Board had no authority to do that.

The Board has some discretion in fashioning remedies that "effectuate the policies of [the Act]." 29 U.S.C. § 160(c); *see Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). However, the Board's orders must be remedial, not punitive. *E.g.*, *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151, 156-157 (2d Cir. 1991). Any relief "must be sufficiently tailored to expunge only the *actual*, and not merely speculative, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (emphasis added); *see also Manhattan Eye Ear*, 942 F.2d at 157. In other words, the circuit court is "a reviewing court and does not function simply as the Board's enforcement arm. It is [the court's] responsibility to examine carefully both the Board's findings and its reasoning, to assure that the Board has considered the factors which are relevant to its choice of remedy, [and] selected a course which is remedial rather than punitive." *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980).

A posting order that applies to nearly 200 stores in California is "properly remedial where either the evidence supports an inference that the employer will commit further unlawful acts at a substantial number of other sites or the record shows that employees at other sites are aware of the unfair labor practices and may be deterred by them from engaging in protected activities." *Torrington Extend-A-*

Care Emp. Ass'n v. NLRB, 17 F.3d 580, 585 (2d Cir. 1994). The record in this case supports neither inference. The only associates who testified at trial were from the Richmond and Placerville stores (ER 21, ALJ's decision ("the events in this case generally relate to two stores in northern California")), where there is already a notice-posting requirement based on allegedly unlawful acts independent of the 2010 dress code (ER 18). There is no evidence that the 2010 dress code, which was replaced in 2013, has deterred any associate from another store in California from engaging in protected activity. It's questionable whether any California associates even remember that there was a 2010 dress code or what it prohibited. *See, e.g.*, *Emhart Indus. v. NLRB*, 907 F.2d 372, 379 (2d Cir. 1990) ("we must withhold enforcement of orders that will not effectuate any reasonable policy of the [A]ct, even where the problems with the order are caused primarily by the lapse of time between the practices complained of and the remedy granted"). Nor is there any evidence in the record that Walmart has any intention of reinstating its prior dress code. *See, e.g.*, *Commc'ns Workers of Am., AFL-CIO v. NLRB*, 362 U.S. 479, 480-81 (1960) (refusing to enforce order that union cease and desist from coercing employees of "any other employer" because union had not coerced employees of other companies and there was no evidence that it was inclined to do so).

Under the circumstances, nothing remotely remedial in nature is accomplished by ordering a statewide notice posting regarding the obsolete 2010

dress code. *See, e.g.*, *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 189 (2d Cir. 1991) ("Notwithstanding th[e] limited scope of review, courts are authorized to refuse to enforce Board-ordered remedies when enforcement would be unnecessary or futile." (quotations omitted)). Congress has charged the circuit courts with "responsibility for the reasonableness and fairness of Labor Board decisions." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). Given that responsibility, this Court should deny enforcement of the Board's order requiring a notice posting at all Walmart stores in California.

V. Neither this Court nor the Board can award the extraordinary remedies that OWM seeks on appeal.

A. This Court has no jurisdiction to grant OWM any relief.

If this Court grants Walmart's Petition for Review on the merits, OWM's petition regarding two remedies that the Board did not order is moot. If, on the other hand, this Court denies Walmart's Petition for Review on the merits, this Court should also deny OWM's petition.

As OWM concedes (*supra* at 4-5), the Board did not address OWM's request for two extraordinary remedies: (i) a notice posting of the (alleged) unlawful discipline of the six Richmond associate-demonstrators at *all* Walmart stores in California; and (ii) a Board-compelled confession in which Walmart must admit that those associates were engaged in a protected work stoppage and that it violated the Act by disciplining them to "discourage associates from engaging in

those or other protected activities." (ECF 31 at 16-17.) With the Board not passing on these issues, this Court lacks jurisdiction to do so itself. *See Sure-Tan*, 467 U.S. at 900 at n.10 (circuit court improperly imposed a remedy that the Board did not impose); *UFCW, Local 152 v. NLRB*, 768 F.2d 1463, 1476 (D.C. Cir. 1985) ("the enlargement of any remedial order issued by the Board should not be undertaken unilaterally by the courts"). The "power to order" remedies "is for the Board to wield, not for the courts." *NLRB v. J. H. Rutter-Rex Mfg.*, 396 U.S. 258, 263 (1969). This Court cannot review the merits of OWM's petition.

B. This Court should not remand to the Board to consider OWM's extraordinary and untimely remedy requests.

Nor is there any basis in the law or this record for a remand, because the Board cannot and will not award the two remedies that OWM seeks.

1. OWM waived its "wish list" of extraordinary remedies.

OWM waived this "wish list" of extraordinary remedies presented to (and rejected without comment by) the Board. Regarding the statewide posting requirement, OWM did not except to (before the Board) the ALJ's findings underlying the remedies that he did award, including that Walmart did not engage in serious and widespread misconduct. (ER 88-95.) Nor did OWM except to the lack of a factual finding that the discipline of the six Richmond associates was pursuant to a company-wide policy. (*Id.*) That is fatal to OWM's petition, as an award of such an extraordinary remedy requires such findings. *See, e.g., NLRB v.*

C.E. Wylie Constr. Co., 934 F.2d 234, 238 (9th Cir. 1991) ("We therefore hold that an NLRB order extending to jobsites other than those where the NLRA violations at issue were found *must* be supported by a finding that the offending party is likely to commit similar violations at other sites." (emphasis added)); *Fallbrook Hosp.*, 360 NLRB 644, 658 (2014) (additional, broad remedies are required only when employer committed violations "so numerous, pervasive and outrageous" (quotations omitted)); *Teddi of Cal.*, 338 NLRB 1032, 1041 (2003) (while violations were "certainly very serious," they could be remedied "by means of the standard Board remedy"). "No objection that has not been urged before the Board … shall be considered by the court," absent extraordinary circumstances. 29 U.S.C. § 160(e).

Similarly, the forced confession requirement does not appear anywhere in the record before the ALJ: not in the Complaint, the trial transcript, or the post-hearing briefs of the Government and OWM. (SER 786-865, 874-885.) Instead, the Government requested (as is its customary practice) a notice posting that requires Walmart to state that it "will not" engage in the activities the Board found to violate the Act. (SER 837-38.) There was nothing mentioned about "requir[ing] an admission of a finding on the nature of the violation," as OWM demands. (ECF 31 at 20.) As to remedies that neither OWM nor the Government raised before the ALJ, OWM waived its right to seek them on appeal. *See Detroit Typographical*

Union No. 18 v. NLRB, 216 F.3d 109, 117 (D.C. Cir. 2000) (party waived claim presented for the first time in its exceptions brief to the Board). "A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived." *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989).

2. There is no legal or factual basis to award the extraordinary remedies.

Assuming OWM preserved its right to seek the two extraordinary remedies it wants (it didn't), the Board will not grant them. OWM's brief to the Board (ER 88-95) cited no authority or record evidence to support OWM's objection that the ALJ should have ordered the two extraordinary remedies. *See Bruce Packing Co.*, 357 NLRB 1084, 1084 & n.4 (2011) (charging party bears the burden of showing "that the Board's traditional remedies are insufficient to remedy the violations committed by the Respondent"); *First Legal Support Servs., LLC*, 342 NLRB 350, 350 n.6 (2004) (burden on proving necessity of extraordinary remedies lies on party requesting such remedies).

And both remedy requests are contrary to well-established Board law. First, in *Consolidated Edison Co. of N.Y., Inc.*, 323 NLRB 910 (1997), the Board reversed an ALJ's order of a notice posting at all the employer's New York locations and instead "follow[ed] the Board's *usual* practice and confine[d] the injunctive and notice-posting requirements of the Order to the facilities *at which the violations were committed*." *Id.* at 911-12 (emphasis added); *see also Blount*

Bros. Corp. v. NLRB, 571 F.2d 4, 4 (7th Cir. 1978) (striking "unreasonably broad" order that extended beyond "isolated incident involving one of 1,000 employees"). Indeed, the Board repeatedly rejects statewide notice postings, even if violations occur at multiple locations, where there is no evidence that the violations occurred pursuant to a company-wide policy or that employees at other facilities actually knew of the violations. *Edison*, 323 NLRB at 911-12 & n.8; *see also F.W. Woolworth Co.*, 173 NLRB 1146, 1146-47 (1968) (reversing ALJ's decision to require same notice posting at 10 locations where discrete unfair labor practices occurred and, instead, ordering store-specific notices).

Regarding the associate-demonstrators' sit-in, the Board found a discrete violation of the Act at the Richmond store. That OWM's media event sit-in was supposedly part of a "national campaign" (ECF 31 at 13) does not warrant a broad notice posting requirement beyond the Richmond store. No evidence suggests, and OWM did not (and does not) contend, that non-Richmond associates engaged in similar sit-ins, or that the Richmond store's decision to issue two-level disciplinary coachings to the six associate-demonstrators was a company-wide practice. Nor is there evidence that associates at Walmart's nearly 200 other California stores actually knew about the alleged violation at the Richmond store. A remedy already exists—the Board prohibited Walmart from using the 2010 dress code.

OWM cites the California trespass injunction Walmart obtained against it

and the UFCW, but its scope is limited to *non*-associates. *See Lechmere*, 502 U.S. at 537 (noting that Act "drew a distinction of substance between the union activities of employees and nonemployees" (internal citation omitted)). OWM also claims "the Richmond store event was part of a national campaign by [OWM]" (ECF 31 at 13), but it cites only a passage in Walmart's brief before the Board explaining how OWM planned the Richmond event to capitalize on the publicity surrounding the store's grand reopening. (ER 53-54.) With no evidence that the Richmond coachings impacted associates statewide, the Board properly limited the notice posting requirement to the Richmond store.[27]

Second, as to Board-compelled admissions of guilt, OWM tries to pitch its remedy request as "requir[ing] an admission of a finding on the nature of the violation," not "an admission of guilt." (ECF 31 at 20.) That's a distinction without a difference. Admitting the nature of the violation—i.e., that Walmart (allegedly) issued disciplinary coachings "to discourage associates from engaging in [a work stoppage] or other protected activities"—is the same thing as admitting guilt. (ECF 31 at 17.) In fact, OWM's proposed language includes a statement that "[Walmart] *agreed* to remedy those violations by removing any reference to the discipline in

[27] OWM cites an unrelated decision in which an ALJ ordered a nationwide posting (ECF 31 at 15), but that involved certain provisions in Walmart's associate benefits book, which was a document used corporate-wide, *Wal-Mart Stores, Inc.*, 352 NLRB 815, at *62 (2008).

… personnel files." (*Id*. (emphasis added).)

As OWM concedes (*id.* at 17-18), the courts have long rejected any notion that the Board could compel parties to confess their alleged past violations in a notice posting. "Forcibly to compel anyone to declare that the utterances of any official, whoever he may be, are true, when he protests that he does not believe them, has implications which we should hesitate to believe Congress could ever have intended." *Art Metals Constr. Co. v. NLRB*, 110 F.2d 148, 151 (2d Cir. 1940) ("until the Supreme Court speaks, we will not so construe the [NLRA]"); *see also NLRB v. Louisville Refining Co*., 102 F.2d 678, 681 (6th Cir. 1939) (requiring employer to admit its violations "is a power not given to the Board"); *Hartsell Mills Co. v. NLRB*, 111 F.2d 291, 293 (4th Cir. 1940) ("to exact from an employer a confession that he has violated the law is not only to punish him, but is to inflict a humiliating punishment out of harmony with the spirit of our law").

Thus, in *NLRB v. Express Publishing Co*., 312 U.S. 426 (1941), the Board dropped any confession requirement (through "cease and desist" language) and adopted the "we will not engage in" language that has been used since. *Id.* at 438-39. The NLRB Casehandling Manual, section 10132.3, reflects that position:

> Although it is proper to require the posting of a notice that declares publicly that a party will conform in the future to the mandates of the Act . . . notices may *not* be phrased so as to require a charged party to admit a violation of the Act, either directly (e.g., "We violated the law when we fired John Smith.") or by implication (e.g., "We will not fire anyone for union activity *again*.").

(SER 868-871 (first emphasis added).) This Court continues to recognize the ban on Board-compelled confessions. *Am. West Airlines, Inc. v. Nat'l Mediation Bd.*, 986 F.2d 1252, 1257 n.5 (9th Cir. 1993) ("Federal courts have refused to enforce NLRB remedial orders in which employers are made to admit past unfair labor practices." (citing *Express Publ'g*, 312 U.S. at 438-39)).

Board orders are to be remedial (not punitive), and the notice posting is meant to "provide assurances that *future* violations will not occur." *J&R Flooring, Inc.*, 356 NLRB 11,12 (2010) (emphasis added); *see also May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945) ("proper scope" of remedial order is what is "necessary to *prevent*" employer from engaging in unfair labor practices (emphasis added)). OWM fails to explain why or how the Board can ignore the law.[28]

OWM argues that Board notices have "modernized" over the years, but each example OWM provides relates to the distribution of notices, *not* the content of them. (ECF 31 at 19 (*e.g.*, e-mail, internet).) And the Board's findings on this matter are readily available to Richmond associates, as it revised its standard notice language to include a hyperlink to a copy of its full decision on its website. (ER

[28] OWM cites the language of the order in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (notice posting "detailing its prior unfair labor practices"), but the employer there did not challenge that language on appeal. *Id*. In any event, nothing in *Hoffman* suggests an employer should be compelled to confess prior unfair labor practices (which is what OWM wants), and in fact, the Court there reiterated the ban on "punitive" remedies under the Act. *Id.* at n.6.

18.) Not only that, neither OWM or the Board offered any evidence that associates would not "understand" the simple language that the Board uses in its standard notices. (ECF 31 at 16.) Instead, OWM wants detailed confessions in the notice so that it can use it as campaign propaganda to recruit members and push its message through the media. The Government can't compel Walmart to serve as a mouthpiece for OWM. *See, e.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) ("[T]he government may not … compel the endorsement of ideas that it approves." (quotations omitted)). There is simply no basis to remand any remedy issues.

Indeed, this Court should not even reach OWM's petition because the Board's decision cannot stand on the merits. No deference is owed to the Board in this case, because its application of the *Quietflex* factors is contrary to Supreme Court precedent—prohibiting both solicitation on the sales floor and seizures of property—and more than 70 years of the Board's own precedent affording the sales floors of America special protection from labor-related activity.

CONCLUSION

This Court should grant Walmart's Petition for Review, deny the Board's Cross-Petition for Enforcement, and deny OWM's Petition for Review.

DATED this 22nd day of May, 2017.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Walmart states that it is not aware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 28.1-1(c) and Circuit Rule 28.1-1(e) because it contains 16,484 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

DATED this 22nd day of May, 2017.

s/ Douglas D. Janicik

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that those parties or counsel for parties listed below who are registered CM/ECF users have been served through the appellate CM/ECF system.

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