UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

PREFERRED BUILDING SERVICES, INC. AND RAFAEL ORTIZ D/B/A ORTIZ JANITORIAL SERVICES, JOINT EMPLOYERS

And **Case 20-CA-149353**

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87

GENERAL COUNSEL'S STATEMENT OF POSITION TO THE BOARD ON REMAND FROM THE NINTH CIRCUIT COURT OF APPEALS

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I. INTRODUCTION

On October 5, 2021, the Office of the Executive Secretary of the National Labor Relations Board (NLRB) invited statements of position on the issues raised in the remand by the Ninth Circuit Court of Appeals in *SEIU Local 87 v. NLRB*, 995 F.3d 1032 (9th Cir. 2021). By way of background, this case was tried in 2016 before Administrative Law Judge Mary Miller Cracraft who found, among other things, that Respondent Preferred Building Services, Inc. (Preferred) and Rafael Ortiz d/b/a Ortiz Janitorial Services (Ortiz) were joint employers, and together engaged in multiple unfair labor practices, not least of which by: threatening and discharging employees for engaging in the protected concerted activity of protesting outside of their workplace, and cancelling a building maintenance contract in order to chill union activity thereby unlawfully discharging all of the employees employed at those worksites. The ALJ[1] correctly found, as laid out over eleven days of hearing, that the employees' activity was patently protected-concerted activity in that they were protesting unsafe working conditions, low wages, heavy workloads, and most egregious of all, Ortiz owner Rafael Ortiz's sexual harassment of employees. Nevertheless, upon the parties' exceptions to the ALJD, the Board dismissed the complaint in its entirety finding that Respondents' alleged unlawful conduct was in reaction to employees' unprotected conduct. At the time, the Board further found that employees lost the protection of the Act because their picketing, assisted by SEIU Local 87 (the Union) and the San Francisco Living Wage Coalition, failed to comply with the criteria set forth in *Moore Dry Dock*,[2] and had an unlawful secondary object. Significantly, despite its dismissal, the Board poignantly noted that "[i]n reaching this conclusion, we certainly do not condone the abhorrent

[1] "ALJ" refers to the Administrative Law Judge; "ALJD" refers to the Administrative Law Judge's Decision; "Tr." refers to the transcript; "GC Exh." refers to a General Counsel Exhibit.
[2] *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950).

conduct in which the picketers alleged Ortiz engaged, and we fully recognize that employees chose to picket, at least in part, to protest this alleged misconduct." *Preferred Building Services, Inc.*, 366 NLRB No. 159, n. 21 (2018). Upon the Ninth Circuit's discarding the finding that the employees engaged in secondary picketing or that the picketing had a secondary object, this case, involving quintessential protected-concerted activity is once again before the Board.

It is now imperative that the Board make a decision on the true merits of the case, on the substantive allegations of whether Respondents are joint employers and whether they violated the Act in the most appalling of ways: by punishing employees for engaging in classic protected-concerted activity. This case also presents a unique opportunity for the Board to clarify aspects of Section 8(b)(4)(ii)(B), including in the areas of what evidence demonstrates a union had a secondary object, and what activity constitutes threats, restraint and coercion. The ALJD, in addition to an ample record, supports the conclusions that Respondents Preferred and Ortiz were joint employers; the picketing did not have a recognitional or secondary object; the picketers' signs and leaflets were clearly not defamatory; Preferred cancelled its contracts in order to chill unionism; Respondents discharged employees Balbina Mendoza (Mendoza) and Joel Banegas (Banegas) because of protected activity; Respondents failed to transfer or rehire employees Yunuen Useda (Useda) and Claudia Tapia (Tapia) because of their protected activity; and, Respondents engaged in coercive conduct that violated Section 8(a)(1). Additionally, the Union and employees' picketing did not constitute coercive conduct.

Certain remedial exceptions are also still pending including whether the ALJ should have ordered Respondents to have employees undergo a training regarding employees' rights under the Act conducted by a Board Agent, during paid work time; have supervisors and managers undergo a training regarding employees' rights under the Act conducted by a Board agent,

during paid work time; make discriminatees and similarly-situated employees whole, including reasonable consequential damages incurred as a result of Respondents' unlawful conduct; provide the Union with access to contact information for employees; and to mail the Notice to Employees.

The General Counsel's Exceptions, Brief in Support of Exceptions, Answering Brief to Respondent's Exceptions, and Reply Brief to Respondent's Answering Brief to the General Counsel's Exceptions are all before the Board. However, since the original briefing took place, the Board has issued a new rule applied to determining joint employer status. Additionally, as the court correctly found, the employees' picketing contained no secondary object. Nevertheless, that the court noted the serious First Amendment challenge to the ALJ's coercion determination, now presents the opportunity for the Board to clarify what evidence may be relied on in finding threats, restraint and/or coercion were for a secondary object, and to define threatening, restraining and coercive conduct under Section 8(b)(4)(ii). In addition to these issues, more recently, the Board has invited briefing on whether the Board should expand its traditional make-whole remedy for employees who are discharged, laid off, or otherwise discriminated against to more fully account for their actual economic losses.

The General Counsel's position is that even under the New Joint Employer Rule, Respondents are clearly joint employers. With regard to the employees' conduct, the Board should clarify whether that conduct harbors a secondary object and find that the Union and employees' conduct here did not. Furthermore, even assuming the employees' conduct could be characterized as picketing, a conclusion with which the General Counsel takes issue, the Board should clarify what conduct constitutes coercive conduct and definitively find that the conduct

here did not meet that definition. Lastly, it is the General Counsel's position that consequential damages are undeniably appropriate in this case.

II. RESPONDENTS ARE JOINT EMPLOYERS UNDER THE NEW RULE

The facts of this case support a joint employer finding under the Board's New Joint Employer Rule.[3] Under the new final rule effective April 27, 2021, 29 CFR § 103.40

> § 103.40 Joint Employers.
> (a) An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment.[4] To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees. Evidence of the entity's indirect control over essential terms and conditions of employment of another employer's employees, the entity's contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer's employees, or the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment. Joint-employer status must be determined on the totality of the relevant facts in each particular employment setting. The party asserting that an entity is a joint employer has the burden of proof.

The totality of the relevant facts show that Preferred actively codetermined Ortiz's employees' essential terms and conditions of employment. Preferred clearly possessed and exercised substantial direct and immediate control over one or more essential terms and

[3] The case was previously briefed under *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015).

[4] Under the new rule, "Essential terms and conditions of employment" is defined as "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." 29 CFR § 103.40(b)

conditions of employment of Ortiz's employees. Moreover, Preferred exercised such control that it meaningfully affected the employment relationship. The totality of the record evidence shows that Respondent Preferred, through its agents, was involved in the hiring, reinstatement, discharge, discipline, supervision, direction, and setting work hours for Ortiz's employees. Furthermore, the evidence of Preferred's indirect control and contractually reserved authority are sufficient to buttress its possession or exercise of direct and immediate control over essential terms and conditions of employment supervision and direction.

A. Preferred and Ortiz Codetermined Hiring[5], Discharge[6], and Discipline[7]

As the ALJ pointed out, Preferred played a role in the hiring, discharge, and discipline of alleged discriminatees and other Ortiz employees. (ALJD 18) Most probative of all, Preferred exerted its power to terminate and reinstate Ortiz's employees. In 2014, Preferred removed and then reinstated employee Useda during her tenure working under Preferred and Ortiz's

[5] Under the new rule, "hiring" is defined as "An entity exercises direct and immediate control over hiring if it actually determines which particular employees will be hired and which employees will not. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation." 29 CFR § 103.40(c)(4)

[6] Under the new rule, "discharge" is defined as "An entity exercises direct and immediate control over discharge if it actually decides to terminate the employment of another employer's employee. An entity does not exercise direct and immediate control over discharge by bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct, such as those required by government regulation." 29 CFR § 103.40(c)(5)

[7] Under the new rule, "discipline" is defined as "An entity exercises direct and immediate control over discipline if it actually decides to suspend or otherwise discipline another employer's employee. An entity does not exercise direct and immediate control over discipline by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract." 29 CFR § 103.40(c)(6)

maintenance of the 55 Hawthorne worksite. It was Preferred that investigated the "backpack incident," which led to Usedas's removal. Preferred Account Manager Lauren Squeri (Preferred Manager Squeri) reviewed the video footage of the incident and discussed the matter with building management, not Ortiz. Ortiz, through its owner Rafael Ortiz (R. Ortiz), only conveyed to Useda that Preferred decided to remove her. (ALJD 9) Following Useda's removal, it was Preferred that unilaterally exercised its power to reinstate Useda based on its view of the circumstances and Preferred Manager Squeri's own assessment that Useda was consistent and careful in completing her work. (ALJD 9) Preferred reported as much to its client building manager. (ALJD 9) Further, R. Ortiz told Useda that she could return because Preferred was going to give her an opportunity. (ALJD 9) Thus, the ALJ correctly found that Preferred was involved in the removal or suspension and rehiring of employee Useda.

Similarly, it was Respondent Preferred that discharged employee Mendoza from one building and then offered her work at another building. With respect to Mendoza's discharge from 55 Hawthorne in September 2013, the record also established that Preferred solely, without input or discussion with Ortiz, investigated and decided to discharge Mendoza. (ALJD 10) Ortiz did not investigate the incident, and R. Ortiz only communicated the termination to Mendoza. (ALJD 10) Then, in October 2013, it was Preferred that had Ortiz reach out to Mendoza to see if she wanted employment at another worksite, 631 Howard. (ALJD 10) Preferred's controlling role in Mendoza's hiring was cemented by its presence on Mendoza's first day at 631 Howard, when she was greeted by both Preferred Manager Squeri and R. Ortiz. (ALJD 10) Indeed, Preferred Manager Squeri told Mendoza that they were happy to see that Mendoza was going to be working for them again, and both Squeri and R. Ortiz proceeded to explain Mendoza's duties. (ALJD 10) Then in June 2014, Mendoza was again offered employment at Preferred's request at

One Kearny. (ALJD 11) Thus, the ALJ correctly found that Respondent Preferred was involved in the discharge and rehiring of Mendoza. (ALJD 10, 11)

In sum, Preferred exercised control over the most fundamental terms and conditions of Ortiz's employees: their hiring, discharge, and discipline.

B. Preferred and Ortiz Codetermined Supervision[8], Direction[9], Hours of Work[10]

As the ALJ correctly concluded, Preferred was involved in the supervision, direction, and hours of work of Ortiz's employees. (ALJD 12)

Firstly, Preferred had an active role in Ortiz's janitors' supervision. Respondent Preferred was the one who gave Ortiz jobs and performed the walk-thru of the buildings with the employees. R. Ortiz admitted that Preferred Manager Squeri was a supervisor just like R. Ortiz. (ALJD 11-12) Contact between Ortiz and Preferred management was on a daily basis as boss to subordinate. (ALJD 12) As the ALJ pointed out, "This contact went beyond telling a subcontractor what his duties are and allowing the subcontractor to effectuate these duties."

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[8] Under the new rule, "supervision" is defined as "An entity exercises direct and immediate control over supervision by actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals. An entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it." 29 CFR § 103.40(c)(7)

[9] Under the new rule, "direction" is defined as "An entity exercises direct and immediate control over direction by assigning particular employees their individual work schedules, positions, and tasks. An entity does not exercise direct and immediate control over direction by setting schedules for completion of a project or by describing the work to be accomplished on a project." 29 CFR § 103.40(c)(8)

[10] Under the new rule "hours of work" is defined as, "An entity exercises direct and immediate control over hours of work if it actually determines work schedules or the work hours, including overtime, of another employer's employees. An entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the services provided by another employer." 29 CFR § 103.40(c)(3)

(ALJD 12) R. Ortiz let Preferred Manager Squeri know daily if one of his janitors would be absent for the day. (ALJD 12) When employees notified R. Ortiz they would be absent, Ortiz would routinely say that he would talk to Squeri. (ALJD 15) Similarly, R. Ortiz let Preferred Manager Squeri know when he would be absent from his day porter position. (ALJD 12) All communications from the building management, whether complaint or commendation, went from Preferred to Ortiz to employees. (ALJD 14) R. Ortiz would tell the employees that he had to report to Preferred Manager Squeri and seek Squeri's acquiescence before allowing employees time off. (ALJD 12) Squeri is also the person who let building management know when a janitor would be absent. (ALJD 14) All of the ALJ's findings lead to the conclusion that Respondent Preferred engaged in the supervision of Respondent Ortiz's employees.

Secondly, as the ALJ correctly found, Respondent Preferred was involved in formulating and directing the duties of Respondent Ortiz's employees. (ALJD 12) Preferred Manager Squeri was the direct point person for all building emails for the employee cleaners including: special events, plastic bags erroneously placed in the recycling bin, mixing trash with recyclable material, lights left on, when a door is left unlocked, and what should not be thrown away in a refrigerator. (ALJD 14) These messages were then relayed to R. Ortiz so that he would pass on the direction to employees.

With respect to individual employees, their work would also be directed by Respondent Preferred. As referenced above, Preferred Manager Squeri welcomed employee Mendoza when starting her employment at 631 Howard, and both Squeri and Ortiz proceeded to explain her duties to her. (ALJD 10) When employee Tapia was hired at 631 Howard in 2013, Preferred Manager Squeri told Tapia that she, Squeri, was happy Tapia had come back to work for them. (ALJD 14) Squeri explained that she was the boss, and R. Ortiz's boss as well. Preferred

Manager Squeri also told Tapia that she would get her some t-shirts to wear. Preferred Manager Squeri and R. Ortiz both showed Tapia the building and the various suites Tapia would clean.

On yet another occasion in which Preferred directed Ortiz's employees, Preferred Manager Squeri texted R. Ortiz to specifically tell employee Banegas to vacuum under a table. (ALJD 14) On another occasion, Preferred Manager Squeri texted R. Ortiz to tell Banegas to re-vacuum a certain hallway. (ALJD 14) R. Ortiz admitted to employees that his orders came from Squeri and she was the one that would tell R. Ortiz what to do. (Tr. 89) Thus, Preferred Manager Squeri gave the direction, and R. Ortiz was the conduit to getting those directions to employees.

Thirdly, Respondent Preferred set the hours of work respecting Ortiz's employees. In 2014, when Preferred subcontracted One Kearny to Ortiz, it was Preferred Manager Squeri who gave R. Ortiz the square footage, and she decided the number of janitors needed. (ALJD 11) Preferred thereby determined the number of Ortiz employees needed to handle the job. Similarly, Preferred recommended the number of employees for the 631 Howard subcontract. (ALJD 14) The hours for the day porter were given to Ortiz verbally. (ALJD 13) Thus, Preferred set forth the number of hours needed per square footage, and the number of Ortiz employees wanted.

More specifically, Respondent Preferred was involved in setting the hours of individual Ortiz employees. It was Preferred that set employee Useda's hours and then reduced them to six hours at 55 Hawthorne in late 2012. (ALJD 12) Preferred was also involved in setting employees Mendoza and Banegas' hours. (ALJD 13) In 2014, after Banegas began working at One Kearny, Ortiz reduced his hours from seven to six because Preferred Manager Squeri thought it was too little work for so much time. (ALJD 13) After Mendoza's first month of working at One Kearny in 2014, Ortiz told Mendoza and Banegas that Squeri was taking away two hours from their shift.

(ALJD 13) Altogether, the evidence clearly establishes that Preferred set Ortiz employees' hours of work.

Therefore, the ALJD and record evidence clearly establish that Preferred codetermined the supervision, direction, and hours of work of Ortiz employees.

C. Preferred's Indirect Control and Contractually Reserved Authority Clearly Supplements and Reinforces Preferred's Possession and Exercise of Direct and Immediate Control Over Ortiz's Employees' Supervision and Direction

As cited above, under the New Joint Employer Rule, evidence of the putative joint employer's indirect control[11] over essential terms and conditions of employment of another employer's employees, the putative joint employer's contractually reserved[12] but never exercised authority over the essential terms and conditions of employment of another employer's employees, or the putative joint employer's control over mandatory subjects of bargaining other than the essential terms and conditions of employment is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the putative employer's possession or exercise of direct and immediate control over a particular essential term and condition of employment.[13] Although the new rule makes these elements inconclusive on their own, they supplement existing evidence of joint employer.

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[11] The new rule defines "indirect control" as, "indirect control over essential terms and conditions of employment of another employer's employees but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract." 29 CFR § 103.40(e)

[12] The new rule defines "Contractually reserved authority over essential terms and conditions of employment" as "the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer's employees, but that has never been exercised." 29 CFR § 103.40(f)

[13] See 29 CFR § 103.40(a)

Given the factual findings described above, the indirect control over supervision and direction, exercised by Preferred supports the conclusion that Respondents are joint employers. Respondents Preferred and Ortiz held employees out as Preferred employees, thereby supplementing Preferred's possession of supervisory authority. Employees' uniform and identification requirements before building management and the public make clear they are under Preferred's supervision. By holding out employees as Preferred employees, Respondents signaled to employees that Preferred was responsible for their work and consequently their livelihood. The employees were beholden to Preferred, even if Preferred did not sign their checks. Similarly, the contractual authority given to Preferred dictated employees' tasks, thus supplementing direction over employees. The contractual language reserved for Preferred the authority to direct employees: what tasks they were to perform and how they were to complete them. Thus, Preferred's indirect control over supervision and contractually reserved direction supports the conclusion that Respondents are joint employers.

Here, Ortiz janitors were given and wore black uniform shirts with green lettering that read either "Preferred" or "Janitorial" interchangeably but were otherwise identical. These shirts were worn at the direction of Ortiz and Preferred so that employees could be identified. R. Ortiz gave the employees Preferred shirts, in some cases, by order of Preferred Manager Squeri herself. (ALJD 14; Tr. 107, 301, 538, 540, 1093) Further, the employees were required to wear the uniform that included the Preferred shirt. (Tr. 108, 429, 536, 1096; GC Exh. 15(a), 15(b)) The fact that the "Preferred" shirts and the "Janitorial" shirts are almost identical in logo-size and color necessarily leads to the conclusion that Respondents wanted the public to believe they were one and the same. (ALJD 16; GC Exh. 15(a), 15(b), 16(a), 16(b)) Ortiz admitted to having seen the employees wearing the shirts with the Preferred logo and colors and wore one himself that

said Preferred. (Tr. 1380) In terms of appearance, there was no difference between employees working for Ortiz and those working for Preferred and both companies cultivated this image publicly and for employees.

Similarly, Ortiz instructed the employees to identify themselves as working for Preferred. When the employees at One Kearny, who were required to sign in at the security desk, started their employment at that worksite, Ortiz instructed them to write "Preferred" after their name. (Tr. 163, 249, 534; GC Exh. 8) Ortiz himself wrote his name with Preferred next to it when he checked into the building for work. (Tr. 290, 534; GC Exh. 8) As the ALJ correctly concluded, overall, the testimony that Ortiz told employees to write "Preferred" when signing in with the security guard, warrants the conclusion that Ortiz held out its employees as those of Preferred.

As the ALJ pointed out, overall, Respondents blurred the employment relationship to building management and employees. (ALJD 15, 16) The employees were introduced as Preferred employees and described as such in subsequent correspondence with building management. (ALJD 9, 10, 14; Tr. 1093-1094; GC Exh. 55, 56) When employee Tapia was introduced to building management, Preferred Manager Squeri and R. Ortiz introduced Tapia as a new janitor with no reference to the name of her employer -- necessarily leading to building management's conclusion that she was an employee of Preferred. (Tr. 1093-1094) Additionally, a neutral third-party witness corroborated that Preferred held these employees out as its own. Building Manager Maxon testified that he did not know the contract with Preferred had been contracted out to a subcontractor. (Tr. 1335, 1365) Thus, he believed all the janitors at 55 Hawthorne and 631 Howard to be employees of Preferred. Prior building managers Monique Orsot (Orsot) and Edgar Sanchez (Sanchez) were also led to believe Ortiz's employees were Preferred's employees. (Tr. 1531-1532) When Building Manager Orsot discussed R. Ortiz's

performance with Squeri, she referred to him as the "senior janitor." (GC Exh. 57) Later when assistant building manager Sanchez asked by email whether R. Ortiz's wife and son were Preferred employees and covered under Preferred's insurance, Squeri replied only that they were authorized to work in the building and were part of the night crew. (GC Exh. 55) Quite clearly, Sanchez was led to believe that Ortiz's wife and son were Preferred employees, as there was no clarification that they were not Preferred's employees, or mention that they were employees of Ortiz. (GC. Exh. 55) Overall, Preferred held out Ortiz's employees as Preferred employees.

Despite the terms of the contract setting forth that Ortiz was solely responsible for the direction, supervision, and control of its employees, the evidence showed the contrary and the subcontract appendices between Preferred and Ortiz outlined the work that had to be performed by the janitors and when these tasks had to be performed. (GC Exh. 27) Rather than broad instruction to a subcontractor -- such as cleaning floors, surfaces, glass -- the instructions in the contract were quite specific. (GC Exh. 27). The janitorial specifications included work to be performed on a daily basis such as: sweeping, dusting, mopping, vacuuming, spot clean stains, washing all glass doors, and spot clean interior partition glass. (GC Exh. 27) These are the tasks that the janitors were told to perform on a daily basis. (Tr. 804) The appendices also outlined the work to be done on a monthly basis: wash and machine scrubbing bathroom floors, washing interior and exterior lobby glass, detailing stainless steel framing. (Tr. 804) Thus, the subcontract directed much of the employees' work.

Therefore, Preferred's indirect control and contractually reserved authority clearly supplement and reinforce its possession and exercise of direct and immediate control over the supervision and direction of Ortiz's employees.

Together, the evidence shows, as concluded by the ALJ, that Preferred actively codetermined Ortiz's employees hiring, discharge, discipline, supervision, direction, and hours of work. Moreover, Preferred's indirect control and contractually reserved authority clearly supplements and reinforces Preferred's possession and control of direct and immediate control over Ortiz's employees' supervision and direction.

III. THE EMPLOYEES' PICKETING HAD NO SECONDARY OBJECT AND WAS NOT COERCIVE

A. The Ninth Circuit Correctly Found No Secondary Object

The Ninth Circuit correctly found that the evidence did not show that the picketing had a secondary object.[14] It determined that the Board's conclusions finding the picketing had a secondary object were not supported by substantial evidence under *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). First, the court found the Board erred when it found the picketers did not clearly disclose the dispute was with the Employer under the fourth prong of *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549 (1950). The court held that the two leaflets, which mentioned a secondary employer but also named primary Preferred as the target of the picketing, did not obfuscate the picket signs which clearly stated the dispute was with the primary employer. Thus, the court held the picketing here enjoyed a rebuttable presumption that it constituted lawful primary activity. Second, the court disagreed with the Board's alternative conclusion that, even if the picketing enjoyed a presumption of legality under *Moore Dry Dock*, that presumption was rebutted by independent evidence of a secondary object, primarily relying on statements made by various picketers to the secondary employer. The court held that the statements were better understood as explaining the nature and purpose of the

[14] *SEIU Local 87 v. NLRB*, 995 F.3d 1032 (9th Cir. 2021).

picketing, and that these discussions with the neutral employer were not themselves evidence of a secondary object, since such discussions are perfectly lawful when other evidence of a secondary object is absent. Thus, under the law of the case, the evidence cannot be found to prove the Union had a secondary object. The Ninth Circuit declined to address whether the employees' picketing was coercive, stating that it was unnecessary to do so in light of finding no secondary object. 995 F.3d at 1039.

B. The General Counsel Urges the Board to Clarify the Definitions of Secondary Object and of Threatening, Restraining and Coercive Conduct Under Section 8(b)(4)(ii)(B)

The Ninth Circuit's remand not only provides the Board an opportunity to revisit its original conclusion that the Union's activity here had a secondary object and was coercive, but also to clarify what constitutes activity having a secondary object, as well as threatening, restraining or coercive conduct under Section 8(b)(4)(ii).

First, while the law of the case is that the picketing satisfied the criteria in *Moore Dry Dock* and had no secondary object, the Board now has the opportunity to consider generally what constitutes evidence of an unlawful secondary object under Section 8(b)(4)(ii)(B) as it relates to activity otherwise protected by the First Amendment.

Second, in the Union's Motion for Reconsideration dated September 25, 2018, it argued that classifying the conduct here as coercive would violate the First Amendment. The Board denied the motion on October 31, 2018, finding the Union had not "identified any material error or demonstrated extraordinary circumstances warranting reconsideration."[15] The Ninth Circuit, in turn, held that it "need not resolve either party's contentions concerning the coercion

[15] *Preferred Building Services, Inc.*, Case 20-CA-149353, Order Denying Motion for Reconsideration (Oct. 31, 2018).

element," but did agree that the Union and *amici* raised a "serious First Amendment challenge to the ALJ's coercion determination."[16] Now that the Board has been ordered to reconsider its original decision, it should embrace and confront that challenge.

Thus, on remand, the Board can and should use this case to clarify (1) the evidence required to demonstrate that a union had an "object of forcing [an] employer to cease doing business with a primary employer;"[17] and (2) the circumstances under which peaceful picketing "threaten[s], coerce[s], or restrain[s]" a secondary.

1. The Board Should Clarify What Evidence Constitutes a Secondary Object Under Section 8(b)(4)(ii)

While the Ninth Circuit's holding that the Union did not have the requisite secondary object is the law of the case, the Board should use this case on remand to clarify its test for secondary object. Like the Board's current interpretation of the threat, restraint, coercion prong further discussed in the next section, its current interpretation of what constitutes a secondary object creates an overly broad prohibition on picketing that is not required by either the statute or the legislative history. It is also inconsistent with the Supreme Court's requirement that the Board apply constitutional avoidance in the area of peaceful picketing.[18]

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[16] *SEIU Local 87 v. NLRB*, 995 F.3d 1032, 1039 (9th Cir.2021).

[17] *NLRB v. Local 3, Int'l Bhd. of Elec. Workers,* 471 F.3d 399, 402 (2d Cir. 2006).

[18] *NLRB v. Drivers, Chauffeurs, Helpers Local Union 639 (Drivers)*, 362 U.S. 274, 284 (1960) (peaceful labor picketing does not violate the NLRA "unless there is the clearest indication in the legislative history" of congressional desire to outlaw the particular tactic); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo)*, 485 U.S. 568, 577–78 (1988) (concluding that Section 8(b)(4)(ii)(B) "is open to a construction that obviates deciding whether a Congressional prohibition of handbilling on the facts in this case would violate the First Amendment"). *Cf. Carpenters Local 1506 (Eliason & Knuth)*, 355 NLRB 797, 797 (2010) (construing Section 8(b)(4)(B)(ii) consistent with Board's obligation "to seek to avoid construing the Act in a manner that would create a serious constitutional question"); *UFCW Local 1996*

The Board's *Moore Dry Dock* doctrine itself, which the Board uses as a framework to test for a secondary object to picketing at a common situs where both the primary and secondary entities are present, creates a complicated set of obligations in order for a union to be entitled to a presumption that it does not have the prohibited object.[19] In doing so, the *Moore Dry Dock* doctrine presumes that the presence of union picketing at a site with a secondary entity, notwithstanding that the primary and lawful target also occupies that site, automatically means the union has a secondary object of forcing the secondary to cease doing business with the primary unless each of the guidelines is specifically met. Indeed, the Board has held that where a union fails to meet any one of the *Moore Dry Dock* guidelines, it will typically result in a rebuttable presumption that the picketing is secondary and unlawful.[20] And the burden of establishing compliance with all four *Dry Dock* guidelines is placed on the union.[21] However, because of the constitutional concerns inherent in protecting public speech, it is more appropriate to presume a union acts lawfully and has no prohibited object unless rebutted by clear and explicit evidence to the contrary without resort to requiring compliance with artificial guidelines.

(Visiting Nurse Health System), 336 NLRB 421, 427 (2001) (adopting interpretation of Section 8(b)(4)(B) that "has the virtue of averting the need to decide the First Amendment issues raised").

[19] *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950) (common situs picketing is presumptively lawful if "(a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer"). *See also Electrical Workers v. NLRB*, 366 U.S. 667, 677, 680 (1961) (approving *Moore Dry Dock* criteria, while counseling against applying them "mechanically" to declare conduct illegal).

[20] *Ironworkers Local 433 (Carlson S.W. Corp.)* 293 NLRB 621, 622 (1989), *enforced*, 930 F.2d 98 (9th Cir. 1991).

[21] *Id.*

The Supreme Court effectively applies such a presumption to other peaceful public speech, applying strict scrutiny to find content-based restrictions unconstitutional unless the government establishes that the restriction is narrowly tailored to serve compelling state interests.[22] Indeed, non-labor picketing is regularly considered to be public speech and protected by the First Amendment, regardless of any coercive element.[23]

The *Moore Dry Dock* guidelines necessarily rely on the proposition that a union picketing at a locale at which both the primary and secondary are present, either by way of it being ambulatory or a common site, requires a balancing of the union's right to picket that primary with the right of the secondary to be free from the picketing.[24] However, consistent with the Supreme Court's approach of protecting all forms of public speech absent a compelling state interest, the Board should clarify that unless picketing is conducted with picket signs that explicitly ask passersby to completely boycott or not enter the secondary's premises, such conduct does not have the object of forcing the secondary to cease doing business with a primary

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[22] *See e.g., Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (in striking down a sign ordinance that treated political signs differently from temporary directional signs, the Court said that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Similarly, viewpoint discrimination is presumptively unconstitutional. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

[23] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (holding that civil rights activists' picketing as part of a massive boycott of white-owned businesses was protected, noting that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"); *Snyder v. Phelps*, 562 U.S. 443, 452, 458 (2011) (peaceful picketing near a military funeral, even if upsetting, was of public concern and protected by the First Amendment); *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (striking down law restricting protests on public property outside of clinics that provide abortions, noting that the government's ability to restrict speech in public streets and sidewalks is "very limited").

[24] *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950).

employer, regardless of where it takes place. Such a rule would be far more consistent with the Supreme Court's First Amendment case law, as the current Board law chills workers' and union's collective actions by making it very difficult for them to predict what activities the Board will ultimately deem to violate Section 8(b)(4)(ii).[25] It is also fully consistent with the statutory language of Section 8(b)(4)(ii)(B) and more consistent with the Supreme Court's decisions in *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 63 (1964) and *NLRB v. Drivers, Chauffeurs, Helpers Local Union 639 (Drivers)*, 362 U.S. 274, 284 (1960), which make clear that the Board should create ample protection for primary picketing.

In the instant case, even though the Union's picket signs clearly identified their primary employer and disavowed a secondary object, the Board marshalled evidence from leaflets and other protected activity that referenced sexual harassment and poor working conditions, and which merely mentioned secondary entities, to infer that the Union had an objective of forcing the secondary entities to cease doing business with the primary. The Board also found that the Union had failed to meet the *Moore Dry Dock* standards because it said the Union's request that a tenant ensure "their" janitors obtain better working conditions did not clearly enough disclose that their dispute was with Preferred even though that was what was plainly stated on the picket signs. Neither of these facts in any way prove that the Union had an object of forcing any secondary to cease doing business with Preferred. Instead, the Board's incorrect inferences stripped workers of protection for core protected activity under the Act as well as under the First

[25] Charlotte Garden, *Avoidance Creep*, 168 U. Pa. L. Rev. 331, 378 (2020). *Cf. Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (invalidating regulations, noting that the vagueness of content-based regulation of speech "raises special First Amendment concerns because of its obvious chilling effect on free speech").

Amendment. The Board should clarify its test so as to avoid this kind of outcome, as well as the accompanying chill caused by its holding.

2. The Board Should Also Clarify the Circumstances under which Peaceful Picketing Threatens, Coerces, or Restrains a Secondary under Section 8(b)(4)(ii)

The Supreme Court in *DeBartolo* explained that due to the First Amendment concerns "in the sensitive area of peaceful picketing" the Board must not prohibit activity unless there is the "clearest indication" that the conduct is prohibited. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo)*, 485 U.S. 568, 577–78 (1988). The Court has thus emphasized multiple times that, in interpreting 8(b)(4)(ii), the Board should focus on the isolated evil that Congress intended to address, which is the use of picketing to "cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer."[26] The Court has applied these principles to exclude certain product picketing and handbilling from Section 8(b)(4)(ii)'s prohibitions.[27] Other federal courts have done likewise in excluding bannering, inflatables, and mock funerals from the coverage of Section 8(b)(4).[28]

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[26] *Debartolo*, 485 U.S. at 577; *Tree Fruits*, 377 U.S. at 63; *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 614 (1980).

[27] *See Tree Fruits*, 377 U.S. at 71; *Safeco*, 447 U.S. at 612–13.

[28] *See Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429, 439 (D.C. Cir. 2007) (holding mock funeral to communicate labor dispute did not violate Sec. 8(b)(4)(ii)(B), and observing that "unsettling and even offensive speech is not without the protection of the First Amendment"); *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1212-13 (9th Cir. 2005) (concluding that restrictions on stationary banners "would pose a 'significant risk' of infringing on First Amendment rights," and thus, in absence of clear evidence that Congress intended stationary banners to be covered, the Act should be interpreted to permit such banners); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005) (denying Section 10(*l*) injunction; no reasonable cause to believe union's use of banner violated Section 8(b)(4)); *Benson v. United Bhd. of Carpenters Locals 184 and 1498*, 337 F. Supp.2d 1275 (D. Utah 2004) (same; Section 10(*l*) injunction denied based on no reasonable cause); *Kohn v. Southwest*

The Board recently applied these principles in affirming that an inflatable rat and banner is not "coercive" under Section 8(b)(4)(ii).[29]

However, the Board's current test for Section 8(b)(4)(ii) conduct is inconsistent with these principles in that it assumes that picketing with a secondary object *per se* threatens, coerces, or restrains a secondary in violation of the Act. Such a reading is inconsistent with the statutory language and the principles of constitutional avoidance that the Board is required to follow in the area of peaceful picketing. It is also inconsistent with the current reality of the effects of peaceful picketing.[30] The Board should therefore give meaning to the "threaten, coerce, or restrain" clause of Section 8(b)(4)(ii) and apply constitutional avoidance principles by prohibiting peaceful picketing with a secondary object only where the picketing itself objectively creates a choice for a secondary between severing the relationship with the primary or experiencing "ruin or substantial loss."[31] In analyzing whether peaceful picketing created a choice for a secondary between severing the relationship with the primary or experiencing ruin

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Regional Council of Carpenters, 289 F. Supp. 2d 1155 (C.D. Cal. 2003) (same; Section 10(*l*) injunction denied based on no likelihood of success on the merits); *Ohr v. Operating Engineers Local 150*, 2020 WL 1639987 (N.D. Ill. 2020) (again denying Sec. 10(*l*) preliminary injunction in case involving inflatable rat and banners); *King v. Constr. & Building Laborers' Local 79*, 393 F. Supp. 3d 181 (E.D.N.Y. 2019) (same; involving digital banner and inflatables).

[29] *Operating Engineers Local No. 150 (Lippert Components, Inc.)*, 371 NLRB No. 8, slip op. at 1, 2, 6 (2021).

[30] Garden, *supra* note 23, at 375-76 (explaining the changed social circumstances of picketing from 1947 or 1959 when Congress was targeting small businesses being shut down or violent mass picketing and today when picket lines depend far more on the moral persuasiveness of their messages about labor standards, fair treatment, and respect at work); Michael M. Oswalt, *The Content of Coercion*, 52 U.C. Davis L. Rev. 1585, 1619 (2019) (arguing that labor law lacks a metric for coercion and instead relies on proxies; "if today the aggregate responses to picketing cause a business to suffer, it's not because the pickets are too coercive, it's because the pickets are too persuasive.").

[31] *Safeco*, 447 U.S. at 615.

or substantial loss, the Board should consider the employer's size, the actual financial effects, if any, of the picketing on the employer's business, and the employer's realistic options to avoid the harm.[32]

Applying such a test to the instant case, it is clear that the picketing at issue did not create such a choice. While the picketing here does not have a secondary object, the evidence also falls short of establishing that this activity threatened, restrained or coerced a secondary party with ruin or substantial loss. The presence of individuals with signs on sticks cannot be said, alone, to be reasonably likely to threaten ruin or substantial loss absent probative evidence. Given that the main secondary entity was a radio station, the only listeners who could have been affected by the picketing were the ones who incidentally worked in the same building. Even if individuals within the listening area experienced some disruption to their day, it is well established that "[s]ome disruption of business relationships is the necessary consequence of the purest form of primary activity."[33] Similarly, secondary Harvest Properties, the building's management company and also not a retail business, likely had few, if any, employees present in the building beyond building manager Ben Maxon. Therefore, as the employees' picketing was not designed to interfere with customers or employees in a way that would or did lead to any secondary's unavoidable ruin or substantial loss, it was not threatening, restraining or coercive.

[32] Oswalt, *supra* note 28, at 1645-47 (position that an encounter is coercive where there are no realistic control options, which would allow the employee, employer or bystander to avoid or lessen, i.e., cope with, the impact of the allegedly coercive encounter).

[33] *NLRB v. Operating Engineers Local 825 (Burns and Roe, Inc.)*, 400 U.S. 297, 304 (1971).

3. The Board Can and Should Address the Questions of Secondary Object and of Threats, Restraint and Coerciveness on Remand

Whether the employees violated Section 8(b)(4)(ii) by acting with a secondary object and coercing employers is properly before the Board.

First, the Employer filed exceptions to the ALJ's conclusion that the employees were engaged in protected concerted activity and were not in violation of Section 8(b)(4), a question that necessarily includes whether the employee protest was coercive and harbored a secondary object. In fact, Respondent claimed, in conjunction with this exception, that the employees "engaged in unlawful and unprotected . . . secondary picketing." *See* Amended Exceptions by Respondents to Administrative Law Judge's Decision, at 2. But for the employee picketing to be unlawful as violative of Section 8(b)(4), in addition to the secondary object, the picketing necessarily had to "threaten, coerce, or restrain," thus putting both elements into question. Obviously the Union and General Counsel had no reason to file exceptions to a favorable ruling, but the Ninth Circuit at least has held that where at least one party has filed exceptions to an issue (here, the Employer) it cannot be considered waived.[34] Thus, while the General Counsel and Union did not file exceptions specifically as to the ALJ's finding that the employee conduct was coercive, that does not limit the Board from addressing this issue in this case.

Second, the issue of whether the conduct was threatening, restraining or coercive or had a secondary object was squarely presented to the Board in the Union's Motion for

[34] *Gardner Mech. Servs., Inc. v. NLRB*, 115 F.3d 636, 641 (9th Cir. 1997). Because the Section 8(b)(4) question was not raised for the first time in the motion for reconsideration, but rather was argued before the ALJ and excepted to by the Employer, the motion for reconsideration was not an untimely effort to file additional exceptions. *See H&M International Transportation, Inc.*, 363 NLRB No. 189, slip op. at 2 (2016), *enforced mem.*, 719 F. App'x 3 (D.C. Cir. 2018).

Reconsideration, which the Board now has the opportunity to revisit in light of the Ninth Circuit's decision.

The Board has held that so long as an issue is properly before it, the Board is not limited to the particular theories advanced by the parties, but retains the independent power to *sua sponte* identify and apply the proper construction of governing law.[35] For all of the reasons stated herein, we respectfully request that it do so in this case.

IV. CONSEQUENTIAL DAMAGES ARE APPROPRIATE IN THIS CASE

As previously briefed, consequential damages are appropriate in this case because of the egregious nature of the violations and the necessity of making the discriminatees completely whole.[36] However, since then, the Board has invited briefs addressing whether the Board should expand its traditional make-whole remedy for employees who are discharged, laid off, or otherwise discriminated against to more fully account for their actual economic losses, such as through consequential damages. *Thryv, Inc.*, 371 NLRB No. 37 (2021). Indeed, in *The Voorhees Care and Rehabilitation Center*, 371 NLRB No. 22, n. 14 (2021), Chairman McFerran noted that "it is time for the Board to consider addressing the issue of consequential damages in an

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[35] *The Boeing Company*, 365 NLRB No. 154, slip op. at 21-22 (2017) (citing *Kamen v. Kemper Financial Servs.*, 500 U.S. 90, 99 (1991)). *Cf. Dish Network Corp.*, 359 NLRB 311, 313 n.9 (2012) (noting that Section 102.46(b)(2) of the Board's Rules and Regulations stating that "[n]o matter not included in exceptions . . . may thereafter be urged before the Board" does not prohibit the Board from considering a matter *sua sponte*, where due process permits) (case decided by a panel invalidated under *NLRB v. Noel Canning*, 573 U.S. 513 (2014)).

[36] The General Counsel's earlier briefs to the Board address the arguments that in order to remedy the violations of the Act in this case, the Board should also order: Respondents to provide training to its employees about their rights under the Act; Respondents' managers and supervisors attend training regarding employers' obligations under the Act; Respondents provide SEIU Local 87 with employees' contact information; and Respondents to mail the Notices to employees.

appropriate case, and to consider any other appropriate ways to ensure that employees victimized by unfair labor practices are made completely whole." Chairman McFerran also pointed out that on at least one recent occasion, the Board acknowledged that other make whole remedies were necessary to remedy the economic harm immediately caused by unfair labor practices. McFerran cited *Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 4 (2018), enfd. 976 F.3d 30 (D.C. Cir. 2020), for this proposition. In that case, the Board awarded employees reimbursement for the damage-repair expenses they incurred as a result of the respondent's unlawful removal of their toolboxes from the workplace and for the towing expenses they incurred as a result of the respondent's unlawful requirement that they remove their toolboxes, determining that expenses were "specific and easily ascertainable" and that "making the employees whole for those costs is necessary to fully remedy the [r]espondent's unfair labor practice and effectuate the policies of the Act." *Id*. However, under any circumstances, the Act's remedial mission to make discriminatees whole can only be fulfilled by taking into account *all* economic losses.

Under the Board's present remedial approach, some economic harms flowing from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g., Graves Trucking,* 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.),*

145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB 101 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 263 (1969), (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly

whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB361 NLRB 101, 103 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB 709, 718 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole

unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[37] Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[38]

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the

[37] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

[38] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB 709, 718 (2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

Where expenses did not occur by the time the complaint was filed or by the time the case reached the Board, the Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering. In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001). The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).[39]

[39] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII

V. CONCLUSION

In conclusion, the discriminatees in this case have long suffered the impact of Respondents' unlawful conduct. Employees who engage in protected-concerted activity protesting their unsafe working conditions, low wages, and *their repeated subjection to sexual harassment* should not be stripped of the protection of the Act because of an unwarranted application of Section 8(b)(4)(ii) of the Act. Indeed, so that no such misapplication ever occurs, the General Counsel urges the Board to clarify the requirements for finding the presence of a secondary object, and find none here. In addition, the Board should clarify the definition of threatening, restraining or coercive conduct under Section 8(b)(4)(ii), and find that here, the Union and employees did not engage in such conduct. Here, the employees were engaged in protected-concerted activity pure and simple. Their joint employers discharged them in retaliation for their protected-concerted activity and in order to chill union activity. These discriminatees must be made completely whole for their economic losses.

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discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).