UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC

and Case Nos. 14-CA-197985
14-CA-208242

CHARLES ROBINSON

BRIEF OF *AMICUS CURIAE*

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The Society for Human Resource Management ("SHRM") submits this brief, *amicus curiae*, responding to the order of the National Labor Relations Board (the "NLRB" or "Board") in its September 5, 2019 Notice and Invitation to File Briefs ("Notice") in the above-captioned matter.

INTERESTS OF *AMICUS CURIAE*

SHRM's goal is to create inclusive and diverse workplaces, where respect and civility form the basis of workplace culture, and employers and employees thrive together. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With over 300,000 human resource and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. A principal function of SHRM is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to work, workers, and the workplace. This is such a case.

SUMMARY OF ARGUMENT

In response to the Notice, SHRM respectfully submits that: (1) the modern workplace has dramatically changed since the 1935 passage of the National Labor Relations Act ("NLRA" or "Act"), with employers recognizing that diversity, gender equality, civility and respect are core values of the twenty-first century "shop"; (2) today's modern workplace has developed in part due to the proliferation of federal, state, and local laws prohibiting workplace discrimination and harassment and protecting employee health and safety; (3) to harmonize the modern workplace with these laws and federal court precedent, and promote the cultural norms of civility and inclusion, the NLRB should adopt a bright-line rule that workplace language or conduct that is racially or sexually charged, profane, or abusive is not protected under the Act, even if the language or conduct occurs as part of otherwise protected concerted activity, and such a rule should replace

the *Atlantic Steel* balancing factors which have scant foundation in the Act; (4) with respect to profane language or conduct, such language and behavior is subject to prohibition by an employer so long as the employer maintains a lawful work rule forbidding such language or conduct and the employer neutrally enforces the rule; (5) to the extent that prior Board decisions in *Plaza Auto Center*, *Pier Sixty*, *Cooper Tire*, and other cases are inconsistent with these principles, these cases should be overruled.

Cultivating a positive workplace culture is a key priority for American employers. Workplace culture translates directly to worker engagement, commitment, satisfaction, health, safety, and overall business success. SHRM Foundation's Effective Practice Guideline Series (2016), *Creating a More Human Workplace Where Employees and Business Thrive* (Nov. 7, 2019 11:17 AM) https://www.shrm.org/foundation/ourwork/initiatives/building-an-inclusive-culture/Documents/Creating%20a%20More%20Human%20Workplace.pdf ("SHRM Guideline Series"). Toxic workplace cultures interfere with those externalities and harm both workers and the workplace. Society for Human Resource Management (July 2019) *The High Cost of a Toxic Workplace Culture: How Culture Impacts the Workface - And the Bottom Line* ("SHRM Study"). With a majority of Americans believing there is a "crisis" of incivility, SHRM Study, Dori Meinert, (Mar. 20, 2017) *How to Create a Culture of Civility,* (Nov. 7, 2019, 10:35 AM) https://www.shrm.org/hr-today/news/hr-magazine/0417/pages/how-to-create-a-culture-of-civility.aspx ("SHRM Civility Study"), organizations need the freedom to maintain standards of civility and respect, unhampered by outdated Board precedent that has permitted incivility, disrespect, and even racial and gender slurs to go unchecked in the workplace. The bottom line is that employers must be permitted to prohibit discriminatory, offensive, abusive, and profane behavior and language in the workplace and establish diverse, respectful, inclusive, and civil workplaces.

ARGUMENT

I. CASE LAW HISTORY REVIEW

A. Review Of Applicable Case Law and Troublesome Precedent That Allows Employees To Invoke The Protection Of The Act When Using Profane or Racially Charged Language

i. Atlantic Steel

In examining the question of whether and when employee behavior loses protections of the NLRA, the Board has traditionally applied a four-factor test set forth in *Atlantic Steel*, 245 NLRB 814, 816 (1979), which considers: (1) the location of the conduct; (2) the subject matter of the discussion; (3) the nature of the employee's misconduct; and (4) whether such conduct was provoked by an unfair labor practice. At the outset, it should be noted that *Atlantic Steel* itself is a manufactured agency doctrine. The actual text of the NLRA says nothing about protecting profane, racially charged, or sexual language or behavior. 29 U.S.C. § 157. Rather, in 1979, the *Atlantic Steel* majority derived NLRA protections for such behavior from the provision in Section 7 which guarantees employees the right "to engage in other concerted activities for . . . other mutual aid or protection . . . ." *Id*. Indeed, the National Labor Relations Board and U.S. Supreme Court have long recognized employees' right to engage in protected concerted activity. *See generally NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9 (1962) (holding as protected concerted activity employee complaints about working conditions). The classic examples of protected concerted activity are obvious instances of employees banding together to improve their workplace—conduct such as forming a union, collective bargaining, engaging in a strike, or joining with co-workers to talk directly to their employer, to a government agency, or to the media about problems in the workplace. *Owens-Corning Fiberglas Corp*. v. *NLRB*, 407 F.2d 1357 (4th Cir. 1969) (holding as protected concerted activity an employee seeking a union representative's help in a confrontation with an employer); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *aff'd*. 414 F.2d. 99 (7th Cir. 1969)

(holding as protected concerted activity an employee's participation in a labor strike); *Republic Aviation Corp,* v. *NLRB,* 324 U.S. 793 (1945) (holding as protected concerted activity an employee wearing buttons, t-shirts, and other clothing displaying slogans that protest the terms and conditions of employment); *S & R Sundries, Inc.,* 272 NLRB 1352 (1984) (holding as protected concerted activity an employee assisting a coworker seeking unemployment compensation); *Cub Branch Mining, Inc.,* 300 NLRB 57 (1990) (holding as protected concerted activity an employee engaging in a work stoppage in support of an individual employee's complaint about compensation after a larger group adopts the same goals).

In contrast, federal courts have repeatedly recognized the inherent danger in agencies promulgating amorphous, multi-factor tests with flimsy or non-existent statutory backbone and then applying those tests in circumstances well beyond what the statute intended. *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986) (recognizing that Agencies are creatures of Congress and that an Agency has no power to act "unless and until Congress confers power upon it."); *Bellion Spirits, LLC v. U.S.,* 393 F.Supp.3d. 5, 14 (D.D.C. 2019) (same); *Arangure* v. *Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (providing "Courts have always had an emphatic duty to say what the law is … But all too often, courts abdicate this duty by rushing to find statutes ambiguous, rather than performing a full interpretive analysis.") (internal quotations omitted); *Chevron, USA Inc*., v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984) (providing that even *Chevron* itself reminds courts that they must do their job before applying deference: they must first exhaust "traditional tools" of statutory interpretation and "reject administrative constructions" that are contrary to the clear meaning of the statute).

Unfortunately, the Board's decisions in *Plaza Auto Center*, *Pier Sixty*, *Cooper Tire*, and other cases are text-book examples of an agency misapplying a vague test and finding federal legal

protections for conduct and language that have no protections under the Act itself. In order to understand these misguided decisions, we briefly review the facts and holdings of each case below:

ii. Plaza Auto Center

In *Plaza Auto Center*, 360 NLRB 972 (2014), during a meeting between the employee, a car salesperson, two sales managers, and the car-dealership owner, the employee inquired about the employer's policies concerning vehicle costs, commissions, and minimum wage. In response to the owner's answers, the employee grew belligerent, calling the owner a "f**ing mother f**ker," a "fu**ing crook," and an "a**hole"; telling the owner that he was stupid, nobody liked him, and everyone talked about him behind his back; and standing up in the small office where the confrontation occurred, pushing his chair aside, while threatening the owner that he would "regret it" if he was fired. *Id.* at 973. As a result of the outburst, the owner fired the employee. Applying the *Atlantic Steel* factors, the Board found three of the four factors (the place of discussion, subject matter of discussion, and provocation by unfair labor practices) were in favor of the employee retaining protection of the Act. *Id.* at 976-979. The Board agreed that the employee's obscene and denigrating remarks must be given considerable weight, but ultimately did not find that the employee lost the protection of the Act. *Id*. at 979.

In his dissent, then-Member Johnson attacked the majority's decision, finding that the majority's approach "implies that such misbehavior is normative, or at least that the Act mandates tolerance of it whenever profane and menacing outbursts are somehow connected to protected concerted activity." *Id* at 983. Then-Member Johnson disagreed, finding that, "By this standard, employees . . . will be permitted to curse, denigrate, and defy their managers with impunity during

the course of otherwise protected activity, provided that they do so in front of a relatively small audience, can point to some provocation, and do not make overt physical threats." *Id.*[1]

iii. Pier Sixty

The Board found that similarly vulgar and offensive conduct directed at a specific employee was also protected under the NLRA in *Pier Sixty, LLC*, 362 NLRB 505 (2015), *aff'd.* 855 F.3d 115 (2d Cir. 2017). In that case, an employee, after being upset with his manager, took a break, went outside the employer's facility, and posted the following to Facebook:

> Bob is such a NASTY MOTHER F**KER don't know how to talk to people!!!!!! F**k his mother and his entire f**king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

Id. at 505.

This profanity-laden post was visible to his Facebook friends, which included some coworkers, and others who visited his Facebook page. *Id.* at 506. Before the post was deleted, the employer viewed it and, following an investigation, discharged the employee. *Id.* Instead of applying the *Atlantic Steel* factors, the Board utilized a broad and vague "totality of the circumstances" test, ostensibly because the comments in questions involved off-duty, offsite use of social media to communicate with other employees or third parties. *Id*. 506. Despite the Board acknowledging that "the overwhelming evidence establishes [that the employee's remarks were] distasteful," the Board concluded that "Perez's comments were not so egregious as to exceed the Act's protection." *Id.* at 507.

[1] The Board originally found that the employer unlawfully discharged the employee in question in *Plaza Auto Ctr.*, 355 NLRB 493, 496 (2010). On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case back to the Board, chastising the agency for disregarding prior Board precedent that has held that "obscene, degrading, and insubordinate comments may weigh in favor of lost protection even absent a threat of physical harm." *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d. 286, 296 (9th Cir. 2011). The 2014 *Plaza Auto Ctr.* decision addressed in this brief was based on this Ninth Circuit remand.

In his dissent, then-Member Johnson again lambasted the majority for not only condoning the employee's obscene conduct, but holding it was protected as a matter of federal law. *Id*. at 508-10. Specifically, then-Member Johnson objected that his fellow Board members were "recast[ing] [an] outrageous, individualized griping episode as protected activity. I cannot join in concluding that such blatantly uncivil and opprobrious behavior is within the Act's protection." *Id*. at 509. Based on the deference afforded to the Board and ALJ factual findings, in 2017 a panel of the Second Circuit disagreed with then-Member Johnson, finding that the above-described employee conduct was not "opprobrious enough" to lose the protection of the NLRA.[2]

iv. Cooper Tire

In *Cooper Tire & Rubber Co.*, 363 NLRB No. 194 (May 17, 2016), *aff'd* 866 F.3d 885 (8th Cir. 2017), an employee on the picket line attacked replacement workers who were predominantly African-American with racist taunts such as: (1) "Hey, did you bring enough KFC for everybody?"; and (2) "Hey anybody smell that? I smell fried chicken and watermelon." *Id.* at 4. There was evidence that some of his fellow picketers laughed at the employee's comments, mocking the African-American replacement workers in the process. *Id.* The employer discharged the employee based on his racially charged offensive statements that violated the company's anti-harassment policy and the union's conduct rules. *Id.* The union's grievance alleging the employer violated the collective bargaining agreement by discharging the employee was denied by an independent arbitrator who found the employer had cause to discharge the employee. Nevertheless, the Board reinstated the employee, concluding his firing violated the Act. *Id*. at 5. Even though the Board acknowledged the racist and offensive nature of the conduct, applying the *Atlantic Steel* factors, the Board nonetheless concluded it did not contain any overt or implied

[2] The Court also found that the employer tolerated the use of profanity in the workplace that was not qualitatively different.

threats to replacements workers or the employer's property and that the statements were not accompanied by threatening behavior or physical acts of intimidation. *Id*. at 6-7. A panel of the Eighth Circuit Court of Appeals deferred to the Board, concluding that even if the comments had been made in the workplace instead of on the picket line, they did not create a hostile work environment actionable under Title VII, and thus the employer was not obligated by Title VII to fire the employee.[3] 866 F.3d at 889-94. The employee was thus reinstated as a result of the Board's decision. *Id.* Circuit Judge Beam dissented, concluding that an employee's conduct that directs racial bigotry toward African American employees is not protected by the Act. *Id.* at 894-98.

v. Constellium Rolled Products

While not specifically mentioned in the Board's Notice, the facts in another recent case, *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (July 24, 2018), raise the same concerns. Here, the Board held that an employee who wrote "who*e board" on an overtime sign-in sheet was engaged in protected activity because he was protesting unilateral employer changes to overtime scheduling. *Id.* at 1. Although the Board characterized this language as "harsh and arguably vulgar," the Board found, pedantically, that the offensive phrase was protected because it was "clearly implying that those who signed it were compromising their loyalty to the Union and their coworkers in order to benefit themselves and accommodate the [Employer]." *Id*. at 2.

On October 22, 2019, oral argument was conducted in the case before the United States Court of Appeals for the District of Columbia Circuit. During that court session, Judge Millet

[3] Other circuits have held that even a single racial slur can trigger harassment liability under Title VII. *See, e.g., Castleberry v. STI Group*, 863 F.3d 259, 264 (3d Cir. 2017) (one utterance of the "n-word" can state a claim for workplace harassment to survive a motion to dismiss); *Alamo v. Bliss*, 864 F. 3d 541, 550 (7th Cir. 2017) (use of two racially offensive slurs -- "spic" and "f---king Puerto Rican" was sufficiently severe to state a claim for unlawful harassment).

heavily criticized the Board's decision, questioning, "Don't they [the employer] have an interest in *not* having *their* property used for racial or gendered epithets?" Anne Cullen, *DC Circ. Skeptical of NLRB Ruling Protecting Vulgar Message*, Law360, (Oct. 22, 2019, 5:50 PM), https://www.law360.com/articles/1211996/dc-circ-skeptical-of-nlrb-ruling-protecting-vulgar-message (emphasis added). In response, the Board's appellate attorney argued that the "who*e board" sheet was taken down quickly, to which Judge Millet retorted, "I'm not sure why you get to use racial or gendered epithets as long as it's not for very long." *Id*. *Amicus* submits that such language should be treated as presumptively unprotected, and subject to appropriate discipline under the employer's anti-harassment and other workplace policies.

vi. Summary

The above cases make clear that so long as the employee can set forth an after-the-fact claim (often encouraged by labor unions or plaintiff attorneys) that the profane, abusive, sexual or racially charged language used was tangentially related to protected concerted activity, the Board will not only condone the offensive language or conduct, but also find that it is protected as a matter of federal labor law. How, exactly, did we get to *this* place based on carefully crafted statutory language around "concerted activities" for "other mutual aid and protection?" 29 U.S.C. § 157. It is plainly obvious that the Board has lost its way in its expansion of what constitutes "protected concerted activity," taking the doctrine to an extreme that has no foundation in the statute and now protects language and conduct that is racist, sexist, and patently offensive. Protecting such behavior and language is anathema to today's workplace where inclusion, civility, and diversity are contributing to a "rapidly changing workforce" in "American workplaces [that] are more diverse than ever before." SHRM Study at 4.

II. REVIEW OF ANTI-DISCRIMINATION LAWS IN THE WORKPLACE AND MODERN MOVEMENT TOWARDS WORKPLACE CIVILITY AND RESPECT

While this radical expansion of the NLRA is troubling in and of itself, the Board's decisions are particularly alarming in light of the proliferation of federal, state, and local law prohibiting discrimination and harassment in the workplace and new cultural norms which have demanded that employers embrace civility and inclusion in the workplace.

A. The Proliferation Of Federal, State, and Local Anti-Discrimination and Harassment Laws and Zealous Regulatory Enforcement Of these Statutes

The Supreme Court has long held that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). In that way, the NLRA does not exist in a vacuum; rather it stands side by side with a plethora of federal, state, and local laws which are designed to ensure that workplaces are free from the insidious effects of harassment, discrimination, and other indecent behavior. At the federal level alone, Congress has banned workplace harassment and discrimination based on race, sex and other protected characteristics. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e); Equal Credit Opportunity Act, 15 U.S.C. § 1691(a); Fair Housing Act, 42 U.S.C. § 3601; Voting Rights Act of 1965, 52 U.S.C. § 10101; Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121; Equal Pay Act of 1963, 29 U.S.C. § 206, as amended in the Fair Labor Standards Act of 1932, 20 U.S.C. § 203; Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; American with Disabilities Act of 1990, 42 U.S.C. § 126; Genetic Information Non-discrimination Act, 29 U.S.C.§ 216(e), and; Pregnancy Discrimination Act, 42 U.S.C. § 2000(e), as amended.

In order to enforce these laws, Congress also created the Equal Employment Opportunity Commission ("EEOC"). Title VII of the Civil Rights Act of 1964. The EEOC has approximately 2,000 employees, operating out of 53 regional offices across the United States. In Fiscal Year

2018 alone, the agency resolved 90,558 charges of discrimination and secured $505 million dollars in damages for workplace discrimination victims in the private sector, state and local government, and federal workplaces. *EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data*, U.S. Equal Employment Opportunity Commission (Apr. 10, 2019) https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm. In adjudicating these cases, the agency received more than 200,000 inquiries at its field offices. *Id.* In a similar vein, the U.S. Department of Labor has warned that offensive, profane, and vulgar language is often a pre-cursor to workplace violence and has properly treated the subject as a serious public health matter. U.S. Department of Labor, Office of the Assistant Secretary for Administration & Management, DOL Workplace Violence Program, (October 30, 2019, 4:36 PM), https://www.dol.gov/agencies/oasam/human-resources-center/policies/workplace-violence-program ("DOL Study").

And layered on top of this federal system is a collection of state and local anti-discrimination and anti-harassment laws. Indeed, almost all states have adopted discrimination laws related to employment, with some states and local jurisdictions adding protected characteristics beyond those in the federal law, reflecting local cultural norms and traditions. *See e.g.* Amendment to New York City's Human Rights Law, Bill No. S.6209A/A.7797A, which provides that discrimination based on race includes discrimination related to hairstyles or traits associated with a particular race; California's CROWN (Create a Respectful and Open Workplace for Natural Hair) Act, SB 188 (2018-2019); Center for American Progress Action Fund, A State-by-State Examination of Non-Discrimination Laws and Policies (providing that as of 2012, 16 states and Washington, D.C. have passed laws that prohibit discrimination on the basis of sexual orientation and gender identity).

Effectuating Congress's intent, the agencies have taken a hard stance towards offensive conduct and behavior; and recognizing its adherence to the statutes enabling these agencies, federal courts have routinely found that the laws should be viewed broadly and enforced rigidly. For instance, echoing Judge Millet's earlier sentiment, federal courts have routinely found that a single racial or gender epithet violates federal anti-discrimination laws. *Castleberry v. STI Group*, 863 F.3d 259, 264 (3d Cir. 2017) (single use of epithet constitutes actionable harassment under Title VII); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [the "n-word"] by a supervisor in the presence of his subordinates . . . [that] impacts the work environment severely") (internal quotations omitted); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) ("This single incident [of using the "n-word"] might well have been sufficient to establish a hostile work environment."); *Howley* v. *Town of Stratford*, 217 F.3d 141, 148, 156 (2d Cir. 2000) (referring to plaintiff as a f**king whining c*** who got her job by performing sex was sufficiently severe to violate Title VII); *Summa* v. *Hofstra Univ.*, 708 F.3d 115, 126 (2d Cir. 2013) ("Our case law…establishes that a single incident can create a hostile environment if it is sufficiently severe."); *Jones* v. *Mayflower Int'l Hotel Grp.*, No. 15-CV-4435 (WFK), 2018 U.S. Dist. LEXIS 199031, at *18 (June 29, 2018) (providing for "claims under Title VII, 42 U.S.C. § 1981… Plaintiff may demonstrate the creation of a "sufficiently severe or pervasive" work environment either through a single event…).

The impact of and judicial deference to these federal, state, and local laws on the workforce and workplace cannot be overstated. When these laws were originally passed by Congress, an effective human resources department that policed, and prohibited, offensive behavior was, unfortunately, rare in most workplaces. Racism was all too common and gender equality was

nearly unknown. And while there is still much work ahead to continue to make progress towards eliminating workplace discrimination and harassment, the bottom line is that the modern workplace has changed dramatically, and for the better, as a result of the passage of federal, state, and local anti-discrimination and harassment laws, along with the creation of a robust regulatory agency structure. Employers, large and small, now devote sizeable resources to hiring and training effective HR personnel and creating policies and infrastructure to ensure that the laws are properly followed.

But while "[a]dherence to legal requirements is necessary," by itself that is "not sufficient to drive the change needed to address" harassment. *See* National Academies of Sciences, Engineering, and Medicine 2018. *Sexual Harassment of Women: Climate Culture, and Consequences in Academic Sciences, Engineering and Medicine*, Washington, D.C. The National Academies Press. (https:doi.org/10.17226/24994) ("NAS Study"). Policies that go beyond just prohibiting unlawful behavior but also ban disrespectful, uncivil, profane and vulgar behavior can themselves drive positive change and help prevent escalating and unlawful behavior. The connection between uncivilized behavior and unlawful harassment cannot be questioned, as sexual harassment "often takes place against a backdrop of incivility, or in other words, in an environment of generalized disrespect" *Id.* at 125. This is especially true when it comes to gender harassment "because when it occurs, it is virtually always in environments with high rates of uncivil conduct" *Id.* Indeed, in its 2016 comprehensive study on sexual harassment in the workplace, the EEOC observed that "organizational *culture* is one of the key drivers of harassment." U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace* (June 2016), at 54. ("EEOC 2016 Report"). Employers must have the freedom to promulgate and enforce policies that further and maintain civil, respectful, inclusive, and diverse workplaces and

specifically prohibit all forms of offensive, vulgar conduct and harassment that is based on a person's protected status—including their race, sex, age and religion.

The emphasis on creating positive workplace cultures is also critical for employers from a pure cost perspective. A recent study found that,"[f]ailing to build a strong workplace culture is not only detrimental to employees: it is also bad for business," which has led to a "nearly quarter-of-a-trillion dollar cost borne by employers, simply because they didn't produce environments that result in employee retention and job satisfaction." SHRM study at 4, 6. Toxic workplaces have other human costs, too. Research shows that "a toxic workplace culture impacts an employee's engagement, productivity, and even health and wellness." *Id*. at 8. Indeed "[t]oxic atmospheres are generally associated with stress, which affects employees in the workplace and at home." *Id*. And, as previously noted, the U.S. Department of Labor has specifically recognized that toxicity creates serious workplace safety issues, as well. *See generally* DOL Study.

When enacted in 1935, the National Labor Relations Act was the first major piece of federal labor and employment legislation. But, as seen in its decisions in *Plaza Auto*, *Pier Sixty*, *Cooper Tire*, and *Costellium Rolled Products Ravenswood*, at times, it seems as if the Board is frozen in 1935, or willfully ignorant of the modern workplace, enlightened standards of workplace civility, comprehensive workplace legal obligations, and powerful social movements that shape how employees work and interact with each other daily and the professional standards that employers expect of the workforce. Given today's "rapidly changing workforce" the need to establish a culture of civility and respect, including through the maintenance of neutral policies aimed at creating and fostering civil, respectful, diverse, and inclusive workplaces, "is especially important" SHRM Study at 4. The NLRA may well be the first national labor and employment law, but it is not the only one, and the Board needs to recognize this indisputable fact—as the Supreme Court has long encouraged it to do. *Southern S.S. Co.*, 316 U.S. at 47. Instead of issuing decisions that

ignore nearly every other anti-discrimination and harassment law passed, the judicial enforcement of those laws by federal courts, the regulatory enforcement of those laws by agencies, as well as the body of literature and data that supports employers' need to actively discourage employees' vulgar, offensive, racist and sexist workplace conduct, the Board should harmonize its troublesome precedent with these other sources of law and important societal and workplace norms of civility, respect, non-discrimination, and inclusion.

III. THE USE OF SEXUAL AND/OR RACIALLY OFFENSIVE, PROFANE OR ABUSIVE LANGUAGE IN THE WORKPLACE SHOULD NEVER BE AFFORDED PROTECTION UNDER THE ACT

In order to achieve this harmonization, the Board should establish a bright-line rule that an employee forfeits any protection under the Act when the employee uses sexual and/or racial language or engages in sexual and/or racist conduct (or conduct based on someone's other protected status), even if such language or conduct occurs within the context of protected concerted activity. This bright-line rule should also apply on strike or picket lines.[4] Simply put, the Board should no longer tolerate an employee using Section 7 as a cloak for behavior and language that would otherwise result in termination of employment under any other legal analysis.

A bright-line approach around this issue has already been endorsed by judges on the D.C. Circuit and former NLRB Members of different political backgrounds. For instance, in *Consol. Commc'ns, Inc.* v. *NLRB*, 837 F.3d 1 (D.C. Cir. 2016), Obama-appointee Judge Millet properly observed that:

> While the law properly understands that rough words and strong feelings can arise in the tense and acrimonious world of workplace strikes, targeting others for sexual or racial degradation is categorically different. Conduct that is designed to humiliate and intimidate

[4] Question 4 of the Board's Notice asks for a specific position on strikes or picket lines. There is no reason that strikes or picket lines justify otherwise abhorrent behavior. People are people; they do not lose their protected characteristics because of a union strike. Any other suggestion to the contrary is reflective of the by-gone era in which racially derogatory terms towards replacement workers were accepted as a fact of life. This is not the world we live in anymore and the Board should state so emphatically.

> another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment. **Full stop**. Yet time and again the Board's decisions have given short shrift to gender-targeted behavior, the message of which is calculated to be sexually derogatory and demeaning… .

Id. at 21 (italics in original) (bold emphasis added).

Then-Member Johnson made a similar observation in *Pier Sixty,* finding that:

> We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment. Given all this, employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency."

Pier Sixty, 362 NLRB at 510.

While the Board generally provides "some leeway"[5] for impulsive behavior in the workplace when "passions may run high," *Bechtel Power Corp.*, 277 NLRB 882, 889 (1985), the Board's recent cases seem to have forgotten that such impulsive behavior "must be balanced against an employer's right to maintain order and respect." *See Mast Advert. & Publ'g,* 304 NLRB 819, 819 (1991); *see also Piper Realty Co.,* 313 NLRB 1289, 1290 (1994). In today's society, particularly in the workplace, employers must be able to set the tone from the top of an organization down by taking a zero tolerance stance on the use of vulgar, profane, abusive, or offensive racial or sexual language in the workplace. Providing "leeway" for such language and behavior runs counter to the "rapidly changing" inclusive workforce of today. SHRM Study at 4. Additionally, a strong-bright line rule will harmonize the NLRA with Title VII and other federal, state, and local

[5] In his dissenting opinion in *Plaza Auto Center,* then-Member Johnsons correctly opined "The standard is 'some leeway,' not substantial leeway, not maximum leeway, and certainly not unrestrained" freedom. *Plaza Auto Center,* 360 NLRB at 985.

anti-discrimination and harassment laws.[6] Without aligning the Act with such laws, the Board continues to put employers in the precarious situation of being found liable under Title VII for failing to address and remedy language or conduct in the workplace that clearly violates that Act, with the potential of being found liable for an unfair labor practice charge under the NLRA if the employee is disciplined for the underlying conduct or language itself. It is time for the Board to resolve this Catch-22 for employers. The NLRA should not be the *single* federal law that condones racist or sexist language or conduct, so long as the offending behavior is somehow related to terms and conditions of employment. In short, the confluence of federal, state, and local anti-discrimination and harassment laws and powerful social movements have reshaped the "realities of industrial life" and the Board should adapt its case law to reflect this new culture.

With respect to *Atlantic Steel*, as noted above, *Atlantic Steel* is a manufactured agency doctrine and has, at best, a tenuous connection to the language of the statute—which of course provides no protection whatsoever itself for racist or sexualized language or conduct.[7] 29 U.S.C. § 157. In order to put a "full stop" to this type of behavior, as Judge Millet recommends, SHRM urges this Board to adopt the aforementioned bright-line test, without consideration of any other *Atlantic Steel* factors. Indeed, the use of racial or sexually profane or abusive language should always be "opprobrious conduct, [that should] los[e] protection of the Act" and thus it should be unnecessary to take into consider the "place of the discussion, the subject matter of the discussion [or]…whether the outburst was, in any way, provoked by an employer's unfair labor practices."

[6] Indeed, former Deputy General Counsel Jennifer Abruzzo, has stated as recently as 2017 that the two agencies should issue joint guidance to synchronize the statutes. *See* Hassan Kanu, *Labor Board and EEOC to Clarify Overlap in Anti-Bias, Labor Laws*, Bloomberg BNA (Nov. 13, 2017), https://news.bloomberglaw.com/daily-labor-report/labor-board-and-eeoc-to-clarify-overlap-in-anti-bias-labor-laws.

[7] Such conduct also seems at odds with the legislative history of the NLRA. As scholars have noted, the NLRA was designed to foster cooperation and problem-solving between management, labor unions, and employees. Daniel P O'Gorman, *Construing The National Labor Relations Act: The NLRB and Method of Statutory Construction*, 81 TEMP. L. REV 177, 180-190 (2008).

See Atlantic Steel Co., 245 NLRB at 816. In this way, SHRM envisions that the bright-line test will stand separate and apart from *Atlantic Steel*.

In the alternative, if the Board is inclined to adhere to one or more of the *Atlantic Steel* factors, the Board should adopt a rule that the nature of the outburst should always be dispositive of the outcome. SHRM is concerned, however, that allowing this question to be adjudicated within the *Atlantic Steel* framework will allow future Boards with different priorities to downplay this factor and to allow patently offensive language to become protected by the Act again. SHRM is also concerned that in circumstances where it is legally or politically convenient, the Board may replace *Atlantic Steel* with an even more amorphous "totality of the circumstances," kitchen sink approach, and find the offensive conduct protected on the basis of whatever factor then current Board Members may imagine. This was precisely the approach used by the Board in *Pier Sixty*, 362 NLRB at 506.

As many academic observers have noted, the unfortunate reality is that often "much of the Board's decision-making consists of ideologically tinged policy judgments" and vague, amorphous multi-factor tests that allow the Board to reinvent the law subject to political whims. *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, EMORY LAW JOURNAL http://law.emory.edu/elj/_documents/volumes/64/special/garden.pdf (last visited Oct. 29, 2019). Adopting a bright-line rule test now, however, will be harder to reverse in the future; rather than escaping through a vague, multi-factor fact dependent test, a future Board would have to come down firmly, and unambiguously, on the side of bigotry, racism, sexism, and other unsavory employee behavior to change the law.

The bottom line is that no employer should be required to tolerate employees using racist, sexually charged or abusive language or conduct in the workplace, and then allow the employee to claim that the "opprobrious conduct" is actually protected by federal labor law.

IV. THE USE OF PROFANE LANGUAGE IN THE WORKPLACE SHOULD BE SUBJECT TO WORKPLACE PROHIBITION SO LONG AS THE WORKPLACE RULE IS FACIALLY NEUTRAL AND NEUTRALLY ENFORCED

With respect to profane language that does not target an individual's protected status, the Board will often look to the "norms of the workplace" to determine whether the profanity is considered protected activity, particularly when the use of profanity is commonplace in the workplace. *Traverse City Osteopathic Hosp.*, 260 NLRB 1061 (1982); *Desert Springs Hosp. Med. Ctr.*, 363 NLRB No. 185 (May 10, 2016). Given the importance of the need for greater civility, inclusion, respect, and decorum in the workplace, the reliance on "norms of the workplace" is misguided. Instead, the Board should establish that the use of profane language in the workplace may be subject to prohibition so long as the workplace rule that prohibits such language is facially neutral and neutrally enforced by the employer.

To be sure, the Board has found profane language protected under the Act in numerous instances. *See Severance Tool Indus.*, 301 NLRB 1166, 1169 (1991) (calling company president a "son of a b**ch"), *aff'd*. 953 F.2d 1384 (6th Cir. 1992); *U.S. Postal Service*, 241 NLRB 389, 390 (1979) (calling acting supervisor an "a**hole"); *CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578, 1582, 1585-1586 (2000). (employee used f--word several times in his discussion with management); *Alcoa Inc.*, 352 NLRB 1222, 1225, 1231-1233 (2008) (calling supervisor an "egotistical f***er"); *Corrections Corp. of Am.*, 347 NLRB 632, 635-636, 647 (2006) (statement by employee, "this is bulls***"). Yet, at best, profane language is on the periphery of Section 7 activity. Indeed, there is nothing in the statute itself that protects profanity. 29 U.S.C. § 157. Any protections for profane language are derived from the same "other concerted activities for mutual aid and protection" portion of the statute. *Id.* Allowing that single section of the statute to afford employees federal labor law protection for conduct that is clearly offensive to most reasonable employees is yet another example of the Board's case law coming loose from its statutory mooring.

In contrast, Board policy which gives considerable deference to lawful and neutral workplace rules has a strong foundation in prior case law and the statute. While the previous NLRB issued multiple decisions heavily scrutinizing workplace rules, *Triple Play Sports Bar & Grille*, 361 NLRB 308, 313 (2014), *aff'd*. 629 F. App'x 33 (2d Cir. 2015), *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 72 (2014), *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1817 (2011); *Hills & Dales Gen. Hosp.*, 360 NLRB 611, 612 (2014), the Board has recently clarified that, when evaluating facially neutral work rules, the proper inquiry should focus on "(1) the nature and extent of the potential impact on NLRA rights; *and* (2) the legitimate justifications associated with the rule." *Boeing Co*., 365 NLRB No. 154, at *4 (Dec. 14, 2017) (emphasis original). The Board then developed three "categories" of potential work rules, with "Category 1" rules defined as those which are lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights, and thus no balancing of employee rights versus employer justification is warranted; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. *Id.* In a subsequent General Counsel Memorandum setting forth agency guidance on applying *Boeing*, the General Counsel specifically found civility rules fall under "Category 1" and, thus, are generally lawful. Memorandum GC18-04 from Peter B. Robb, General Counsel to All Regional Directors, Officers-in-Charge, and Resident Officers on Guidance on Handbook Rules Post-*Boeing* (June 6, 2018). Moreover, the Board's recent decision in *LA Specialty Produce Co.*, 368 NLRB No. 93 (Oct. 10, 2019), made clear that reasonable and common-sense work rules will survive Board scrutiny post-*Boeing*. Put together, a facially neutral and neutrally enforced "no profanity" rule is lawful under the NLRA.

The Board's deference to facially neutral and neutrally enforced work rules also has ample support in prior Board precedent for conduct that is on the periphery of Section 7. For instance,

in *Register Guard*, 351 NLRB 1111 (2007),[8] the Board considered whether employees have a right to use an employer's email system for Section 7 activity, when the employer maintained a work rule prohibiting the use of e-mail for all "non-job related solicitations." In finding that the maintenance of the e-mail policy was lawful, the Board made clear that Section 7 protects "organizational right . . . rather than particular means by which employee may seek to communicate." *Id* at 1110; 1115. The Board, while recognizing that "e-mail has, of course, had a substantial impact on how people communicate, both at and away from the workplace," nonetheless correctly concluded that "the use of e-mail has not changed the pattern of industrial life at the Respondent's facility to the extent that the [other] forms of workplace communication . . . have been rendered useless . . . ." *Id* at 1116. In other words, the Board recognized that the use of an employer's email system is only tangentially related to Section 7 activity and employees have other accessible ways to engage in Section 7 activity. *Id.* Similarly, here, while SHRM recognizes employees have a legal right to engage in protected concerted activity, employees have many other ways to voice frustration in the workplace and engage in lawful Section 7 activity without resorting to the use of profane language in the face of a neutral work rule.

Beyond the legal justifications, strong public policy interests also favor the approach urged by SHRM. As reviewed above, proper civility, decorum, respect, inclusion, and tolerance are core values of the modern workforce. Employees simply cannot, and should not, be allowed to use abusive and profane language under the guise of "concerted activity" and find themselves protected by federal labor law. The modern workplace demands more; the NLRB should too. By deferring to facially neutral and neutrally enforced workplace rules, the NLRB is striking the

[8] While SHRM recognizes that the *Register Guard* was overturned by *Purple Commc'ns*, 361 NLRB 1050 (2014), there is a strong argument that *Purple Commc'ns* was wrongly decided; and, in any event, the principle set forth in *Register Guard* should be embraced by the current Board, regardless of the vitality of the holding in *Purple Commc'nss*.

proper balance between Section 7 rights and the employer's strong interest in promoting a workplace atmosphere that is free of toxicity, abuse, and unprofessional conduct.

V. *PLAZA AUTO CENTER, PIER SIXTY, COOPER TIRE,* AND OTHER SIMILAR CASES SHOULD BE OVERRULED

SHRM recognizes that the position advocated for in this *amicus* brief is in direct conflict with *Plaza Auto Center*, *Pier Sixty*, *Cooper Tire*, and other similar cases. SHRM urges the Board to unequivocally make clear that such cases are overruled and of no further effect, to the extent they are in conflict with SHRM's position. In due time, SHRM hopes that these cases are relegated to a past when workplace civility and inclusion were not as valued.

CONCLUSION

The Board should recognize that the workplace has dramatically changed since the passage of the Act over 80 years ago. Employers embrace and recognize civility, inclusion, diversity, and respect as core elements of the workplace. So far, the Board has failed to do so, and through *Plaza Auto Center*, *Pier Sixty*, *Cooper Tire*, *Constellium Rolled Products* and other similar cases, have expanded narrow language in the statute to protect a wide variety of racist, sexist, profane, vulgar, and other inappropriate language and conduct. The Board now has the opportunity to recognize the realities of today's workplace and adopt common-sense guidelines that recognize and celebrate the diversity of the workforce, encourage civility, respect, and decorum as core values, and harmonize the NLRA with federal, state, and local anti-discrimination laws. The proposals set forth in this *amicus* brief accomplish these important goals without abandoning any of the key protections offered by the NLRA. Labor law in the twenty-first century should demand nothing less.

Respectfully submitted this 12th day of November, 2019.

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CERTIFICATE OF SERVICE

Pursuant to the Board's September 5, 2019 "Notice and Invitation to File Briefs," the undersigned hereby certifies that a copy of the foregoing *amicus* brief in Cases 14-CA-197985 and 14-CA-208242 was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on this 12th day of November, 2019.

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