Nos. 24-1406, 24-1513

In the United States Court of Appeals for the Eighth Circuit

HOME DEPOT U.S.A., INC.,
Petitioner / Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent / Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Board Case No. 18-CA-273796)

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amicus curiae* the Chamber of Commerce of the United States of America ("the Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*

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

Nearly all of the Chamber's members are subject to the National Labor Relations Act ("NLRA"), and a substantial number of those members have dress codes for their employees. The Chamber and its members have an interest in ensuring that the National Labor Relations Board ("NLRB" or the "Board") applies a coherent and consistent interpretation of "concerted activities" under § 7 of the NLRA, 29 U.S.C. § 157, but here the Board adopted an overly broad definition that leaves

businesses without any meaningful guidance for determining when an individual employee's conduct is protected by the statute. The Chamber's brief thus urges the Court to clarify when individual conduct may be considered "concerted activities" and, at a minimum, vacate and remand so that the Board can apply the proper standard.

No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Board applied an overly expansive understanding of which individual conduct qualifies as "concerted" employee activity protected under § 7 of the NLRA, 29 U.S.C. § 157. As a result, the NLRB's decision should at a minimum be vacated and the case remanded for the Board to apply the proper test for concerted action to the facts.[1] This brief seeks to assist the Court by addressing the history and application of that term to individual activity.

The Board stretched the definition of "concerted activities" too far. The Board determined that Bo's[2] conduct qualifies as concerted activity (1) under the "logical outgrowth" theory and (2) under the alternate theory that the conduct was an effort to present "truly group complaints" to management. The Board's application of both theories suffers from the same flaw: the lack of a direct, objectively ascertainable link connecting Bo's individual conduct to collective action either previously taken or sought to be induced. If the decision below is allowed to stand, employers

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[1] The Chamber takes no position on any other issues presented in this case.

[2] This brief uses the same naming conventions as Home Depot's opening brief.

will lack clear, objective, predictable criteria for determining whether and when individual conduct qualifies as "concerted activity" for purposes of § 7.

To be "concerted," the later individual action must link directly to previous collective activity or be aimed at inducing collective activity. Here it did neither. Bo never asserted that the apron display was designed to elicit group activity, and the Board did not identify objective evidence that Bo's conduct was meaningfully connected to any prior conduct engaged in by other employees. The Board's decision does not rest on a showing of past or anticipated coordinated activity. It rests instead on a single employee's vague, subjective sentiment that the individual activity related to workplace concerns that arose *after* the employee first marked the company apron. As dissenting member Kaplan properly concluded, individual action linked to group action already lies at the "outside edge" of § 7 conduct, and "holding that an act by an individual employee that was not concerted at its inception can *become* concerted as a logical outgrowth of subsequent protected concerted activity pushes that outside edge beyond the breaking point." *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024) Add.30 (Kaplan, M.,

dissenting) (emphasis in original). Without a direct link between the individual and concerted activity, employers like Home Depot are left to speculate about concertedness.

The Board's decision was flawed not only as a substantive matter, but also as an evidentiary one. A violation of the employee's right to engage in protected concerted activity cannot be shown unless the employer has knowledge the employee's action was concerted. Here the individual activity did not unambiguously relate to a workplace practice or policy that was the subject of previous collective activity. This was especially true because the individual employee activity began *before* the concerted activity. By untethering the individual action from a group complaint about a specific workplace policy or condition, the Board's decision requires employers to guess at whether an employee's individual conduct relates to workplace grievances that may have only a tenuous or vague link to group action. In so doing the Board effectively shifted the General Counsel's burden of proving concertedness to the employer, which must *disprove* the assumption that the employee's conduct is related to some other complaint. This contradicts decades-old precedent under § 7. Employers should not be liable for failing to discern

concertedness based on evidence that is ambiguous, equivocal, and subjective rather than objective and ascertainable.

ARGUMENT

In ordinary English, "concerted" and "individual" are opposite, mutually incompatible concepts. Both the Board and federal courts have nevertheless accepted that individual conduct can sometimes qualify as concerted. To reconcile this linguistic inconsistency, the cases involving this narrow circumstance have insisted that individual action will not be deemed concerted unless it has some discernible, objective link to past or proposed collective action on the same subject matter. Though the Board has repeatedly expanded and contracted the scope of § 7, that constant remains. This brief therefore explains (1) the historical development of this principle, (2) why, in light of this history, the Board improperly expanded the grounds upon which individual activity qualifies as "concerted," and (3) why evidence of concertedness must be objectively ascertainable to employers. Both employers and employees need a clear, predictable, and reliable understanding of the term "concerted," and correcting the Board's error here will help accomplish that goal.

I. The Touchstone of Concerted Activities Is a Direct Link Between Individual Action and Past or Anticipated Collective Action.

1. Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

29 U.S.C. § 157. Neither Congress nor the Supreme Court has defined the term "concerted." But in both ordinary speech and other areas of law, the word inherently conveys the idea that more than one person is doing something—that there is some mutuality, agreement, or coordination between or among two or more people. *See*, *e.g.*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2010) (defining "concerted" as "contrived or arranged by agreement; planned or devised together") (available at https://tinyurl.com/msupzsx4); BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "concerted action" as "action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause"). The definition of "concerted" has remained constant for centuries, including through the passage of the NLRA. *See*, *e.g.*, WEBSTER'S DICTIONARY (1828) (defining "concert" as "[a]greement of two

or more in a design or plan; union formed by mutual communication of opinions and views; accordance in a scheme; harmony.") (available at https://tinyurl.com/2tvckpjk).

Ordinarily, concerted activity is not hard to identify. Section 7 itself refers to activities, such as forming unions or bargaining collectively, that are easily visible to employers as involving the conduct of more than one person. The catchall "other concerted activities" refers to similarly coordinated conduct. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512 (2018) (construing § 7 according to the canon of *ejusdem generis*, which provides that such language identifies "objects similar in nature to those objects enumerated by the preceding specific words.") (cleaned up). Cases involving individual conduct fall at the outer edge of even that catchall: where *individual* activity is afforded protection under the statute not because it is genuinely individual, but rather because it is meaningfully part of some larger whole.

The Board's seminal guidance in this circumstance remains the *Meyers* cases, described further below. *See Meyers Industries*, 268 NLRB 493 (No. 73) (1984) ("*Meyers I*"); *Meyers Industries*, 281 NLRB 882, 885 (No. 118) (1986) ("*Meyers II*"). The Board noted there that the purpose of

§ 7 is not to address workplace complaints generally but rather to protect employees when coordinating freely so they can do so themselves. *Meyers II*, 281 NLRB at 884 (noting the Board's "focus on joint employee action as the touchstone for our analysis of what kinds of activities we must find within the scope of Section 7 in order to effectuate the purposes of the Act"). Though the Board has repeatedly reversed course on how to apply § 7 to individual activity, it has consistently declared its adherence to the *Meyers* approach. This fealty endures because *Meyers* sets forth a standard that most closely aligns with the statutory text and the "central purposes for which the [NLRA] was created." *Id.*, 281 NLRB at 883.

In this case, the Board rested its decision on two different lines of reasoning. The Board based its decision primarily on the "logical outgrowth" doctrine. Add.7. That doctrine holds that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (No. 210), 1038–39 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995) ("The lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity.") (citations

omitted). In a footnote, the Board noted that it would also find Bo's conduct concerted "on the alternate rationale" that it "was an attempt to bring 'truly group complaints to the attention of management.'" Add.9 n.23 (citing *Meyers II*).

Though not explicitly mentioned in *Meyers*, the logical-outgrowth theory is either a corollary or an example of the *Meyers* standard, as the majority and the dissent noted here. Add.6 n.16 (majority observing that the theory is part of the "broad boundary of concerted activity" contemplated though not mentioned in *Meyers II*, which did "not intend to exhaustively define concertedness"); *id.* at 30 (dissent noting that *Meyers II* "identified two circumstances under which an act by an individual employee constitutes concerted activity, and the 'logical outgrowth' scenario represents a third"). Since the *Meyers* line of cases reflects by far the predominant test for whether individual activity qualifies as concerted, the history of that line helps clarify how the Board misapplied it here.

2. For at least sixty years, courts have recognized that group *action*—not talk—must be "concerted" to satisfy § 7. In an early leading case, the Third Circuit held that though a conversation between two

people alone may constitute concerted activity, "to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for *group action* or that it had some relation to group action in the interest of the employees." *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (emphasis added). In *Mushroom*, the Third Circuit reversed a Board decision in favor of a nonunion driver who complained that he was delisted because he spoke to the employer's union drivers about holiday pay, vacations, and trip assignments. The court acknowledged that "preliminary discussions" that do not result in "organized action or in positive steps toward presenting demands" may qualify as concerted action because some kind of communication is nearly always necessary to initiate group action, but that this point loses force when "it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to." *Id.* In other words, "[a]ctivity which consists of mere talk *must*, in order to be protected, be talk *looking toward group action*." *Id.* (emphasis added).

The Board attempted to weaken this requirement in *Alleluia Cushion Co.*, 221 NLRB 999 (No. 162) (1975). There, the employee was

discharged after writing a letter to a state agency complaining of safety violations at the employer's plants. Because he had acted alone, the ALJ dismissed the complaint based on *Mushroom Transportation* and other cases holding that "there must be some form of or relationship to group action." *Id*. at 1004. The Board reversed, accepting the General Counsel's view that since "safe working conditions" are of "such obvious mutual concern" to all employees, it would be "incongruous" with the public policy embodied in safety statutes to presume nonagreement by other employees "absent an outward manifestation of support." *Id*. at 1000. The Board held that where an employee individually seeks to enforce statutory safety provisions designed to benefit all employees, it would find "implied consent" to that action absent "evidence that fellow employees disavow such representation." *Id*.

The Board reversed course nine years later in *Meyers I* and *II*, which remain the lodestar for the conception of "concerted activities." As in *Alleluia*, the employee was fired after he individually complained of unsafe conditions to a state safety agency. *Meyers I*, 268 NLRB 493. In concluding that the employee's activity was not concerted, the Board explicitly overruled *Alleluia* for two reasons. First, it noted that a solitary

employee's invocation of relevant legislation (which embodies a public policy) "transform[ed] concerted activity into a mirror image of itself" by pointing to what employees "*ought*" to care about—its purpose—before determining whether the action was concerted. *Id.* at 495 (emphasis in original). The Board held that this was backwards, and that the proper standard was always to consider "first, whether the activity is concerted, and only then, whether it is protected." *Id.* at 496. Thus, a finding that "a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity 'concerted' within the meaning of Section 7." *Id.* Second, the Board held that by implying concerted action absent evidence of disavowal by other employees, *Alleluia* shifted the burden of proof from the General Counsel (to prove concerted activity) to the employer (to prove that the individual activity was *not* in concert).

The Board then defined "concerted activity" in a way that continues to guide decisions today: "In general, to find an employee's activity to be 'concerted,' we shall require that it be *engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself*." *Id.* at 497 (emphasis added). The Board acknowledged that given the "myriad of factual situations" in employment matters, its

definition was "by no means exhaustive," but it was nevertheless an attempt to be "comprehensive." *Id.* at 496–97. The Board also held that there could be no violation of § 8(a)(1), which prohibits interference with § 7 rights, unless "the employer knew of the concerted nature of the employee's activity." *Id.* at 497; 29 U.S.C. § 158.

On appeal, the D.C. Circuit determined that the Board's definition of "concerted" was not mandated by the NLRA. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) ("*Prill I*"). It also relied on the intervening decision in *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984), where a closely divided Supreme Court held that § 7 protected an individual who asserted rights protected under a collective-bargaining agreement because the individual activity was deemed an extension of the concerted activity giving rise to the agreement. The Supreme Court noted that though the undefined term "'concerted activities' . . . clearly enough embraces the activities of employees who have joined together in order to achieve common goals," it did not make "self-evident" "the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity." *Id.* at 830–31. The

Supreme Court identified examples of individual action qualifying as concerted activity. *Id.* at 831 (citing (1) the intent to induce group action and (2) one employee representing at least one other employee). The Supreme Court thus held that § 7 could not be narrowly confined to "a situation in which two or more employees are working together at the same time and the same place toward a common goal." *Id.* Rather, the statute allowed for "differing views," *id.* at 831, and thus permitted the Board to define the scope of § 7 in its reasonable discretion in light of "its expertise in labor relations." *Id.* at 829. The Supreme Court summarized its reasoning by observing that in enacting § 7 and allowing employees to "band together," the statute manifested "a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements." *Id.* at 835. Congress did not indicate that it "intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way," or "to have this general protection withdrawn in situations in which a single

employee, acting alone, participates in an integral aspect *of a collective process*." *Id*. at 835 (emphasis added).

In view of *City Disposal*, the D.C. Circuit in *Prill I* vacated the Board's decision and remanded to ensure that the Board's decision was consistent with (1) cases holding that an individual who "brings a group complaint to the attention of management" is protected even when "not designated or authorized to be a spokesman by the group," and with (2) the *Mushroom Transportation* jurisprudence that § 7 protects "individual efforts to enlist other employees in support of common goals." 755 F.2d at 957.

On remand, the Board adhered to its definition of "concerted activities" from *Meyers I*. It did so as a reasonable construction of § 7 "over other possibly permissible standards," finding that its definition was "faithful to the central purposes of the Act." *Meyers II*, 281 NLRB at 882–83. The Board noted that "focus on joint employee action" is the "touchstone" for analyzing concertedness under § 7. *Id*. at 884. The Board held that the *Meyers I* definition "proceeds logically" from that analysis insofar as concertedness "requires some linkage to group action." *Id*. (noting that under *City Disposal*, "some linkage to collective employee

action [is] at the heart of the 'concertedness' inquiry"). The Board also offered three "guiding principles" for determining concertedness: (1) the concept "could include some, but not all, individual activity," (2) the definition should reflect the "essential component" of § 7, namely its "collective nature," and (3) following both *Meyers I* and *City Disposal*, the concept of concertedness was a distinct and separate exercise from determining whether the activity is for "mutual aid or protection." *Id.* at 885. In response to the D.C. Circuit's concerns, the Board also confirmed that its definition "encompasses those circumstances where individual employees seek *to initiate or to induce or to prepare* for group action, as well as individual employees bringing *truly group complaints* to the attention of management." *Id.* at 887 (emphasis added). The Board again dismissed the complaint.

This time, the D.C. Circuit affirmed. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) ("*Prill II*"). It agreed that determining "concerted activity" and "mutual benefit or protection" under § 7 are "two distinct factual inquiries that are to be analyzed separately." *Id.* at 1483. It also rejected the employee's argument that the *Meyers I* definition requiring a "direct link" between the actions of the individual and the action or

approval of coworkers was unreasonable. *Id.* at 1484. It held that the Board's definition of "concerted activity" was consistent with the statute, and it rejected the employee's contention that his action was concerted merely because he overhead complaints by coworkers on another matter or because his actions might benefit other employees. *Id.* at 1485.[3]

In the forty years since *Meyers II*, the Board has repeatedly cited the *Meyers I* definition as controlling, but it has varied substantially in applying it. In *Wyndham Resort Dev. Corp.*, 356 NLRB 765 (No. 104) (2011), an employee who always wore his shirt untucked received a warning when, in front of coworkers, he protested a new dress code policy requiring employees to tuck their shirts. The Board held that concerted activity occurs where a single employee complains in front of coworkers about a policy directed to all of them. *Id.* at 766. The Board found that,

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[3] In *Prill II*, 835 F.2d at 1485, the D.C. Circuit deferred to the Board's interpretation of § 7 under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 864 (1984), which was decided the same year as *City Disposal*. Before the instant case will be fully briefed, the Supreme Court is expected to decide whether to overrule *Chevron*. *See Loper Bright Enterprises v. Raimondo*, No. 22-451 (S. Ct.); *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (S. Ct.). That decision may have some effect on the level of deference owed to the Board's decision here. But even if *Chevron* survives, the Board's interpretation of "concerted," which stretches the concept of "logical outgrowth" beyond the breaking point, is plainly unreasonable.

based on his coworkers' conduct, the employee might "reasonably suspect" that others would disagree with the rule change even if he didn't know that they *actually* disagreed with it. *Id.* The dissenting member noted that the Board was "impermissibly conflating the concepts of group setting and group complaints," and that "simply voicing an individual complaint about an employment matter within earshot of fellow employees is not an inducement for action, nor a protest for mutual aid and protection." *Id.* at 768–69 (Kaplan, M., dissenting). The Board's conclusion—that an employee's activity is concerted where he might simply *suspect* that his coworkers agree with him—silently and impermissibly resurrected the *Alleluia* standard improperly requiring employers to disprove a default presumption of collective *sentiment*.

Eight years later, the Board adopted the dissent's position and explicitly overruled *Wyndham*. *See Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019). In *Alstate*, an airport luggage handler was asked to assist certain customers and complained in front of coworkers that a similar job the previous year resulted in no tip. In a holding intended to "begin[] the process of restoring the *Meyers* standard," *id.* at *1, the Board held that *Wyndham* had to be overruled because it deviated from *Meyers* in two

respects: first, rather than requiring a factual inquiry, *Wyndham* had announced a *per se* rule that speaking publicly in a group setting *is* initiating group action; second, *Wyndham* had conflated group settings with group complaints and allowed for the possibility that "concerted activity" could arise from individual complaints that were not "engaged in with or on the authority of other employees." *Id.* at *6–7. The Board then set forth a list of five factors that might be relevant to the determination of whether an individual speaking in front of a group engaged in concerted activity. *Id.* at *8 & *8 n.45 (describing this as a "borderline scenario" far from the "heartland of concerted activity—instances where an employee acts *with* other employees or on their behalf as their authorized representative") (emphasis in original).

Four years later, the Board reversed course once more. In *Miller Plastic Prods., Inc.*, 372 NLRB No. 134 (2023), an employee was terminated for complaining about the employer's COVID protocols and for remaining open for business. The Board held that the employee's complaints were concerted activity both because they sought to bring "truly group complaints" to management's attention, and because his subsequent one-on-one conversations with management were a "logical

outgrowth" of that earlier group complaint. *Id.* at *11. But the Board also determined that even though concerted action might be found under *Alstate*, that decision should be overruled because its multifactor test was "unduly cramped." *Id.* at *10 (cleaned up). Rejecting the *Alstate* five-factor analysis, the Board held that it was "reaffirm[ing] the fundamental principle of *Meyers II* that 'the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.'" *Id.* at *10 (quoting *Meyers II*, 281 NLRB at 886). And under *Meyers II*—which reaffirmed *Meyers I*—the General Counsel has the burden of showing a "direct link" between the individual employee's action and the action or approval of other employees.

II. The Board's Decision Improperly Expands the Scope of "Concerted Activities" by Tacitly Eliminating the "Direct Link" Requirement.

Though the Board and the courts have identified some discrete instances where individual conduct qualifies as "concerted," the unifying principle of these exceptions is some direct and discernible link to collective action involving workplace concerns. *See supra,* Part I (discussing *Mushroom Transp.*, *City Disposal*, *Meyers II*). The jurisprudential history yields several guideposts for identifying whether

individual activity qualifies as concerted. The Board failed to follow these guideposts, regardless of whether Bo's individual conduct is framed as a "logical outgrowth" of prior concerted activity or as presenting a "truly group complaint" to management.

1. Concertedness requires a "direct link" between the individual action and the *specific* practice or policy that was the subject of the earlier or contemplated collective action.[4] *Prill II*, 835 F.2d at 1484. This is as true in the dress-code context as any other. *See*, *e.g.*, *Medco Health Sols. of Las Vegas, Inc.*, 357 NLRB 170 (No. 25) (2011), enfd. in part sub. nom. *Medco Health Sols. of Las Vegas, Inc. v. N.L.R.B.*, 701 F.3d 710 (D.C. Cir. 2012) (employee's T-shirt critical of "WOW" program was logical

[4] The leading "logical outgrowth" cases likewise evince this direct link. *See*, *e.g.*, *JMC Transport*, 272 NLRB 545 (1984) (individual complaint grew out of earlier group activity about the "change in the pay structure"); *Salisbury Hotel*, 283 NLRB 685 (1987) (switchboard operator's complaint about lunch hour grew out of group protest to change in lunch hour policy); *Every Woman's Place*, 282 NLRB 413 (1986) (call to Wage and Hour Division was logical outgrowth of protest by three employees about holiday and compensation changes); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038–1039 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995) (individual complaint about overtime logically grew out of earlier protest about reduced schedules that resulted in overtime). As Home Depot notes in its opening brief, this link was also evident from the cases the Board itself relied on. App. Br. at 33–34 (citing *KNTV, Inc.*, 319 NLRB 447 (1995) and *Blue Circle Cement Co.*, 311 NLRB 623 (1993)).

outgrowth of concerted complaint about *that* program); *Wyndham*, *supra* (employee's complaint about untucked shirts was specifically connected to policy requiring shirt-tucking). It is also true regardless of whether the case is decided under the logical-outgrowth doctrine or by explicit reference to *Meyers*. Though recent logical-outgrowth cases often fail to cite *Meyers*, nearly all the original logical-outgrowth cases point to *Meyers* as either their source or their controlling precedent.[5] Accordingly, to avoid straying too far from the relevant statutory text, the logical-outgrowth theory should be interpreted consistently with the *Meyers* standard. As dissenting member Kaplan noted while discussing these and similar cases, because "concertedness is determined under an objective standard," the link between the prior group activity and the subsequent individual activity "must be sufficiently apparent to a reasonable person aware of the relevant facts" for the individual activity

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[5] *See*, *e.g.*, *JMC Transport*, 272 NLRB 545, 545 fn. 2 (1984) (citing *Meyers I* rather than *Meyers II* to connect individual activity that "grew out of the earlier concerted complaint"), enfd. 776 F.2d 612, 617–618 (6th Cir. 1985); *Salisbury Hotel*, 283 NLRB 685, 685 (1987) (deciding the case under *Meyers II*); *Every Woman's Place*, 282 NLRB 413, 413 (1986) (noting logical outgrowth as consistent with *Meyers II*), enfd. mem. 833 F.2d 1012 (6th Cir. 1987); *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988) (citing the "logical outgrowth" theory and *Every Woman's Place* as an example of the nexus required by *Meyers II*).

to constitute a logical outgrowth of the concerted activity. Add.27 (Kaplan, M., dissenting). Thus, an individual's actions should not be considered a "logical outgrowth" of group activity unless there is a "direct link" between the individual's action and the prior group activity.

Record evidence of that link is missing here. As Home Depot notes in its brief and as highlighted by dissenting member Kaplan, there is no evidence that the conduct here either sought to "initiate, induce, or prepare for group action," or to present a "truly group complaint" to management. App. Br. at 14, 16–17, 32–33 (quoting Add.24 (Kaplan, M. dissenting)). For example, the evidence is only that the conduct was unilateral; there was no evidence that other employees discussed, approved, supported, or authorized the conduct. App. Br. at 32. Nor was there evidence to show what action, if any, the conduct was even *intended* to prompt from other employees. *See Novelis Corp. v. N.L.R.B.*, 885 F.3d 100, 108 (2d Cir. 2018) (individual action must be "engaged in with the object of initiating or inducing group action").

The Board also did not identify any evidence suggesting that the individual conduct *logically grew out of* earlier collective activity involving specific workplace complaints. The Board merely credited the

employee's after-the-fact assertion that the apron display was connected to group concerns. It ignored that the individual conduct began months *before* any of the group complaints. The Board thus failed to identify a "direct link" between Bo's individual conduct and any prior group activity. As Home Depot notes, neither the employee nor anyone else drew a connection between the apron display and earlier group activity. App. Br. at 34. It defies the meaning of "logical outgrowth" to find, as the Board did here, that conduct which indisputably began before any concerted activity can have grown out of that activity. The dissent correctly noted that the finding that "an act that was *not* concerted as a logical outgrowth of prior protected concerted activity at its inception *can become* concerted on a 'logical outgrowth' theory in light of subsequent events . . . represents an unprecedented extension of the 'logical outgrowth' theory." Add.30 (Kaplan, M., dissenting) (emphasis in original). The Board's interpretation of "concerted" is thus unreasonable even under *Chevron*.

2. The Board also erred by conflating the concertedness inquiry with the purpose inquiry. As the Board has repeatedly held, concertedness is distinct from, and must be determined *before*, purpose.

See Meyers I, 268 NLRB at 496. Here, the Board first identified the alleged purpose of Bo's conduct and then extrapolated backwards in a hunt for some concerted activity that might conceivably relate to that purpose. This confuses the inquiry. Even if one credits the Board's view that Bo's conduct might further the purpose of addressing workplace concerns, concertedness is a distinct and separate inquiry, as the Board acknowledged. Add.18 n.42.

The Board appears to have concluded that because both Bo's individual conduct and the group complaints arguably pursued the same broad purpose, Bo's actions must have been a logical outgrowth of that group activity. But that puts the cart before the horse. The first question is whether *Bo's specific conduct* was concerted action, and the Board cannot back into an answer on that question by identifying a "purpose" for Bo's conduct—framed at a sufficiently high level of generality—and then identifying other group activity that pursues a similar purpose. An employee's complaint about air quality in the workplace is not "concerted" merely because the purpose of the complaint is to address employee safety and a group of employees have previously complained about slippery floors. The logical outgrowth theory requires the

individual's activity to be a logical outgrowth of previous *group activity*. A common purpose vaguely connecting group activity and an individual's conduct is not the sort of "direct link" that can support a finding of concerted activity.

3. The Board further erred by equating parallel activity with concerted action. The Supreme Court (*City Disposal*, 465 U.S. at 834), the D.C. Circuit (*Prill I*, 755 F.2d at 952 n.66), and the Board (*Meyers II*, 281 NLRB at 883–84) have all observed that Congress drew the phrase "concerted activities" from earlier legislation that sought to exempt peaceful labor activity from the criminal conspiracy and antitrust laws. This provides a helpful clue to that phrase's meaning: criminal law and antitrust law use the idea of "acting in concert" to penalize coordinated activity, not merely parallel activity. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007) (explaining that "[e]ven 'conscious parallelism' . . . is 'not in itself unlawful'") (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)). There would have been no need to enact § 7 to protect conduct that the law did not deem "concerted" in the first place. The fact that other employees engaged in other conduct to address the workplace environment therefore

cannot by itself indicate concerted activity, just as it cannot be inferred that concerted action exists where one employee merely overhears the complaint of another. *Meyers I*, at 498.

* * *

The Board's decision here strayed far from Congress's original aim of ensuring parity in the collective bargaining process. The Board did not point to any evidence that Home Depot engaged in the kind of untoward conduct that motivated the passage of § 7 in the first place: *interfering* with employees' right to coordinate with coworkers for the purpose of raising complaints. On the contrary, Home Depot plainly allowed the employees at Bo's store to raise their complaints *collectively*. But the Board did not identify a "direct link" between Bo's individual conduct and those group complaints. Because the Board's decision stretches the concept of "logical outgrowth" beyond the breaking point, this Court should, at minimum, vacate and remand for the Board to apply the proper standard.

III. The Board's Decision Improperly Shifts the Burden of Proof of Concertedness to Employers.

The Board erred not just as a matter of substance but also as a matter of evidentiary procedure. Though it claimed to determine

concertedness under an objective standard, Add.5, the Board relied entirely on Bo's alleged *motivation*, rather than on evidence of actual or incipient *collective activity*. *Id.* at 4, 8. It then held that such evidence provided sufficient notice to Home Depot of concertedness. *Id.* This decision leaves employers without objective, advance guidance for determining whether and when individual conduct qualifies as "concerted."

Employees should not be immunized from discipline based merely on their asserted motivations for engaging in conduct when (1) the challenged individual conduct predated the group activity and (2) there is no objectively discernible nexus between the group activity and the individual activity. Nor should employers bear the burden of scouring their records or institutional memory to find collective activity that may have some possible connection to a superficially unrelated individual grievance for fear that the Board will retroactively determine that the employer interfered with employee rights of association. There must be objective, unambiguous evidence of actual or incipient coordination of *activity* before the General Counsel can meet her burden of proof. Such evidence is entirely missing from the record here.

The Board criticized the dissenting member for supposedly seeking to impose a new, "plainly evident" standard of proof. Add.17. This misses the point, which is not so much the standard of proof as the *object* of proof. The Court should reinforce that the General Counsel must prove past (or attempted future) coordinated *activity* among the employees about a specific workplace practice or policy. This follows from the plain language of § 7. An employee's subjective *sentiment*, which may be shared with other employees but does not "look toward" some group action or logically grow out of group action, is not sufficient evidence of concerted action. *Mushroom Transp.*, 330 F.2d at 685.

The burden of proof also cannot be shifted to the employer to show that the individual activity was *not* concerted, another result of *Meyers* overruling *Alleluia*. As Home Depot explains, the Board interpreted § 7 to cover employee statements only tangentially related to workplace concerns. App. Br. at 31 & 31 n.2. The Board itself acknowledged that non-workplace concerns motivated the conduct at least in part. Add.8 n.21. Yet it expected Home Depot to parse employee motives for possible signs of concertedness.

This imposes an impossible burden on employers. It effectively requires them to presume that wherever an individual's conduct reflects non-workplace concerns, it may *also* involve workplace concerns shared by other employees. This Court should clarify that this is not the standard. When reversing *Alleluia*, the *Meyers* cases reasoned that even where enacted legislation (such as that relating to safety) reflects public concern about a workplace issue, a presumption of agreement among an individual's coworkers not only shifts the burden of proof to negate agreement, but also eliminates the reliance on "observable evidence of group support." *Meyers I*, 268 NLRB at 496. Where an employee has mixed motives, it remains the General Counsel's burden to show by objective, *observable* evidence that the individual's conduct directly, as opposed to indirectly or tenuously, relates to concerted action about a specific employer policy. The Board improperly shifted that burden here.

CONCLUSION

As the history of § 7 shows, employers face unpredictable, fluctuating interpretations of the NLRA. The Court can provide helpful guidance by reminding the Board that the definition of "concerted" in § 7 may be broad but is not limitless. The Board here exceeded the

provision's limits, retroactively transforming one individual's conduct into action that is "concerted" under no reasonable lay or legal understanding of that term. The connection between individual and collective action must be objectively discernible to the reasonable employer. At a minimum, the Board's decision should be vacated because its understanding and application of § 7 were error.

Dated: May 29, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 6,380 words excluding the parts of the brief that Federal Rule of Appellate Procedure 32(f) exempts. The brief thus complies with Federal Rules of Appellate Procedure 32(a)(7) and 29(a)(5).

The brief also complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and Federal Rule of Appellate Procedure 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word in Century Schoolbook 14-point font.

Dated: May 29, 2024

/s/ *Robert E. Dunn*
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CERTIFICATE OF SERVICE

I hereby certify that, on May 29, 2024, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit through the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by that system.

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