UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC and CHARLES ROBINSON, an individual	Case Nos. 14-CA-197985 14-CA-208242

BRIEF OF *AMICI CURIAE* AMERICAN HOSPITAL ASSOCIATION AND FEDERATION OF AMERICAN HOSPITALS IN SUPPORT OF RESPONDENT

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In response to the Board's Notice and Invitation to File Briefs dated September 5, 2019, the American Hospital Association ("AHA") and the Federation of American Hospitals ("FAH") respectfully submit this brief as *amici curiae* in support of Respondent.

STATEMENT OF INTEREST

The AHA is a national not-for-profit association that represents the interests of nearly 5,000 hospitals, health care systems, networks, and other health care providers, as well as 43,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed.

The FAH is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems throughout the United States. Members include teaching and non-teaching hospitals in urban and rural parts of America, as well as inpatient rehabilitation, psychiatric, long-term acute care, and cancer hospitals. Dedicated to a market-based philosophy, the FAH provides representation and advocacy on behalf of its members to Congress, the Executive Branch, the judiciary, media, academia, accrediting organizations, and the public.

Most of the employers that belong to the AHA and the FAH are subject to the National Labor Relations Act (the "Act"). Many member health care employers interact frequently with organized labor, in circumstances that range from long-standing collective bargaining relationships to initial organizing campaigns.

The AHA, the FAH (together, "*Amici*"), and their members share the same general interest that all employers have in maintaining order and civility in the workplace, but health care

employers also have a special concern with legal developments that may interfere with the delivery of patient care or may result in disruptions in their facilities. The mission of health care employers is to provide quality patient care at the highest level and in the most efficient manner. As part of this mission, health care employers must be able to foster a peaceful and tranquil environment that promotes their patients' wellbeing. Disruptions to that tranquility harm patients and, moreover, are likely to upset their families and visitors. Thus, America's health care employers have a special interest in the Board's interpretations of the Act governing employees' egregious, offensive, or opprobrious conduct that disrupts the workplace and harms the delivery of care.

SUMMARY OF ARGUMENT

The *Amici* join the arguments in the *amicus curiae* brief of the Coalition for a Democratic Workforce that certain employee conduct is sufficiently egregious that it should be *per se* beyond the Act's protection, that the Board should harmonize the Act's protections with relevant anti-discrimination and anti-harassment laws, and that the Board should not have a separate standard for picket line conduct. The *Amici* therefore urge the Board to overrule *Plaza Auto Center,* 360 NLRB 972 (2014), *Pier Sixty, LLC,* 362 NLRB 505 (2015), and *Cooper Tire*, 363 NLRB No. 194 (May 17, 2016).

AHA and FAH write separately to emphasize the importance of safeguarding the tranquility of the health care environment, and to encourage the Board to modify the *Atlantic Steel*[1] and totality of the circumstances tests in such settings. Specifically, and as explained more fully below, the Board should modify its standards governing the evaluation of offensive employee conduct to account for longstanding Congressional and Supreme Court recognition of the unique circumstances that arise in health care settings. The policy justifications underpinning the Board's

[1] 245 NLRB 814 (1979).

prior decisions assessing whether offensive employee conduct should be protected – *i.e.*, the need to account for the "realities of industrial life" and that the "language of the workplace is 'not the language of polite society'" – are in irrevocable tension with the Congressional and Supreme Court directives to the Board to frame its standards to account for the special need to maintain a tranquil health care environment for patients and their families.

The Board should adopt a modified *Atlantic Steel* test for health care settings under which employee conduct that occurs in a health care setting and violates a lawful employer rule is presumptively not protected by the Act. This presumption would also apply to the "totality of the circumstances" analysis governing employee-to-employee outbursts, which incorporates the *Atlantic Steel* factors. The proposed presumption would not eliminate protection for all conduct that violates a lawful employer policy. Rather, the proposed presumption, while strong, could be rebutted by the remaining factors in the *Atlantic Steel* and totality of the circumstances tests, such as through an evidentiary showing that the employer knowingly tolerated the same or similar conduct in circumstances not related to allegedly otherwise protected conduct.

ARGUMENT

The *Amici* join the arguments contained in the *amici curiae* brief of the Coalition for a Democratic Workforce that certain employee conduct during the course of otherwise protected activity is so egregious that it should be *per se* beyond the Act's protection, that the Board should harmonize the Act's protections with relevant anti-discrimination and anti-harassment laws, that the Board should have not have a separate standard for employee conduct on picket lines, and, therefore, that *Plaza Auto Center, Pier Sixty, and Cooper Tire* were wrongly decided and should be overturned.

AHA and FAH write separately to highlight a significant point of concern for America's

health care employers, *i.e.,* the need to safeguard the peace and tranquility in a health care setting to support a proper healing environment for patients and their families. As such, the *Amici* urge the Board to modify the *Atlantic Steel* test by holding that conduct in violation of legitimate employer rules in health care settings is presumptively not protected by the Act.

I. The Supreme Court, Congress, and the Board Have Long Recognized the Unique Considerations That Arise in Health Care Settings.

For almost half a century, Congress, the Supreme Court, and the Board have recognized that health care employers have a compelling interest in providing patients and their visiting family and friends a peaceful healing environment that is conducive to the delivery of high quality patient care. Both labor and management have recognized the paramount importance of patient care and, thus, the unique considerations that must be given to health care facilities under the Act. Accordingly, in its Report on the 1974 Amendments to the NLRA – which extended the Act's coverage to non-profit hospitals – the Senate Committee on Labor and Public Welfare noted:

> Many of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care institutions. There was a recognized concern for the need to avoid disruption of patient care wherever possible.

COMM. ON LABOR AND PUBLIC WELFARE., 93rd CONG., LEGISLATIVE HISTORY OF THE COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, 1974, at 13. Then-Senator and Committee Member Robert A. Taft, Jr. best articulated this general sentiment:

> It is important to remember that hospitals are not factories or retail establishments, and that patients are not raw material or merchandise. Hospitals are for human beings and actions taken pursuant to this legislation must take this fact into account.

Id. at 116.

A few years later, the Supreme Court echoed this principle regarding health care environments:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike are often under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, *rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.*

NLRB v. Baptist Hospital, 442 U.S. 773, 783 n.12 (1979) (emphasis added); *see also Beth Israel Hosp. v. NLRB,* 437 U.S. 483, 495 (1978) ("[T]he primary function of a hospital is patient care" and "a tranquil atmosphere is essential to the carrying out of that function.") (internal quotation omitted).

The Supreme Court has thus instructed the Board to tailor its rules to account for the unique concerns that arise in health care settings. In *Beth Israel*, for example, the Supreme Court cautioned:

> [T]he Board [bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar.

437 U.S. at 508 (citation omitted). The following year, the Court directed the Board to "frame its rules and administer them with careful attention to the wide variety of activities within the modern hospital." *Baptist Hospital,* 442 U.S. at 789-90 n. 16.

The Board, in implementing these principles, has long recognized the importance of avoiding conflict and disruption in various areas in health care settings and has created a unique set of rules governing protected activity in such health care environments. *See, e.g*., *Flagstaff Medical Center, Inc.,* 357 NLRB 659, 693 (2011) (upholding a hospital-wide ban on unauthorized photography); *St. John's Health Center,* 357 NLRB 2078 (2011) (noting that, in health care

facilities, restrictions on wearing insignia in patient care areas are presumptively valid); *Intercommunity Hospital,* 255 NLRB 468, 472-74 (1981) (upholding hospital's ban on solicitation in halls, corridors, lobby, waiting room, and nurses stations).

While certain of these decisions authorize broad employee conduct restrictions, others attempt to draw a distinction between restrictions in "immediate patient care areas" from other areas in a health care setting. *See e.g., St. John's Health Center,* 357 NLRB at 2078-79. Even in these cases, however, prior Board Members have acknowledged the senselessness of drawing lines between "immediate patient care areas" and other areas in a health care environment, given that "patients benefit from an atmosphere of serenity and well[-]being" that extends to all areas. *Brockton Hospital,* 333 NLRB 1367, 1371 (2001) (Member Hurtgen, dissenting in part) (arguing for permitting hospitals to institute broad restrictions on Section 7 activity); *cf. Beverly Health and Rehabilitation Services, Inc.,* 346 NLRB 1319, 1323 n.22 (2006) (Member Schaumber, dissenting) (arguing that employee's profane attack against co-worker in breakroom of health care facility should have lost the Act's protection, and noting that such conduct "can provoke further confrontation" in other areas and, at the very least "create[] tension among employees which is not easily left at the breakroom door").

II. The Board Should Adopt a Modified Test For Determining When Offensive Speech in a Health Care Setting Loses Protection of the Act.

The Board's framework for determining whether an employee's outburst is nevertheless protected is unworkable in a health care environment and is inconsistent with Congress's and the Supreme Court's mandate that the Board recognize health care employers' unique need for tranquility and to insulate the health care environment from the "tensions of the marketplace." Accordingly, the Board should adopt a modified framework to evaluate speech in a health care setting.

The Board applies the "*Atlantic Steel* test" when considering whether "direct communications, face-to-face in the workplace, between an employee and a manager or supervisor" lose protection of the Act. *Three D, LLC,* 361 NLRB 308, 311 (2014). Under *Atlantic Steel,* the Board considers four factors: (1) the location of the activity; (2) the subject matter of the activity; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB at 816.

In cases involving statements "made by one employee to another," the Board generally relies upon the "totality of the circumstances" analysis. *Fresenius USA Mfg., Inc.,* 358 NLRB 1261, 1267 (2012). The "totality of the circumstances" analysis "necessarily…encompasses the *Atlantic Steel* factors," (*id.*), as well as others, such as:

> (i) whether the employer maintained a rule prohibiting the language used by the employee; (ii) whether the employer generally considered language such as that used by the employee to be offensive; (iii) whether the employee's statement was impulsive or deliberate; (iv) whether the discipline imposed on the employee was typical of that imposed for similar violations…(v) whether the discipline was clearly directed at offensive language as opposed to protected activity; (vi) whether the record contains any record of anti-union hostility; and (vii) whether the employee had previously engaged in similar protected conduct without objection.

Pier Sixty, 362 at 531 (noting that the "totality of the circumstances test" incorporates the *Atlantic Steel* factors).

The Board should follow Congressional and Supreme Court directives to "frame its rules and administer them" for the modern health care setting, *Baptist Hospital,* 442 U.S. at 789-90 n.16, and acknowledge that a tranquil atmosphere is critical to such environments' essential patient care function, *Beth Israel,* 437 U.S. at 495. Accordingly, the Board should modify the *Atlantic Steel* test as discussed below when assessing whether concerted activity accompanied by offensive

speech in a health care environment is nonetheless protected.[2]

A. The Current *Atlantic Steel* and Totality of the Circumstances Tests Should Not Apply to Health Care Settings.

More than forty years ago, the Board explained that the basis for its policy of permitting "offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities" is that "the language of the shop is not the language of 'polite society.'"[3] *Dreis & Krump Mfg., Inc.,* 221 NLRB at 315 (collecting cases, and finding that manufacturer of metal forming equipment violated the Act by discharging employee who publicly criticized his employer).

It is on that basis that the Board has justified finding that employees did not lose protection of the Act when they used profanity and other offensive speech in the course of otherwise protected activity. For example, in *Plaza Auto Center,* the Board found that an employee did not lose protection of the Act when he called the business owner a "fucking motherfucking crook," a "fucking crook," "stupid," and an "asshole." 360 NLRB at 973. And in *Nexteer Automotive Corp.,* 368 NLRB No. 47, slip op. at *1 (Aug. 27, 2019), the Board found that an employee did not lose protection of the Act despite repeatedly yelling "fuck you" and "go fuck yourself" at his manager. *See also, e.g., Fresnius USA Mfg.,* 358 NLRB at 1265-66 (employee did not lose protection despite using the salutation "dear pussies" to address co-workers in newsletter, even though it is vulgar and can be construed as demeaning to women); *Kiewit Power Corp.*, 355 NLRB 708, 710 (2010) (employees who told a supervisor that the situation could "get ugly," and that supervisor "better

[2] This modification would further extend to the "totality of the circumstances" analysis governing employee-to-employee conduct, which "necessarily…encompasses the *Atlantic Steel* factors." *Fresenius USA Mfg.*, 358 NLRB at 1267.

[3] The Board has more recently expanded its principle regarding the language of the industrial shop to that of the "workplace." *Compare Dreis & Krump Mfg., Inc.,* 221 NLRB 309, 315 (1975) (noting, in industrial setting, that the "language of the shop is not the language of 'polite society,'") *with Plaza Auto Center,* 360 NLRB at 978 ("[T]he language of the workplace 'is not the language of polite society'").

bring his boxing gloves" did not lose protection); *Alcoa Inc.,* 352 NLRB 1222, 1226 (2008) (employee who called supervisor an "egotistical fucker" did not lose protection); *Tampa Tribune,* 351 NLRB 1324, 1326 (2007) (employee did not lose protection despite referring to vice president as a "stupid fucking moron"); *Beverly Health & Rehabilitations Services,* 346 at 1322-1323 (employee did not lose protection when she told another employee to "mind her fucking business"); *Union Carbide Co.,* 331 NLRB 356, 360 n.1 (2000) (employee did not lose protection despite calling supervisor a "fucking liar"); *Severance Tool Industries,* 301 NLRB 1166, 1178 (1991) (employee did not lose protection despite calling company president a "son of a bitch"); *Burle Industries,* 300 NLRB 498, 502-04 (1990) (employee did not lose protection despite calling supervisor a "fucking asshole").[4]

The Board has rationalized protecting such opprobrious statements by explaining that employees have more latitude for "impulsive behavior" in the course of otherwise protected activity because "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *see also Kiewit Power Constructors Co.*, 355 NLRB at 710 (noting that the Board distinguishes between cases where employees engaged in concerted activities exceed the bounds of lawful conduct "in a moment of animal exuberance" and "those flagrant cases in which the

[4] Likewise, in cases where the Board did not apply *Atlantic Steel*, the Board has found that employees who engaged in similarly opprobrious conduct did not lose protection of the Act. In *Pier Sixty, LLC*, for instance, an employee retained the Act's protection despite his profanity-laden Facebook post, wherein he described his supervisor as a "NASTY MOTHER FUCKER" and a "LOSER," and further stated "Fuck his mother and his entire fucking family!!!!" 362 NLRB at 505-507. And in *Cooper Tire,* the Board found that an employee's racist comments on the picket line – where he stated, regarding African-American replacement workers, "Did you bring enough KFC for everybody?" and "I smell fried chicken and watermelon" – did not lose protection of the Act. 363 NLRB No. 194, slip op. at *2. The *Amici* adopt the position of the Coalition for a Democratic Workforce with respect to *Pier Sixty* and *Cooper Tire* in general, although the *Amici* also argue that their proposed presumption applicable in health care settings outlined in Section II-B, *infra*, at 12-14, should also be applied to picket line conduct directed against a health care employer. For a full discussion of the *Amici*'s position regarding picket line misconduct, *see* Section III, *infra*, at 16-17.

misconduct is so violent or of such a character as to render the employee unfit for further service."). The Board has also justified protection by explaining that "leeway" must be granted for offensive behavior due to the "realities of industrial life." *Plaza Auto Center,* 360 NLRB at 978 (citations omitted).

As the Supreme Court has explained, however, "[h]ospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that ***do not apply in the industrial settings*** with which the Board is more familiar." *Beth Israel*, 437 U.S. at 508, quoted in *Baptist Hosp.*, 442 U.S. at 790 (emphasis added). Thus, the basis for the Board's current formulation of the *Atlantic Steel* and totality of the circumstances tests should be inapplicable to offensive speech in a health care facility. Moreover, regardless of whether offensive language is exclaimed "in a moment of animal exuberance" or is characteristic of the modern "realities of industrial life," it is fundamentally at odds with the mission of health care employers where "patients and relatives alike are often under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family…need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." *Baptist Hospital,* 442 U.S. at 783 n.12.

Despite this fundamental incompatibility between the Board's concept of "industrial" workplaces and health care environments, the Board has repeatedly applied the *Atlantic Steel* factors in assessing offensive conduct in health care settings by improperly considering the "realities of industrial life" rather than the unique considerations the Supreme Court recognized. *See, e.g.*, *Advoserv of New Jersey, Inc.,* 363 NLRB No. 143 (Mar. 11, 2016) (finding employee of behavioral health care provider did not lose protection of Act despite calling supervisor "jackass,"

and comparing employee favorably to other conduct found protected outside of health care setting); *Gaylord Hospital,* 359 NLRB 1266, 1277-78 (2013) (relying on the "realities of industrial life" and failing to consider the unique health care environment in holding employee's outburst protected).

In other cases, the Board has failed to appreciate a health care employer's "public function of the utmost seriousness and importance" (437 U.S. at 508) and that patients and their families need a restful and relaxing atmosphere, "rather than one remindful of the tensions of the marketplace" (442 U.S. 783 n.12). For example, in *Traverse City Osteopathic Hospital,* 260 NLRB 1061 (1982), the Board addressed an employee's outburst directed at another employee in the hospital's cafeteria.[5] Specifically, the employee – during a discussion about unionizing – called another employee seated nearby a "brown-nosing suck-ass" due to her misgivings about organizing. *Id.* at 1061. The employer discharged the offending employee due to his misconduct, but the Board found that the employee's outburst was protected by the Act. *Id.* at 1061-62. In so doing, the Board did not give the necessary weight to the location of the outburst (a hospital's cafeteria that served patients and their families, in addition to employees), noting only that there were "few" nonemployee visitors in the cafeteria at the time. *Compare id. with Beth Israel,* 437 U.S. at 509 (Blackmun, J., concurring) (noting that "[p]atients and their families are not to be treated as impersonal categories or classes").

The Board should adopt a modified – and clear – standard that applies to conduct that occurs on the campus of a health care employer and that accounts for the unique considerations

[5] If it were decided today, *Traverse City Osteopathic Hospital* – addressing an employee-to-employee outburst – would likely be decided under the Board's "totality of the circumstances" test, which incorporates the *Atlantic Steel* factors. *See* FN 2, *supra.* Thus, any modification to the *Atlantic Steel* test to account for the Board's responsibility to tailor its rules to health care settings would also alter the analysis in cases like *Traverse City Osteopathic Hospital.*

that arise in health care settings and the importance of maintaining a tranquil atmosphere. *Baptist Hospital,* 442 U.S. at 789-90 n.16.

B. A Modified Standard For Health Care Settings.

The Board's current application of the *Atlantic Steel* and totality of the circumstances tests is premised upon "realities of industrial life" that are not suitable to – and are fundamentally in tension with – health care employers' unique mission to foster a tranquil environment. As such, the *Amici* urge the Board to modify the *Atlantic Steel* test to resolve this tension by incorporating a special standard for health care settings. This modified *Atlantic Steel* test would necessarily extend to cases involving employee-to-employee outbursts which are currently analyzed under the "totality of the circumstances" test.

The first *Atlantic Steel* factor – the location of the conduct – should include a determination of whether the conduct or activity at issue occurred on a health care employer's campus. Conduct that took place on a health care employer's campus should be presumptively unprotected if it violates a lawful employer rule.[6] While this presumption should be strong, it could nonetheless be overcome by the remaining *Atlantic Steel* (and, where applicable, totality of the circumstances) factors, such as evidence that the employer knowingly tolerated the same or similar conduct in circumstances unrelated to concerted activity. This framework, consistent with longstanding Supreme Court precedent, more appropriately balances the unique considerations that arise in a health care setting with the latitude granted to employees engaged in concerted activity.

The modified standard should apply to all areas of a health care facility's campus. Health care settings are diverse and open environments, with patients and family members in many areas

[6] That is, a rule that is lawful under the framework adopted by the Board in *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

outside of "immediate patient care areas," such as lobbies, waiting rooms, cafeterias, and parking lots. Requiring that patients or visitors actually witness an employee's misconduct creates an unworkable standard. *See, e.g.*, *Gaylord Hospital,* 359 NLRB at 1278 (finding misconduct protected where there was no evidence that the outburst was overheard by patients or visitors); *Beverly Health and Rehabilitation Services, Inc.,* 346 NLRB at 1322-23 (finding conduct protected where there was no evidence it was overheard by patients or visitors). It is impractical and inappropriate to require that health care employers ask patients or visitors whether they witnessed an employee's offensive conduct before they can discipline the employee. Even worse would be requiring that health care employers rely on patients or their family members for evidence in defense of an unfair labor practice charge. Imagine, for example, requiring that a health care employer ask a patient undergoing cancer treatment for a signed statement regarding the profane language or sexually or racially offensive outbursts she witnessed. *See Baptist Hospital*. 442 U.S. at 783 n.12 ("the patient and his family …need a restful, uncluttered, relaxing and helpful atmosphere…"). The *Amici*'s proposed standard – that employee offensive conduct that occurs anywhere on the campus that violates a lawful rule is presumptively unprotected – eliminates the unworkable and inappropriate burden on health care employers to obtain admissible evidence that a patient or family member witnessed the conduct.

Applying the modified test to all areas of a health care campus is consistent with Supreme Court and other precedent. The Supreme Court has recognized that the "modern hospital houses a complex array of facilities and techniques used for patient care and therapy that defy simple classification." *Baptist Hospital,* 442 U.S. at 789-90 n.16. For example, patients who are not under immediate treatment and their visitors also use other areas of health care facilities such as "recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even the

corridors, where patients are often encouraged to walk, or to visit with their families." *Id.* Outpatient clinics, short-stay units, elevators, stairways, coffee shops, and cafeterias also serve patients, their families, their friends, and other visitors. *Id.*; *see also Beth Israel,* 437 U.S. at 509 (Blackmun, J., concurring) (noting that hospital cafeterias and similar areas have "far more than commercial interests at stake" and that "[p]atients and their families are not to be treated as impersonal categories or classes"). Likewise, patients and their visitors also use and access the parking lots, lobby, waiting areas, outdoor space between buildings, gift shop, billing department administrative offices, and other areas of a health care facility's campus. A health care employer's mission to provide a tranquil environment, therefore, extends beyond the "simplistic 'immediate patient care criterion,'" to all areas of its campus. *Cf. Baptist Hospital,* 442 U.S. at 789-90 n.16.

III. Answers to the Board's Questions in *General Motors.*

Based on the foregoing, the *Amici* provide brief answers to the questions enumerated by the Board in its invitation to file briefs.

Question 1.[7] As explained more fully in Sections II-A and II-B, *supra*, in health care environments, offensive speech that violates lawful, legitimately adopted and fairly applied employer policies should be presumptively unprotected by the Act. The *Amici* adopt the position and standard laid out in the *amicus curiae* brief of the Coalition for a Democratic Workforce for settings other than health care.

Question 2.[8] The "realities of industrial life" that the Board has held require granting

[7] Question No. 1 states, "Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act?" In *Plaza Auto*, although the nature of Aguirre's outburst weighed against protection, the Board found that the other three *Atlantic Steel* factors favored protection, and it concluded that Aguirre retained the Act's protection. And although the *Plaza Auto* majority did not say that the nature of the outburst could never result in loss of protection where the other three factors tilt the other way, it also did not say that it ever could. Are there circumstances under which the 'nature of the employee's outburst' factor should be dispositive as to loss of protection, regardless of the remaining *Atlantic Steel* factors? Why or why not?" *General Motors LLC,* 368 NLRB No. 68, slip op. at *2 (Sept. 5, 2019).

[8] Question No. 2 states, "The Board has held that employees must be granted some leeway when engaged in

employees some leeway are fundamentally incompatible with the day-to-day realities of the health care environment and the mission of health care employers and do not apply to health care settings. *See Beth Israel*, 437 U.S. at 508 (the public function of health care employers gives rise to "unique considerations that ***do not apply in the industrial settings*** with which the Board is more familiar") (emphasis added); *see also* discussion in Sections I and II-A, *supra*. In addition, the *Amici* adopt the position and standard laid out in the *amicus curiae* brief of the Coalition for a Democratic Workforce regarding language that is offensive on the basis of race or sex in any type of workplace setting.

Question 3.[9] In a health care setting, the Board should hold that employees' outbursts that violate a lawful employer rule are presumptively unprotected. *See* Section II-B, *supra.* Under the *Amici*'s proposed modified test, the norms of the health care workplace (considered in *Atlantic Steel* factor three – the nature of the outburst – or, where applicable, the totality of the circumstances test factors considering whether evidence exists that the employer knowingly tolerated the same or similar offensive language in circumstances not involving concerted activities) are relevant in determining whether an employee has overcome the presumption. Outside of the health care context, the *Amici* adopt the position and standard laid out in the *amicus curiae* brief of the Coalition for a Democratic Workforce.

Section 7 activity because '[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.' *Consumers Power Co.,* 282 NLRB 130, 132 (1986). To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?" *Id.*

[9] Question No. 3 states, "In determining whether an employee's outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. *See, e.g., Traverse City Osteopathic Hospital,* 260 NLRB 1061 (1982). Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?" *Id.*

Question 4.[10] The Board should not have a separate standard applicable to picket lines. Given that picket line activity at a health care employer's campus undoubtedly affects the health care environment for patients and their families, picket line misconduct at such a location should be governed by the modified test for health care settings discussed in Section II-B, *supra*.

Moreover, the Board's near blanket protection of picket line misconduct that violates lawful company conduct rules places employers in the contradictory position of choosing between complying with the Act or applicable anti-discrimination and anti-harassment laws. This conflict is exacerbated because employers are vicariously liable for actionable discrimination of their employees if they have knowledge of such harassment and take no action to remedy it. *See generally Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). The First, Second, Seventh, and Eighth Circuit Courts of Appeals have all acknowledged that harassment outside of the workplace – including in parking lots and on picket lines – can serve as the basis for a Title VII complaint. *See, e.g., Crowley v. L.L. Bean, Inc.,* 303 F.3d 387, 409-10 (1st Cir. 2002) (harassment outside of the company's physical space – including in parking lot, at company-sponsored pool party, and stalking near plaintiff's home – could serve as basis for Title VII complaint against employer); *Ferris v. Delta Airlines, Inc.,* 277 F.3d 128, 135 (2d Cir. 2001) (same, where conduct took place in a hotel room); *Lapka v. Chertoff,* 517 F.3d 974, 983 (7th Cir. 2008) (same, conduct took place in private hotel room); *cf. Dowd v. United Steelworkers of Am.,* 253 F.3d 1093, 1102 (8th Cir. 2001) (conduct took place on picket line "in physical proximity to the plant [where plaintiff

[10] Question No. 4 states, "Should the Board adhere to, modify, or abandon the standard the Board applied in, *e.g., Cooper Tire, supra, Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995), *enf. denied sub nom. NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989), to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context--e.g., picket-line setting--when determining whether racially or sexually offensive language loses the Act's protection? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?" *Id.* at *3.

worked], and arguably perpetrated with the intention to intimidate and affect the working atmosphere inside the plant" could be imputed to union). As a result, it is imperative that the Board harmonize its standard governing employee misconduct on picket lines with Title VII and other relevant anti-discrimination and anti-harassment laws. For this reason, the *Amici* adopt the position and standard applicable to non-health care settings set forth in the *amicus curiae* brief of the Coalition for a Democratic Workforce.

Question 5.[11] Regardless of the workplace setting, the Board's interest in granting "leeway" based on the "realities of industrial life" has resulted in protection for sexist (*e.g.*, *Fresenius*) and racist (*e.g.*, *Cooper Tire*) conduct in direct conflict with anti-discrimination and anti-harassment laws. The Act, however, must coexist with other applicable statutes – undergirded by equally important policy considerations – prohibiting discrimination and harassment based on race, color, creed, national origin, sex, age, disability, and others.[12] In a June 2016 report, the Equal Employment Opportunity Commission ("EEOC") highlighted the conflict between the EEOC's enforcement of the laws that it administers and the NLRB's enforcement of the Act. *See* Chai R. Feldblum & Victoria A. Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace*, at 43 (June 2016). In the report, the EEOC "recommend[ed] that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA." *Id.* And the EEOC has explained that sex and race-based conduct found

[11] Question No. 5 states, "What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act? How should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?" *Id.*

[12] *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (prohibiting discrimination and harassment on the basis of race, color, creed, national origin, and sex); Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (prohibiting discrimination and harassment on the basis of age); Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (prohibiting discrimination and harassment on the basis of disability).

protected in past Board decisions may be "sufficiently severe to violate Title VII, or it might violate Title VII if the conduct were to be repeated." Brief for the EEOC as Amicus Curiae at 22, *General Motors LLC,* Case Nos. 14-CA-197985, 14-CA-208242 (NLRB Nov. 4, 2019) (collecting cases). As such, the EEOC's position is that "employers should be able to address and take corrective action vis-à-vis workers who use [] racist and sexist language while otherwise lawfully exercising their rights under the NLRA." *Id.*

The NLRB is not an "überagency" authorized to ignore other relevant laws governing workplace conduct (*Plaza Auto Center,* 360 NLRB at 986 (Member Johnson, dissenting)), and "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) (noting that "it is not too much to demand of an administrative body" to "careful[ly] accommodate[e] one statutory scheme to another."). Indeed, "in the modern, extensively regulated workplace, it is essential for an employer to proscribe profane behavior that could be viewed under other employment laws as harassing, bullying, create a hostile work environment, or a warning sign of workplace violence." *Plaza Auto Center,* 360 NLRB at 986 (Member Johnson, dissenting). Employers should not have to choose between risking a violation of one federal statute and risking a violation of another federal statute.

Therefore, in response to Question 5, the *Amici* adopt the position and standard laid out in the *amicus curiae* brief of the Coalition for a Democratic Workforce.

CONCLUSION

For the reasons stated above, as well as those stated in the *amici curiae* brief of the Coalition for a Democratic Workforce, the AHA and FAH respectfully request that the Board overrule *Plaza Auto Center, Pier Sixty LLC,* and *Cooper Tire,* and adopt an *Atlantic Steel* test that accounts for the critical role of providing patient care in a tranquil environment and the unique considerations that arise in health care settings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2019, a copy of the Brief of *Amici Curiae* American Hospital Association and Federation of American Hospitals was filed electronically. True and correct copies of the brief were served to the following:

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