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Flip Flops Should Be Limited to Footwear: An Analysis of the NLRB's Ever-Changing Interpretations of Concerted Activity Under the NLRA

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Flip Flops Should Be Limited to Footwear: An Analysis of the NLRB's Ever-Changing Interpretations of Concerted Activity Under the NLRA

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ABSTRACT

After a period of labor hostility, Congress enacted the National Labor Relations Act ("NLRA") in 1935 to equalize the bargaining power between employers and employees, encourage collective bargaining, and protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Nine decades later, its terms and provisions still inspire debate. Section 7 of the NLRA protects, among other things, employees' right to engage in concerted activities. Because the makeup of the National Labor Relations Board (the "Board"), tasked with interpreting the NLRA, is vulnerable to changes in presidential administrations, the Board has flip-flopped on the issue of what activities constitute concerted activities under section 7. As a result, employers and employees alike are left unsure of how to comply with or exercise their rights under the NLRA.

Four major Board decisions have expanded or contracted the definition of concerted activity, creating both employer- and employee-friendly results along the way. Some interpretations of the term would protect individual employees, acting alone and with no evidence of group support. In contrast, other interpretations protect employees only when they band together with their coworkers or act alone, but with support from others or with an intention to induce their coworkers to act with them.

In late 2021, the Board's General Counsel encouraged another shift from an employer-friendly interpretation back to a more expansive, employee-friendly interpretation. This Comment argues that the Board

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should stay its course and continue adhering to the current, more limited interpretation. This Comment also recommends that Congress amend the NLRA to define concerted activity to promote clarity and efficiency.

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I. INTRODUCTION

Suppose a non-unionized fast-food employee complains about a new task of assembling bacon cheeseburgers in front of coworkers and management.[1] Should the employee receive protection from any adverse employment action the employer takes as a result of the complaint?[2] While most would view this type of complaint as akin to mere griping, some argue that Section 7 of the National Labor Relations Act ("NLRA")[3] would preclude the employer from handing down any punishment.[4]

1. *See* Alstate Maint., L.L.C., Case 29-CA-117101, 2019 N.L.R.B. LEXIS 8, at *5 (Jan. 11, 2019) (involving similar facts); *see also infra* Section II.B.7.

2. *See generally Alstate Maint.*, 2019 N.L.R.B. LEXIS 8 (involving a similar issue); *see also infra* Section II.B.7.

3. Section 7 provides that "[e]mployees 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

Section 7 of the NLRA protects, among other things, employees' concerted activities.[5] The National Labor Relations Board (the "Board"), tasked with interpreting the NLRA, has flip-flopped on the issue of what constitutes concerted activities under section 7.[6] The Board's interpretation of this provision does not affect unionized employees,[7] but because only 10.3% of American workers are unionized, it affects the vast majority of employees.[8] Under the current employer-friendly Board precedent, the fast-food employee would not receive protection for making this type of complaint and could be terminated as a result.[9] However, this precedent is under attack, as evidenced by a memo published in 2021 by Jennifer Abruzzo, the Board's General Counsel, which could leave employers across the country vulnerable to an attack on their right to maintain discipline in the workplace.[10] Another change in interpretation would perpetuate the instability and ineffectiveness of the NLRA.[11]

First, Part II of this Comment provides a brief history of the labor movement and the NLRA.[12] Part II also discusses the Board's historical approaches to defining concerted activity.[13] Next, Part III argues that the correct standard is the Board's current standard outlined in the *Meyers Industries, Inc.* and *Alstate Maintenance, L.L.C.* cases because it aligns with Congress's intent in enacting the NLRA and is consistent with Supreme Court guidance and the statute's plain language.[14] Finally, Part III encourages Congress to amend the NLRA to define concerted activity and provides a suggested definition.[15]

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collective bargaining or other mutual aid or protection." National Labor Relations Act of 1935, 29 U.S.C. § 157 (emphasis added).

4. *See, e.g.*, Wyndham Resort Dev. Corp., 356 N.L.R.B. 765, 766 (2011).

5. *See* § 157.

6. *See infra* Section II.B.

7. Current Board doctrine provides that employees covered by a collective bargaining agreement participate in concerted activity when they exercise rights under that agreement. *See* Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966). All collective bargaining agreements cover a wide range of subjects, including "wages, hours, and other terms and conditions of employment." NLRB v. Wooster Div., 356 U.S. 342, 348 (1958) (quoting § 158(d)).

8. *Union Members Summary*, BUREAU OF LAB. STAT., DEP'T OF LAB. (Jan. 20, 2022, 10:00 AM), https://bit.ly/34UQytk.

9. *See generally* Alstate Maint., L.L.C., Case 29-CA-117101, 2019 N.L.R.B. LEXIS 8 (Jan. 11, 2019).

10. *See* OFF. OF GEN. COUNS., N.L.R.B., GC 21-04, MANDATORY SUBMISSIONS TO ADVICE 3 (2021) [hereinafter GC Memo].

11. *See infra* Part III.

12. *See infra* Section II.A.

13. *See infra* Section II.B.2.

14. *See infra* Part III.

15. *See infra* Part III.

II. BACKGROUND

After a long history of labor hostility, Congress enacted the NRLA,[16] but its terms and provisions are still subject to debate.[17] The Board has changed its interpretation of concerted activity under section 7 at least five times in less than 45 years.[18] The current General Counsel of the Board has targeted this area as one in need of yet another reform effort.[19]

A. Brief History of the Labor Movement and NLRA

In the eighteenth and nineteenth centuries, American labor policy began to form.[20] Union membership[21] grew to more than 5,000,000 by 1920, but declined in the 1930s due to union losses in large strikes and hostility from the courts.[22] As a result of the extreme hostility of labor management relations at the time, courts issued injunctions to stop workers' concerted efforts.[23] However, in 1932, Congress sought to stop the courts from issuing injunctions against workers participating in lawful concerted activity through the Norris-LaGuardia Act,[24] a precursor to the NLRA that made it unlawful for courts to issue injunctions absent a showing of violence or fraud.[25]

In 1933, Congress passed the National Industrial Recovery Act ("NIRA") as part of President Roosevelt's New Deal.[26] Section 7(a) of the NIRA is similar to Section 7 of the NLRA.[27] The NIRA sparked a

16. *See infra* Section II.A.

17. *See infra* Section II.B.

18. *See infra* Section II.B.

19. *See* GC Memo, *supra* note 10.

20. *See Pre-Wagner Act Labor Relations*, NLRB, https://bit.ly/2Zik88Y (last visited Sept. 20, 2021) [hereinafter *Pre-Wagner*].

21. A union member is a person who is part of a labor organization, defined as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." National Labor Relations Act of 1935, 29 U.S.C. § 152(5).

22. *See Pre-Wagner*, *supra* note 20.

23. *See id.*

24. Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70, 70 (1932).

25. *See Pre-Wagner*, *supra* note 20.

26. *See generally* National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

27. Section 7(a) of the NIRA states:

> (1) . . . employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid of

"renewed interest in organizing."[28] However, because employers were still hostile toward unions, President Roosevelt created the National Labor Board ("NLB") to encourage voluntary compliance with Section 7 of the NIRA.[29] The NLB had no meaningful enforcement power and was largely unsuccessful.[30] In 1935, the Supreme Court held that the NIRA was unconstitutional.[31] The same year, U.S. Senator Robert Wagner introduced the Wagner Act, or, as it is primarily known today, the NLRA.[32]

Congress passed the NLRA in 1935 to encourage collective bargaining and protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[33] Employers are inherently organized,[34] while employees act alone, which creates an imbalance in bargaining power between the two parties that Congress recognized and sought to remedy.[35]

Opponents of the NLRA attacked the law as "a regulation of labor relations and not of interstate commerce."[36] However, in *NLRB v. Jones & Laughlin Steel Corporation*, the Supreme Court upheld the statute as constitutional.[37] Although constitutional, the NLRA was biased toward organized labor.[38] Neither employers nor employees could sue unions under the NLRA as originally enacted.[39] In 1947, Congress sought to remedy that bias when it adopted the Labor-Management Relations Act,

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> protection; (2) . . . no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing . . . .

Id. § 7(a). *Compare id.*, *with* National Labor Relations Act of 1935, 29 U.S.C. § 157. See *supra* note 3 and accompanying text for the text of Section 7 of the NLRA.

28. *1933 The NLB and "The Old NLRB"*, NLRB, https://bit.ly/3s08Eme (last visited Feb. 18, 2022).

29. *See id.*

30. *See id.*

31. *See A.L.A. Schechter Poultry Corp.*, 295 U.S. at 551. The Court reasoned that Congress improperly delegated legislative power to the President and that the NIRA attempted to regulate practices with only an indirect effect on interstate commerce. *See id.* at 550.

32. *See 1935 Passage of the Wagner Act*, NLRB, https://bit.ly/3CuoKuk (last visited Sept. 20, 2021).

33. National Labor Relations Act of 1935, 29 U.S.C. § 151.

34. *See id.* (explaining that employers are inherently organized because they are "organized in the corporate or other forms of ownership association.")

35. *See id.*

36. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 25 (1937).

37. *See id.* at 30.

38. *See* 1 ANNE MARIE LOFASO, NATIONAL LABOR RELATIONS ACT: LAW AND PRACTICE § 1.01 (2d ed. 2021).

39. *See id.*

or the Taft-Hartley Act.[40] This Act amended the NLRA in a few notable ways.[41] Prior to the Taft-Hartley amendments, employees did not enjoy the right to refrain from participating in union and other concerted activities, but the amendments added the right to refrain from participating in the list of core employee rights under the NLRA.[42] Additionally, the NLRA originally specified a list of prohibited unfair labor practices ("ULPs") only for employers, but the Taft-Hartley amendments added several union ULPs to that list.[43]

The last substantial change to the NLRA occurred in 1959 with the Labor-Management Reporting and Disclosure Act, or the Landrum-Griffin Act.[44] The purpose of this Act was to add provisions to the NLRA that would "protect union members from improper union conduct."[45] Since 1959, there have been few changes made to the NLRA.[46] As it stands today, Section 7 of the NLRA outlines employees' rights.[47] It provides that "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."[48] This section codified and guaranteed employees' rights that had been under attack in the years leading up to the enactment of the NLRA.[49] Section 8 of the NLRA outlines employers' ULPs.[50] Under section 8(a)(1), employers commit a ULP if they "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[51]

In Section 3 of the NLRA, Congress created the Board and empowered it to enforce section 7 and other provisions of the NLRA.[52] The NLRA expressly empowers the Board to prevent and remedy ULPs.[53] When employers retaliate against employees engaging in protected activities, employers can face a broad range of Board-imposed

40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *Id.*
46. *See id.*
47. *See* National Labor Relations Act of 1935, 29 U.S.C. § 157.
48. *Id.* (emphasis added).
49. *See Pre-Wagner*, *supra* note 20.
50. *See* § 158.
51. § 158(a)(1).
52. *See* § 153.
53. *See* § 160(a).

penalties.[54] In 2020 alone, the Board ordered employers to pay $39.4 million in backpay, fees, dues, and fines.[55]

Typically, an Administrative Law Judge ("ALJ") hears a case brought under the NLRA first.[56] Parties can then appeal the ALJ's decision to the Board, which then decides whether to review the case and issue an order.[57] The Board does not have authority to enforce its own orders; rather, the Board must ask a federal court of appeals to enforce them.[58] Additionally, any aggrieved party can appeal a Board order by petitioning a federal court of appeals.[59] If a court of appeals remands a case to the Board, then the Board can either accept the remand or seek certiorari from the Supreme Court, but the Board most frequently opts to accept the remand.[60] When a case reaches the Board, the Board must interpret and apply the NLRA, which leads to inconsistent results over time.[61]

B. History of Board Interpretations of Concerted Activity

History shows that the Board tends to change its interpretations of the NLRA's provisions.[62] The Board's composition changes with each presidential administration, which creates instability in the Board's interpretations.[63] The Board's practice of flip-flopping can be seen in its varying definitions of concerted activity over time.[64]

1. The Board's Tendency to Change its Interpretations of the NLRA

There are five Board members, all of whom the President appoints for five-year terms.[65] The Board typically consists of three members of the same political party as the President and two members of the

54. The Board has broad discretion in imposing these penalties. *See* § 160(c) (empowering the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act"); *see also* NLRB v. Strong, 393 U.S. 357, 359 (1969) ("This grant of remedial power is a broad one.").

55. *See Monetary Remedies*, NLRB, https://bit.ly/3AL5Aiz (last visited Sept. 20, 2021).

56. *See Decide Cases*, NLRB, https://bit.ly/3KJ107h (last visited Jan. 25, 2022).

57. *See id.*

58. *See* § 160(e). Circuit courts review approximately 65 NLRB orders per year and side with the NLRB 80% of the time. *See Enforce Orders*, NLRB, https://bit.ly/3H6Y2WZ (last visited Feb. 18, 2022).

59. *See* § 160(f).

60. NLRB, GUIDE TO BOARD PROCEDURES 40 (2017), https://bit.ly/3rSXApJ.

61. *See infra* Section II.B.

62. *See infra* Section II.B.

63. *See infra* Section II.B.1.

64. *See infra* Sections II.B.2–7.

65. *See The Board*, NLRB, bit.ly/2YJEVCu (last visited Nov. 12, 2021).

opposing political party.[66] The appointments are structured so that one member's term expires each year.[67] Therefore, within three years of a new political party taking over the executive branch, the Board's composition and procedures lead to a new Board majority, bringing with it a new stance on labor policy.[68]

Unlike courts and other federal agencies, the Board frequently undergoes doctrinal shifts.[69] For example, the Board altered its standard for determining joint employment status multiple times.[70] The Board has also flip-flopped in other areas, such as addressing misrepresentations made in representation campaigns[71] and determining whether medical residents and graduate assistants qualify as employees under the NLRA.[72]

As the Board's membership changes, its interpretations of NLRA provisions change too.[73] As a result, employees and employers covered by the NLRA are left unsure of how to comply with its provisions.[74] The subject of this Comment serves as just one example of the Board's tendency to change its interpretations of NLRA provisions.[75] The Board has interpreted what constitutes concerted activity under section 7

66. *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board Revisited (With Special Reference to Decision-Bargaining Over Employer Relocation Decisions)*, 14 HOUS. BUS. & TAX L.J. 24, 29 (2014).

67. *See The Board*, supra note 65.

68. *See* Leonard Bierman, *Reflections on the Problem of Labor Board Instability*, 62 DENV. U. L. REV. 551, 551 (1985) ("[T]he Board [is] an agency which is relatively sensitive to shifts in the political winds."); JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 275 (1995) ("[A] presidential administration can make or change labor policy without legislative action through appointments to the NLRB.").

69. *See infra* Section II.B.1.

70. *See* TLI, Inc., 271 N.L.R.B. 798, 798 (1984); Browning-Ferris Indus. of California, Inc., 362 N.L.R.B. 1599, 1600 (2015); Hy-Brand Indus. Contractors, Ltd., Cases 25-CA-163189, 25-CA-163208, 25-CA-163297, 25-CA-163317, 25-CA-163373, 25-CA-163376, 25-CA-163398, 25-CA-163414, 25-CA-164941, and 25-CA-164945, 2017 N.L.R.B. LEXIS 635, at *3 (Dec. 14, 2017); Hy-Brand Indus. Contractors, Ltd., Cases 25-CA-163189, 25-CA-163208, 25-CA-163297, 25-CA-163317, 25-CA-163373, 25-CA-163376 25-CA-163398, 25-CA-163414, 25-CA-164941, and 25-CA-164945, 2018 N.L.R.B LEXIS 103, at *3 (Feb. 26, 2018).

71. *See* Turner, *supra* note 66, at 33–36.

72. *See id.* at 36–40.

73. *See* Epilepsy Found. v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir. 2001) ("It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board.").

74. *See* Turner, *supra* note 66, at 72–73 (arguing that the Board's tendency to engage in ideological voting, and thus its tendency to change its interpretation of the NLRA, is "problematic for those who attempt to comply with the NLRA").

75. *See infra* Section II.B.2.

differently on several occasions, yielding both employee- and employer-friendly[76] outcomes along the way.[77]

2. A Brief Overview of the Board's Historical Interpretations of What Constitutes "Concerted Activity"

The Board's interpretations of what constitutes concerted activity affect nonunionized employees the most because under the Board's *Interboro* doctrine, individual unionized employees receive protection when raising issues pertaining to their collective bargaining agreements.[78] These agreements cover a vast array of terms, such as wages, hours, and other terms and conditions of employment.[79] However, because nonunionized employees do not have collective bargaining agreements, they are not protected under the *Interboro* doctrine.[80] Recall the fast-food employee who complained about having to make bacon cheeseburgers.[81] If the employee is a union member, the activity would likely be protected under the *Interboro* doctrine because work tasks, such as making bacon cheeseburgers, are a term of employment and would be included in the collective bargaining agreement.[82] However, whether a similarly situated non-union employee receives protection is at the whim of the Board's interpretation at a given time.[83]

The Supreme Court affirmed the *Interboro* doctrine as a reasonable interpretation of the NLRA in *NLRB v. City Disposal Systems, Inc.*[84] The Court in *City Disposal* recognized that the legislative history of section 7 does not reveal Congress's intended meaning of concerted activities.[85]

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76. For ease of reference, when this Comment refers to an employee-friendly interpretation, it means that the Board has interpreted concerted activity to include more employee activities. When this Comment refers to an employer-friendly interpretation, it means that the Board has interpreted concerted activity to include less employee activities.

77. *See* Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 97 (1954) ("No matter how the Board decides [disputes between employees and employers], it can not avoid aiding one and hindering the other.").

78. *See* Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966).

79. *See* NLRB v. Wooster Div., 356 U.S. 342, 348 (1958) (holding that "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining for every collective bargaining agreement). The Board has set forth two justifications for the *Interboro* doctrine: "First, the assertion of a right contained in a collective bargaining agreement is an extension of the concerted action that produced the agreement . . . and second, the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement." NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) (citations omitted).

80. *See Interboro*, 157 N.L.R.B. at 1298.

81. *See supra* Part I.

82. *See Wooster*, 356 U.S. at 348.

83. *See Interboro*, 157 N.L.R.B. at 1298.

84. *See City Disposal*, 465 U.S. at 829–39.

85. *See id.* at 834.

The Court deduced Congress's intent from the NLRA's explicit purpose of encouraging collective bargaining and equalizing bargaining power.[86] Congress did not intend to limit section 7 protection to employees engaging in activity that "combine[s] with [other employees' activities] *in any particular way*" or to withdraw protection "in situations in which a single employee, acting alone, participates in an integral aspect of a collective process."[87] On its face, it seems that the Court rejected the premise that an employee's activity must be connected to other employees' activity to constitute concerted activity.[88] Although, in a footnote, the Court stated that, "at some point[,] an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity."[89] This footnote makes clear the requirement that some relationship between an individual employee's activity and the activities of fellow employees must exist for the activity to be considered concerted.[90] Four of the five cases discussed in this Comment were decided post-*City Disposal*, so this guiding principle was available to the Board in the majority of cases.[91]

The Board first expanded its interpretation of what constitutes concerted activity in 1975 in an employee-friendly, pre-*City Disposal* case, *Alleluia Cushion Co.*[92] The Board held that a presumption of concerted activity exists "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees," even when there is no evidence of other employees' involvement in the effort.[93]

Nine years later, the Board overruled *Alleluia Cushion* in an employer-friendly case, *Meyers I*.[94] In *Meyers I*, the Board required an actual showing of employee interaction and group concern to support a finding of concerted activity.[95] Additionally, the Board held that an individual employee's activity must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself" to qualify as concerted activity.[96]

86. *See id.* at 834–35.
87. *Id.* at 835 (emphasis added).
88. *See* Prill v. NLRB, 755 F.2d 941, 960 (D.C. Cir. 1985) (Bork, J., dissenting).
89. *City Disposal*, 465 U.S. at 833 n.10.
90. *See Prill*, 755 F.2d at 960 (Bork, J., dissenting).
91. *See infra* Sections II.B.3–7.
92. *See* Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975).
93. *Id.*
94. *See* Meyers Indus., Inc., 268 N.L.R.B. 493, 496 (1984).
95. *See id.* at 497.
96. *Id.*

The D.C. Circuit later reviewed and criticized the Board's *Meyers I* decision.[97] The court expressed concern that the Board interpreted the NLRA to mandate a narrow interpretation of concerted activity and that employees historically protected by section 7 would no longer enjoy protection.[98] However, the court declined to suggest an alternative standard and instead remanded to the Board for further consideration.[99] In *Meyers II*, the Board addressed the D.C. Circuit's concerns and affirmed and clarified the *Meyers I* standard.[100] The D.C. Circuit later affirmed *Meyers II*.[101]

In the employee-friendly 2011 *Wyndham Resort Development Corporation* case, the Board relied on and expanded *Meyers II*.[102] The Board held that "activity [is] concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees."[103]

Most recently, in the 2019 *Alstate* case, the Board overruled *Wyndham*.[104] The Board restored the *Meyers* standard and required a "truly group complaint" or evidence showing that "the employee was seeking to initiate, induce, or prepare for group action" to render activity concerted.[105] Although the current standard is employer-friendly[106], employees might prevail soon through yet another flip-flop by the Board.[107]

President Biden nominated Jennifer Abruzzo to serve as the Board's General Counsel, and she assumed that role on July 22, 2021.[108] On August 12, 2021, Abruzzo issued a memo outlining her plan to reverse the employer-friendly approach the Board took during President Trump's time in office.[109] In the memo, Abruzzo, seeking advisement from regional offices, asked them to submit to her office their decisions involving the applicability of the *Alstate* standard, an employer-friendly standard.[110] Abruzzo also indicated her desire to transition back to the

97. *See* Prill v. NLRB, 755 F.2d 941, 941–57 (D.C. Cir. 1985).
98. *See id.* at 950, 954–55.
99. *See id.* at 957.
100. *See* Meyers Indus., Inc., 281 N.L.R.B. 882, 882 (1986).
101. *See* Prill v. NLRB, 835 F.2d 1481, 1482 (D.C. Cir. 1987).
102. *See* Wyndham Resort Dev. Corp., 356 N.L.R.B. 765, 766 (2011).
103. *Id.*
104. *See* Alstate Maint., L.L.C., Case 29-CA-117101, 2019 N.L.R.B. LEXIS 8, at *24 (Jan. 11, 2019).
105. *Id.* at *30–31.
106. *See infra* Section II.B.7.
107. *See* GC Memo, *supra* note 10.
108. *See General Counsel*, NLRB, https://bit.ly/3oi3Sxm (last visited Nov. 12, 2021).
109. *See* GC Memo, *supra* note 10.
110. *See id.*

Wyndham standard, a more employee-friendly standard.[111] In September 2021, the Board's composition shifted to a Democrat majority, making it more likely for Abruzzo's suggested change in interpretation to occur.[112]

3. *Alleluia Cushion*

In *Alleluia Cushion*, Jack Henley's employer, Alleluia Cushion, terminated him after Henley complained to management and the California Occupational Safety and Health Administration ("Cal/OSHA") office regarding various safety issues at Alleluia Cushion's plant.[113] A Cal/OSHA inspector came to the plant, and Henley showed the inspector the safety violations.[114] The day after the inspection, Alleluia Cushion terminated Henley.[115]

The Board held that Henley's reporting of the safety violations constituted protected concerted activity under section 7.[116] The Board reasoned that an employee acts in the interest of all employees when asserting OSHA rights because safe working conditions "have been legislatively declared to be in the overall public interest."[117] Thus, after *Alleluia Cushion*, a single employee engages in concerted activity when asserting a statutory right, such as a right guaranteed by OSHA.[118]

This case is significant because it is an example of an employee-friendly definition of concerted activity, having expanded the definition to include more employee activities.[119] Under the *Alleluia Cushion* standard, the fast-food employee who complained[120] would be protected if the employee were to assert that making bacon cheeseburgers was especially dangerous and violated OSHA rights to a safe workplace, even if no other employees felt the same way.[121] Until the Board overruled *Alleluia Cushion* in 1984, employees acting alone were protected if they acted to assert a statutory right.[122]

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111. *See id.*
112. *See Members of the NLRB Since 1935*, NLRB, https://bit.ly/3gWSX9d (last visited Feb. 22, 2022).
113. *See* Alleluia Cushion Co., 221 N.L.R.B. 999, 999 (1975).
114. *See id.*
115. *See id.*
116. *See id.* at 1000.
117. *Id.*
118. *See id.*
119. *See id.*
120. *See supra* Part I.
121. *See Alleluia Cushion*, 221 N.L.R.B. at 1000.
122. *See id.*

4. *Meyers I*

Nine years after the Board issued its ruling in *Alleluia Cushion*, the Board overruled that decision in *Meyers I*.[123] Kenneth Prill, a truck driver at Meyers Industries, caused an accident after his trailer's brakes malfunctioned.[124] He contacted the Tennessee Public Service Commission for a safety inspection of the trailer. After that inspection, the Commission cited Meyers for violating several Department of Transportation regulations.[125] Meyers fired Prill for refusing to continue driving the trailer, making this safety complaint, and making other prior safety complaints.[126]

The Board held that section 7 did not protect Prill's activity as concerted activity.[127] Although these facts resemble those in *Alleluia Cushion*, the Board reasoned that the *Alleluia Cushion* standard incorrectly allowed the Board to find concerted activity when it determined that the "employees ougth [sic] to have a group concern."[128] Rather, the Board concluded that a showing of actual group concern is required.[129] The Board reasoned that this approach was "mandated by the [NLRA] itself."[130] The Board further reasoned that *Alleluia Cushion* incorrectly shifted the burden of proof to the employer by requiring the employer to provide evidence that the other employees did not agree with the alleged concerted activity.[131] The Board held that the burden of proof lies with the Board's General Counsel, who must "prove support by other employees."[132] Finally, the Board emphasized that determining whether an employee has engaged in concerted activity requires an analysis of the totality of the record evidence.[133]

Meyers I is significant because the Board opted to return to the pre-*Alleluia Cushion* employer-friendly interpretation of concerted activity by demanding an actual showing of employee interaction and group concern.[134] The *Meyers I* standard protects an employee's activity as concerted activity when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[135]

123. *See* Meyers Indus., Inc., 268 N.L.R.B. 493, 496 (1984).
124. *See id.* at 497.
125. *See id.*
126. *See id.* at 498.
127. *See id.*
128. *Id.* at 495.
129. *See id*.
130. *See id*. at 496.
131. *See id.*
132. *Id.*
133. *See Meyers Indus.*, 268 N.L.R.B. at 497.
134. *See id.* at 495.
135. *Id.* at 497.

Under the *Meyers I* standard, the fast-food employee[136] would receive protection under the NLRA if there were evidence that the employee made the complaint with or on behalf of other fellow employees.[137]

5. *Meyers II*

Prill appealed the Board's decision in *Meyers I* to the United States Court of Appeals for the District of Columbia Circuit.[138] On appeal, the D.C. Circuit criticized the Board's determination that the NLRA "mandated" its interpretation of concerted activity.[139] The court reasoned that the Board has the power to use its "own policy judgment and expertise" to construe the definition of concerted activity.[140] The court cited the Supreme Court's decision in *City Disposal*, which held that "section 7 does not compel a narrowly literal interpretation of 'concerted activities,' but rather is to be construed by the Board."[141] The court also criticized the Board for returning to a pre-*Alleluia Cushion* framework and asserted that the *Meyers I* interpretation of section 7 is narrower than the Board's pre-*Alleluia Cushion* interpretations.[142]

Finally, the court expressed concern that two types of employees acting alone, but for a concerted purpose, would no longer receive the protections they historically enjoyed.[143] The first type of employee that the court worried would lose protection is an employee "not designated or authorized to be a spokesman by the group," but "who brings a group complaint to the attention of management."[144] The second type of employee is one who acts to "initiat[e,] induc[e], or prepar[e] for group action."[145] The court then remanded the case to the Board for reconsideration.[146] The Board accepted the D.C. Circuit's remand and affirmed its *Meyers I* definition of concerted activity.[147] In so doing, the Board addressed each of the Court's concerns.[148]

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136. *See supra* Part I.
137. *See Meyers Indus.*, 268 N.L.R.B. at 497.
138. *See* Prill v. NLRB, 755 F.2d 941, 941–42 (D.C. Cir. 1985).
139. *Id.* at 950.
140. *Id.*
141. *Id.* at 951 (citing NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 829–39 (1984)).
142. *See id.* at 946.
143. *See id.* at 954–55.
144. *Id.* at 954.
145. *Id.* at 955. The court was concerned that the *Meyers I* standard conflicted with the widely-accepted standard set forth in *Mushroom Transportation Co. v. NLRB*, which protects individual employees engaging in this type of conduct. *See id.* (citing Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)).
146. *See id.* at 957.
147. *See* Meyers Indus., Inc., 281 N.L.R.B. 882, 882 (1986).
148. *See id.* at 882–89.

First, the Board clarified that although the NLRA did not mandate its decision in *Meyers I*, its decision was "most responsive to the central purposes for which the Act was created."[149] The Board noted that the language used reflects the Norris-LaGuardia Act of 1932, through which Congress sought to restrict the courts from categorizing union activities as illegal conspiracies.[150] The Board also stated that Congress later emphasized collective, not individual, activity in the Wagner Act by clarifying the NLRA's purpose.[151] Congress intended to remedy the inequality of bargaining power between employers, who are inherently concerted, and employees, who act alone, by encouraging "collective bargaining[,] . . . association, self-organization, and [the] designation of representatives."[152]

Second, the Board addressed the court's concern that previously-protected employees would no longer enjoy NLRA protection.[153] The Board clarified that an employee bringing a group complaint enjoys protection so long as evidence of "group activities" exists.[154] The Board further explained that the *Meyers I* standard "fully embrac[es]" *Mushroom Transportation* by ensuring that an "individual's efforts to induce group action" receive protection.[155]

In the D.C. Circuit's original *Meyers I* opinion, the dissenting Judge Bork agreed with the Board's *Meyers I* interpretation of concerted activity.[156] He argued that the Board's *Meyers I* holding was, indeed, mandated by the NLRA, just as the Board had held below.[157] As Judge Bork explained, if Prill's actions are concerted, then any action could be concerted.[158] Judge Bork stated that a sweeping definition, like the one outlined by the majority, would eliminate the "qualifying word ['concerted'] that Congress wrote into the statute."[159] He further found that the *Meyers* standard is nevertheless reasonable, which he argued was the only appropriate question for the court to answer.[160]

149. *Id.* at 883.

150. *See id.* (citing Auto Workers Loc. 232 v. Wis. Emp. Rels. Bd., 336 U.S. 245, 257 (1949)) (emphasis added).

151. *See id.*

152. *Id.* (quoting National Labor Relations Act of 1935, 29 U.S.C. § 151).

153. *See id.* at 886–87.

154. *Id.* at 886.

155. *Id.* at 887. For background information on the *Mushroom Transportation* case, see *supra* note 145.

156. *See* Prill v. NLRB, 755 F.2d 941, 958 (D.C. Cir. 1985) (Bork, J., dissenting).

157. *See id.*

158. *See id.*

159. *Id.*

160. *See id.* at 959.

In making this finding, Judge Bork looked to *City Disposal*, among other cases, for support,[161] despite finding that *City Disposal* does not control in *Prill*.[162] He argued that the Supreme Court, in *City Disposal*, required a "clear nexus" between group activity and an individual employee's conduct.[163] Judge Bork argued that the nexus in *City Disposal* was the group activity inherent in implementing a collective bargaining agreement and individual assertions of collective-bargaining agreement rights.[164] Finally, he argued that no such nexus existed in this case, and thus, Prill did not engage in concerted activity.[165]

The D.C. Circuit later affirmed the Board's *Meyers II* decision.[166] The Court, persuaded by the Board's modified reasoning, ultimately found the Board's interpretation of concerted activity reasonable, thus upholding the *Meyers* standard.[167] Under the clarified *Meyers* standard,[168] the fast-food employee[169] would receive protection if there were evidence that the employee made the complaint with or on behalf of other fellow employees,[170] there were evidence that the fellow employees supported the employee,[171] or if the employee sought to induce any fellow employees to complain about making bacon cheeseburgers to management collectively.[172]

6. *Wyndham*

In the 2011 case of *Wyndham Resort Dev. Corp.*, the Board relied on the *Meyers* cases and expanded them to make them more employee-friendly by holding that "activity [is] concerted when, in front of their coworkers, single employees protest changes to employment terms

161. *See id.* at 959–62.

162. *See id.* ("The Court [in *City Disposal*] . . . concluded that 'the *Meyers* case is thus of no relevance here.' That remark alone suggests, rather strongly one would think, that *City Disposal* does not control this case." (quoting NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 829 n.6 (1984))).

163. *Id.* at 961. At issue in *City Disposal* was "the nature of the relationship that must exist between the action of the individual employee and *the actions of the group* in order for § 7 to apply." *City Disposal*, 465 U.S. at 831 (emphasis added).

164. *See id.* at 960.

165. *See id.* at 961.

166. *See* Prill v. NLRB, 835 F.2d 1481, 1482 (D.C. Cir. 1987).

167. *See id.* The court stated that it must defer to the Board's interpretation of the NLRA because it is reasonable. *See id.*

168. The *Meyers* standard provides protection when an employee acts with or on behalf of fellow employees, with the support of fellow employees, or if the employee sought to induce the fellow employees to act. *See* Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984); Meyers Indus., Inc., 281 N.L.R.B. 882, 886–87 (1986).

169. *See supra* Part I.

170. *See Meyers Indus.*, 268 N.L.R.B. at 497.

171. *See Meyers Indus.*, 281 N.L.R.B. at 886.

172. *See id.* at 887.

common to all employees."[173] In *Wyndham*, the Board addressed whether Gerald Foley, an in-house sales representative, engaged in concerted activity.[174] Foley and other employees of Wyndham often wore untucked shirts at work.[175] A company executive informed Foley and two other employees of a new dress code policy requiring men to tuck in their shirts.[176] Foley objected to this policy, asked whether it applied to "just *us*," and asked whether the policy would be published in a memo because "*we* always see a memo [when a policy changes]."[177] Charles Feathers, another employee, interjected in support of Foley while seven or eight other employees watched.[178] Later, Foley, but not Feathers, received a written warning.[179] The ALJ found that the "dress code was a term and condition of employment, [but] Foley's protest . . . was not concerted because he acted independently of Feathers, in his own self-interest, [and] without a common goal."[180] The ALJ emphasized the fact that Foley and the other employees did not discuss or agree to protest the issue prior to Foley's objection.[181]

The Board declined to adopt the ALJ's recommendation and held that Foley engaged in concerted activity.[182] The Board reasoned that under *Meyers*, individual employees engage in concerted activities when they act to initiate group action or bring group complaints to management.[183] The Board relied on Foley's use of words such as "we" and "us" as evidence that he attempted to initiate group action.[184] The Board also found relevant Foley's knowledge that his coworkers liked to wear their shirts untucked, concluding that he could "reasonably suspect that his coworkers would disagree with the rule change."[185] Finally, the Board reasoned that Foley's protest constituted concerted activity because Feathers joined the protest.[186]

Dissenting Member Hayes stated that the majority's holding "impermissibly conflat[ed] the concepts of group setting and group

173. Wyndham Resort Dev. Corp., 356 N.L.R.B. 765, 766 (2011).
174. *See id.* at 765.
175. *See id.*
176. *See id.*
177. *Id.* (emphasis added). The Board later relied on Foley's use of the words "us" and "we" to determine that he sought to initiate group action. *See id.* at 766.
178. *See id.* at 765.
179. *See id.* at 766.
180. *Id.*
181. *See id.*
182. *See id.*
183. *See Wyndham*, 356 N.L.R.B. at 766 (citing Meyers Indus., Inc., 281 N.L.R.B. 882, 887 (1986)).
184. *See id.*
185. *Id.*
186. *See id.* (citing Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984) (holding that concerted activity occurs when the employee acts with other employees)).

complaints."[187] Member Hayes emphasized that Foley had no knowledge of his coworkers' opinions on the policy.[188] Additionally, Hayes questioned whether Foley's statements amounted to complaints.[189] Hayes argued that merely voicing an objection in front of other employees "does not rise to the level of concerted activity."[190]

Wyndham is significant because it protects employees who act alone when they protest common employment terms in front of their coworkers.[191] Under the expansive *Wyndham* standard, the fast-food employee[192] would receive protection after making a complaint in front of fellow employees.[193]

7. *Alstate Maintenance*

Eight years later, in 2019, the Board overruled *Wyndham* in *Alstate*.[194] In *Alstate*, Trevor Greenidge, an airport skycap, helped passengers arriving at the airport with their luggage, and his compensation came primarily from tips.[195] Greenidge's supervisor informed him that a soccer team had requested the skycaps' assistance, and Greenidge responded that the skycaps did a similar job previously and did not receive a tip.[196] The skycaps refused to do the job until later, but other employees had already nearly completed the job.[197] As a result, Alstate terminated all of the skycaps involved.[198]

The Board evaluated whether Greenidge engaged in concerted activity by voicing his concern, and the Board ultimately held that he did not.[199] In its reasoning, the Board cited two supporting principles from *Meyers*: (1) an individual bringing a group complaint to management engages in concerted activity,[200] and (2) an individual trying to induce

187. *Id.* at 768 (Hayes, dissenting).
188. *See id.*
189. *See id.* (arguing that Foley's "questions [merely] focused on whether the new dress code was companywide and whether a memo announcing it had been posted").
190. *Id.* at 769.
191. *See id.* at 766.
192. *See supra* Part I.
193. *See id.*
194. *See* Alstate Maint., L.L.C., Case 29-CA-117101, 2019 N.L.R.B. LEXIS 8, at *24 (Jan. 11, 2019).
195. *See id.* at *5.
196. *See id.*
197. *See id.* at *6.
198. *See id.*
199. *See id.*
200. *See id.* at *10 (citing Meyers Indus., Inc., 281 N.L.R.B 882, 887 (1986) ("[A]n individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of 'group activities' [such as] prior or contemporaneous discussion of the concern . . . warranting a finding that the employee was [raising] a 'truly group complaint.'")).

group action engages in concerted activity.[201] Applying the first principle, the Board failed to find evidence of a group complaint.[202] The Board could not conclude that Greenidge brought a complaint on behalf of the group because no evidence existed that the other employees discussed the soccer players' lack of tips in the past.[203] The *Alstate* Board also criticized how the *Wyndham* Board inferred from words such as "we" that there was evidence of group activities.[204]

Applying the second principle, the Board did not find evidence that Greenidge had attempted to induce group action and cited his previous testimony as evidence that he had not acted with the intent to induce fellow employees.[205] The Board noted that "where a statement looks forward to no action at all, it is more than likely mere griping."[206]

Greenidge argued that he engaged in concerted activity because he made his comment in front of coworkers and because he used the word "we."[207] In making this argument, Greenidge cited three Board precedents: *Whittaker Corp.*, *Chromalloy Gas Turbine Corp.*, and *Wyndham*.[208] The Board responded to Greenidge's argument by distinguishing both *Whittaker Corp.* and *Chromalloy Gas Turbine*[209] and overruling *Wyndham*.[210]

In *Whittaker*, management convened employee meetings to announce the absence of an annual wage increase.[211] An employee responded to the company president's invitation for questions by expressing concern that employees had been asked to "bear the brunt" of a recent decrease in business.[212] The Board held that "in a group-meeting context, a concerted objective *may* be inferred from the

201. *See id.* at *11 (noting that the actions of an individual employee seeking to "induce group action" constitute concerted activity (quoting *Meyers Indus.*, 281 N.L.R.B. at 887)).

202. *See id.* at *15.

203. *See id.* at *15.

204. *See Alstate Maint.*, 2019 N.L.R.B. LEXIS 8, at *15 ("Greenidge's use of the word 'we' [does not] supply the missing 'group activities' evidence: it shows only that the skycaps had worked as a group and had been 'stiffed' as a group, not that they had discussed the incident among themselves.").

205. *See id.* Greenidge "testified that his remark was 'just a comment' and was not aimed at changing . . . policies or practice." *Id.* The ALJ also used this statement to determine that Greenidge's remark "was simply an offhand gripe about [Greenidge's] belief that the French soccer players were poor tippers." *Id.*

206. *Id.* at *16.

207. *See id.* at *17.

208. *See id.*

209. *See id.* at *17–21.

210. *See id.* at *24.

211. *See id.* at *17 (citing Whittaker Corp., 289 N.L.R.B. 933, 933 (1988)).

212. *Id.*

circumstances."[213] The Board considered the totality of the circumstances in finding that the employee's statement constituted concerted activity.[214]

Similarly, in *Chromalloy Gas Turbine*, management convened employee meetings to announce a change to the company's break policy.[215] An employee responded to the announcement by asking about the punishment for violating the new policy and management's motivation for implementing it.[216] The employee also expressed a desire for the policy to apply equally to all employees.[217] The Board relied on *Whittaker* and assessed whether "a concerted objective [could] be inferred from the circumstances" in this case.[218] After considering the totality of the circumstances, the Board found that the employee had engaged in concerted activity.[219]

The *Alstate* Board distinguished *Whittaker* and *Chromalloy Gas Turbine* because, in *Alstate*, unlike in those cases, "there was no meeting [and] no announcement by management regarding wages, hours, or other terms and conditions of employment."[220] The Board held that, "absent such an announcement [by management], no protest . . . would support an inference that an individual employee was seeking to initiate or induce group action."[221]

The Board then addressed whether *Wyndham* was consistent with *Whittaker* and *Chromalloy Gas Turbine*.[222] The Board found that the "impromptu gathering" in *Wyndham* slightly resembled the formal

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213. *Id.* at *18 (citing *Whittaker Corp.*, 289 N.L.R.B., at 934).

214. *See Alstate Maint.*, 2019 N.L.R.B. LEXIS 8, at *18. The Board found the following circumstances relevant in determining that Johnston engaged in concerted activity:

> (i) Johnston protested the denial of a wage increase; (ii) Johnston spoke up at an employee meeting convened specifically to announce the denial of the increase; (iii) the denial of the increase affected all the employees; (iv) the meeting was the first opportunity employees had to comment on or protest the denial of the increase, and Johnston had not had a chance to meet with other employees beforehand.

Id.

215. *See id.* at *19. (citing Chromalloy Gas Turbine Corp., 331 N.L.R.B. 858, 859 (2000)).

216. *See id.*

217. *See id.*

218. *Id.* at *20 (citing *Chromalloy Gas Turbine*, 331 N.L.R.B. at 863 (quoting *Whittaker*, 289 N.L.R.B. at 934)).

219. *See id.* at *20 (citing *Chromalloy Gas Turbine*, 331 N.L.R.B. at 863). The Board in *Chromalloy* found relevant that the employee's concerns were not merely personal. *See id.* Additionally, like in *Whittaker*, the Board found relevant that the employee's comments were made in a group meeting called by management to announce a new employment policy and that the meeting was the first opportunity the employee had to raise these concerns. *See id.*

220. *Id.* at *21.

221. *Id.*

222. *See id.* at *21–22.

meetings in *Whittaker* and *Chromalloy Gas Turbine*.[223] The Board then distinguished *Alstate* from *Wyndham* by categorizing Greenidge's comment as "grumbling" about a task and noting the lack of a group meeting.[224]

Even though the Board distinguished *Wyndham*, it still opted to overrule the decision because it could not be reconciled with the *Meyers* cases.[225] In *Meyers*, the Board emphasized the importance of looking at the totality of the record evidence to determine concertedness.[226] The *Wyndham* Board, on the other hand, held that "an employee who protests publicly in a group meeting *is* engaged in initiating group action"[227] as a matter of law and thus adopted a per se standard, which the Board has since rejected in favor of a more case-by-case approach.[228] The Board reasoned that adopting a more individualized approach was necessary because "*many* complaints . . . voiced by individual employees in a group setting are spoken . . . on behalf of the employee himself," and protecting those complaints would be contrary to *Meyers*.[229]

The Board provided five factors relevant to determining whether an employee intended to spark group action.[230] The Board noted that these factors are relevant when "an individual employee speaks to management, not to bring a group complaint to management's attention, but the encounter takes place in the presence of other employees."[231]

Alstate is significant because it restored the *Meyers* standard for determining what constitutes concerted activity.[232] This current standard

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223. *Id.* at *22.

224. *See Alstate Maint.*, 2019 N.L.R.B. LEXIS 8, at *22.

225. *See id.* at *24.

226. *See id.* at *27 (citing Meyers Indus., Inc., 281 N.L.R.B 882, 886 (1986)).

227. *Id.* at *28 (quoting Wyndham Resort Dev. Corp., 356 N.L.R.B. 765, 766 (2011)).

228. *See id.*

229. *Id.* at *28–29.

230. The Board derived these factors from *Whittaker* and *Chromalloy Gas Turbine* and argued that they are consistent with *Meyers*. *See id.* at *32. The five factors provided by the Board are:

> (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely [as in *Wyndham*] to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.

Id. at *31–32.

231. *Id.* at *32 n.45.

232. *See id.* at *30.

requires multiple employees to act together, or one employee to bring a "truly group complaint" to management or to intend to "initiate, induce, or prepare for group action."[233] In considering whether the fast-food employee[234] would be protected today, the answer would be the same as under the *Meyers* standard because *Alstate* restored that standard.[235]

III. ANALYSIS

The Board's flip-flops from an employee-friendly standard in *Alleluia Cushion*,[236] to an employer-friendly standard in *Meyers*,[237] back to an employee-friendly standard in *Wyndham*,[238] and finally, to an employer-friendly standard in *Alstate*,[239] demonstrate the volatility of the definition of concerted activity.[240] The remainder of this Comment proposes next steps for both the Board and Congress to promote stability and effectiveness.[241]

First, this Comment proposes that the Board should continue adhering to the *Alstate* and *Meyers* standard for determining what constitutes concerted activity.[242] Doing so ensures that the Board applies the statute in a manner consistent with the NLRA's plain language and Congress's intent.[243] This Comment also recommends that Congress amend the NLRA to define concerted activity consistent with this standard.[244] Amending the NLRA would further its stability and effectiveness.[245]

A. Adhering to the Alstate *and* Meyers *Standard of Determining What Constitutes Concerted Activity*

The Board should continue adhering to the *Alstate* and *Meyers* standard for determining what constitutes concerted activity. This standard requires multiple employees to act together or one employee to

233. *Id.* at *30–31.
234. *See supra* Part I.
235. Recall that the employee would receive protection under the *Meyers* standard if there were evidence that the employee made the complaint with or on behalf of other fellow employees, the other fellow employees supported the complaining employee, or the employee sought to induce the fellow employees to complain about making bacon cheeseburgers with the complaining employee. *See supra* Section II.B.5.
236. *See supra* Section II.B.3.
237. *See supra* Sections II.B.4–5.
238. *See supra* Section II.B.6.
239. *See supra* Section II.B.7.
240. *See supra* Section II.B.
241. *See infra* Part III.
242. *See infra* Section III.A.
243. *See infra* Section III.A.
244. *See infra* Section III.B.
245. *See infra* Section III.B.

bring a "truly group complaint" to management or intend to "initiate, induce, or prepare for group action."[246] Additionally, this standard is consistent with the statute's plain language and furthers Congress's intent in enacting the NLRA.

The NLRA's plain language best aligns with the *Alstate* and *Meyers* standard. Section 7 provides that "[e]mployees 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."[247] The statute's use of the word "other" is critical because it indicates Congress's intent for concerted activity to encompass activities that involve multiple employees and that are similar to those enumerated immediately beforehand.[248] A broader definition of the statute would effectively eliminate "the qualifying word ['concerted'] that Congress wrote into the statute."[249]

The dictionary definition of concerted provides some clarity as to the meaning of the term. Merriam-Webster defines concerted as "mutually contrived or agreed on" or "performed in unison."[250] Under no possible interpretation of the dictionary definition of concerted can it be inferred that one can act concertedly *and* alone. Rather, the dictionary definition requires two or more people working together and some accord or agreement, supporting Congress's intent for concerted activity to involve multiple employees.[251]

The *Alstate* and *Meyers* standard is also consistent with Congress's intent in enacting the NLRA. Congress recognized that employees lacked bargaining power in negotiations with their employers.[252] Congress sought to "equalize the bargaining power . . . by allowing employees to *band together* in confronting an employer regarding the terms and conditions of their employment."[253]

Reverting to the *Wyndham* standard, which protects employees who act alone when they protest common employment terms in front of their

246. Alstate Maint., L.L.C., Case 29-CA-117101, 2019 N.L.R.B. LEXIS 8, at *30–31 (Jan. 11, 2019).

247. National Labor Relations Act of 1935, 29 U.S.C. § 157 (emphasis added).

248. *See* Rita Gail Smith & Richard A. Parr II, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 377 (1983).

249. *See* Prill v. NLRB, 755 F.2d 941, 958 (D.C. Cir. 1985) (Bork, J., dissenting).

250. *Concerted*, MERRIAM-WEBSTER (11th ed. 2003).

251. *See* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1704 (1989).

252. *See* National Labor Relations Act of 1935, 29 U.S.C. § 151; *see also* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 834–35 (1984).

253. *City Disposal*, 465 U.S. at 835 (emphasis added).

coworkers,[254] would be inconsistent with the NLRA. *Wyndham* "impermissibly conflat[es] the concepts of group setting and group complaints."[255] *Wyndham* also improperly focuses on the complaint's setting, whereas the correct focus should be on whether the complaint itself was a truly group complaint.[256] Not all complaints made in a group setting are automatically group complaints.[257] Employees often raise purely individual complaints in group settings.[258] Furthermore, the Supreme Court requires a "clear nexus" between the group activity and the individual employee's conduct.[259] The *Alstate* and *Meyers* standard properly requires a fact-specific inquiry, rather than the per se rule spelled out in *Wyndham*.[260] A per se rule that complaints are concerted when made in a group setting would go beyond Congress's intent and extend the NLRA's scope to protect workers' complaints that lack a connection to other employees.

B. Amending the NLRA to Define Concerted Activity Consistent with the Alstate *and* Meyers *Standard*

Congress should amend the NLRA to define concerted activity consistent with the *Alstate* and *Meyers* standard. The Board's history and pattern of changing its interpretation of concerted activity has created uncertainty and a lack of clarity, which has caused the NLRA to become inefficient and fail to serve its full purpose.[261] As a result, employers lack clear guidance on how to comply with the statute, and employees remain unsure of what constitutes protected activity under the statute, thus reducing their ability to exercise their rights. Congress must act to preserve this landmark statute's value by defining concerted activity, or risk the Board flip-flopping in the wrong direction again.[262]

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254. *See* Wyndham Resort Dev. Corp., 356 N.L.R.B. 765, 766 (2011).

255. *Wyndham*, 356 N.L.R.B. at 768 (Hayes, dissenting).

256. *See id.*

257. For instance, an employee's complaint in front of coworkers about something in which the other employees have no stake should not constitute concerted activity. *See* Alstate Maint., L.L.C., Case 29-CA-117101, 2019 N.L.R.B. LEXIS 8, at *28 (Jan. 11, 2019) (stating that "*many* complaints . . . voiced by individual employees in a group setting are spoken . . . on behalf of the employee himself" and should not constitute concerted activity).

258. *See id.* (citing *Wyndham*, 356 N.L.R.B. at 766).

259. Prill v. NLRB, 755 F.2d 941, 961 (D.C. Cir. 1985) (Bork, J., dissenting); *see also supra* Section II.B.5.

260. *See Alstate Maint.*, 2019 N.L.R.B. LEXIS 8, at *27 (citing Meyers Indus., Inc., 281 N.L.R.B. 882, 886 (1986)).

261. *See* Bierman, *supra* note 68, at 551 (arguing that the Board's "rapid changes create considerable uncertainty and instability in the law").

262. *See* GC Memo, *supra* note 10 (encouraging reform in this area); *see also supra* Section II.B.2.

Congress should define concerted activity as limited to

> (1) actions taken by multiple employees together; or (2) actions taken by one employee if that employee is (a) acting on behalf of other employees as their authorized representative, (b) bringing a truly group complaint to management, (c) acting in front of other employees for the purpose of inducing or preparing for group action, or (d) protesting a management decision in front of other employees during an employee meeting that the employer has called to announce, for the first time, a decision affecting multiple employees' wages, hours, or other terms or conditions of employment.[263]

The first part of the proposed definition, covering multiple employees acting together, is justified because multiple employees acting together clearly act concertedly.[264] The second part of the proposed definition, which covers employees acting alone in limited circumstances, is justified because failing to cover these individual employees would result in a gap of protection for important actions, such as when one employee seeks to induce group action.[265] Leaving such employees unprotected and vulnerable to termination would hinder the NLRA's purpose.[266] Given the lack of clarity surrounding this issue, the statute should provide specific situations, such as the four outlined in the proposed definition, in which one employee acting alone engages in concerted activity.[267]

When a single employee acts alone, but on behalf of other employees as their authorized representative, that employee acts concertedly because the employee is not acting out of self-interest but rather with the other employees' interests in mind.[268] The employee receives authorization from the other employees, suggesting that some type of mutuality has occurred.[269] In *Alstate* and *Meyers*, the Board approved this definition of concerted activity.[270]

Similarly, a single employee engages in concerted activity when the employee brings a truly group complaint to management.[271] A truly group complaint must show some evidence of previous discussion by

263. This proposed standard is consistent with the *Alstate* and *Meyers* standard and adopts the factors created by the Board in *Alstate*. *See supra* note 230 and accompanying text.

264. *See supra* Section III.A.

265. *See supra* Section II.B.5.

266. *See supra* Section II.B.5.

267. *See supra* Section II.B.5.

268. *See supra* Section II.B.5.

269. *See supra* Section II.B.5.

270. *See* Alstate Maint., L.L.C., Case 29-CA-117101, 2019 N.L.R.B. LEXIS 8, at *10 (Jan. 11, 2019); *see also* Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984).

271. *See supra* Sections II.B.5, II.B.7.

multiple employees on the issue.[272] This is analogous to the classic example of concerted activity that includes multiple employees acting together.[273] Requiring complaints to be truly group complaints also precludes protection for employees who act out of self-interest. The Board in *Alstate* and *Meyers* approved this standard.[274]

Employees who act in front of their colleagues to induce group action must receive protection because leaving them vulnerable to termination for attempting to organize other employees would discourage concerted activity altogether and thus would contravene the purpose of the NLRA.[275] Failing to include this type of activity in the definition would leave unprotected all concerted activity that does not happen spontaneously but rather occurs as a result of individual employees encouraging their colleagues to band together.

Finally, the definition of concerted activity should encompass individual employees who protest a management decision in front of other employees during an employee meeting called by the employer to announce, for the first time, a decision affecting multiple employees' wages, hours, or other terms or conditions of employment.[276] The Board approved this definition in *Whittaker*, *Chromalloy Gas Turbine*, and *Alstate*.[277] The activity in this definition should be considered concerted because the specific circumstances surrounding the action create the reasonable inference that the employee is acting with a concerted objective.[278]

Amending the NLRA to include this exhaustive definition of concerted activity would limit the Board's discretion and thus limit its tendency to flip-flop on this issue. Such a limitation on the Board is necessary to preserve the NLRA's stability and effectiveness.

IV. CONCLUSION

Section 7 of the NLRA has been subject to nearly nine decades of inconsistent interpretations.[279] The Board has flip-flopped on the issue of what activities constitute concerted activity at least four times in a span

272. *See Alstate Maint*., 2019 N.L.R.B. LEXIS 8, at *10 (citing Meyers Indus., Inc., 281 N.L.R.B 882, 887 (1986)).

273. *See supra* Section III.A.

274. *See Alstate Maint.*, 2019 N.L.R.B. LEXIS 8, at *10; *see also Meyers Indus.*, 281 N.L.R.B at 887.

275. *See supra* Section II.B.5.

276. *See supra* Section II.B.7.

277. *See* Whittaker Corp., 289 N.L.R.B. 933, 934 (1988); Chromalloy Gas Turbine Corp., 331 N.L.R.B. 858, 863 (2000); *Alstate Maint*., 2019 N.L.R.B. LEXIS 8, at *31–32.

278. *See* Alstate Maint., 2019 N.L.R.B. LEXIS 8, at *20.

279. *See supra* Section II.B.

of 44 years due to an ambiguity in the NLRA and a lack of clear guidance from Congress.[280]

The current *Alstate* and *Meyers* interpretation is correct, and the Board should continue adhering to it to ensure an interpretation consistent with the NLRA's plain language and Congress's intent.[281] To put an end to the flip-flopping and promote the NLRA's stability and effectiveness, Congress should amend the NLRA to define concerted activity consistent with the current standard.[282] Flip flops should be limited to footwear; they have no place in Board decisions.

280. *See supra* Section II.B.
281. *See supra* Section III.A.
282. *See supra* Section III.B.