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PRELIMINARY STATEMENT

In 2005, Starbucks discharged an hourly worker at one of its retail stores, Joseph Agins, Jr., after the second of two incidents involving his profane outbursts in front of customers and co-workers in the retail area of the store. Local 660 of the Industrial Workers of the World (“Union”) filed unfair labor practice charges against Starbucks, alleging, as relevant here, that Agins’ second outburst was part of protected concerted activity, and that Starbucks therefore violated the National Labor Relations Act (“Act”) when it discharged him. The Board affirmed the Administrative Law Judge’s (“ALJ”) finding that Agins was engaged in protected activity during the incident that precipitated his discharge, and that, notwithstanding his loud, profane eruption in front of customers, he did not lose the protection of the Act. Bd. Dec. 1.¹ The Board evaluated Agins’ entitlement to protection under the four-factor test announced in *Atlantic Steel Co.* to determine when an employee, “by opprobrious conduct, lose[s] the protection of the Act,” 245 N.L.R.B. 814, 816 (1979); *see* Bd. Dec. 1, 32-33.

On petition for review, the United States Court of Appeals for the Second Circuit held that the Board’s analysis “improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers.” *NLRB v. Starbucks Corp.*, 679 F.3d 70, 79 (2d Cir. 2012). The Court remanded for the Board to determine whether section 7 “den[ies] protection to any person who is in fact an employee or only to persons whom the employer reasonably believes customers would reasonably perceive to be an

¹ The Board’s prior decision in this case was first issued by a two-member panel, 354 N.L.R.B. No. 99 (Oct. 30, 2009) and is cited throughout this Position Statement as “Bd. Dec.” Following the Supreme Court’s decision *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), a three-member panel affirmed the ALJ’s rulings to the same extent and for the same reasons as the two-member panel. 355 N.L.R.B. No. 135 (Aug. 26, 2010).

employee,” or like formulation, when that employee utters obscenities or causes a scene in front of customers. *Id.* at 80.

The present Board lacks the power to accept the remand and issue a decision in this case, because the appointments of the three members of the present Board were constitutionally invalid. But should the Board reach the merits of Agins’ discharge, it should hold that the discharge was permissible. In light of Starbucks legitimate interest in maintaining its retail store and café area free of its employees’ obscenity-filled tirades, Agins’ outburst does not merit protection under the Act. An employee’s use of profanity in front of customers is not protected under the Act, regardless of whether the employee is reasonably recognizable as an employee. A categorical rule placing profanity outside the Act’s protection is required by the Court of Appeals’ decision. And applying that rule to all employees is consistent with the Board’s long-standing recognition that special rules govern the rights of even off-duty employees to participate in concerted activity within the customer service areas of retail businesses. But even if the Board disagrees that a categorical rule is required, Agins’ use of repeated profanity in front of customers necessarily tips the balance against the Act’s protection because of Starbucks distinct interest in preserving a hospitable retail environment for customers and in enforcing professional standards of employee behavior when customers are present. Under a proper balancing test that accords due consideration to the presence of customers in the retail area (as required by the Court of Appeals’ decision), Starbucks interest in preserving a professional and decorous retail atmosphere outweighs any purported employee right to engage in loud, profane behavior incident to protected activity.

BACKGROUND

A. Statutory And Regulatory Framework

Section 7 of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. The Act makes it an unfair labor practice for employers, *inter alia*, to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,” or to discriminate against an employee on the basis of his union-related activity. 29 U.S.C. §§ 158(a)(1), (a)(3). But an employee “may engage in concerted activity in such an abusive manner that he loses the protection of § 7.” *NLRB v. City Disposal Sys.*, 465 U.S. 822, 837 (1984).

B. Agins’ Discharge

Joseph Agins was a barista at Starbucks Ninth Street store, and a Union supporter. Bd. Dec. 25. His duties as a barista included preparing beverages and taking orders and payments from customers. *Id.* at 6. On repeated occasions, he failed to control his temper and to maintain professional composure in front of customers and co-workers. *Id.* at 25-27. In May 2005, Agins became impatient with his assistant store manager, Tanya James, during a busy period, and cursed at her in front of customers. *Id.* at 25. He said that it was “about damn time” she came on the line and shoved a blender in the sink, causing a loud noise. *Id.* When James asked Agins to pull his register, he said it was “bullshit,” and told her to “do everything your damn self.” *Id.* Agins was suspended for several days, and later apologized to the district manager for “using foul language on the floor in front of customers” and for his “attitude.” *Id.*

Six months later, Agins again lost his temper and engaged in profanity in front of customers. Bd. Dec. 26. Agins entered the Ninth Street store while off duty with approximately

four other individuals to protest a prior Starbucks policy regarding union pins. *Id.* Agins and the others were wearing Union apparel, including hats, buttons, pins, and T-shirts. *Id.*; Tr. 694, 799, 930, 2030. Agins went immediately to speak with a fellow employee who was on duty at the cash register, and did not purchase anything. Tr. 695, 1504. The other individuals with Agins sat down in the café area. Bd. Dec. 26. Ifram Yablon, a manager at a different Starbucks store and frequent customer of the Ninth Street store, entered to purchase a drink. *Id.* Yablon and Agins began discussing whether Starbucks employees needed a union, but the conversation soon became personal with Agins accusing Yablon of previously insulting Agins' father. *Id.* at 26-27.

The argument was "heated," and Agins "used hand gestures, spoke loudly, and used obscenities." *Starbucks*, 679 F.3d at 74. Among other things, Agins admittedly told Yablon, "[y]ou can go fuck yourself, if you want to fuck me up, go ahead, I'm here." Bd. Dec. 26. Assistant store manager Tanya James heard Agins say: "You gotta stop disrespecting me. Stop fucking disrespecting me. You disrespected me in front of my pops, my dad." *Id.* at 27. Agins' companions had to intervene to stop the confrontation. *Id.* at 26.

There were other customers in the store when Agins erupted at Yablon, as well as the group of employees with Agins. Tr. 781-783; Tr. 869; Tr. 1013, 1018; Tr. 1504; Tr. 2004-2005. Agins admitted that he became angry and used profanity "loud enough for everyone to hear," Tr. 1018, and it is undisputed that customers could hear Agins' outburst, *see* Bd. Dec. 32. Customers noticed, especially because Agins' caused a scene during an evening period in which the store was quiet and customers are customarily using laptops and studying. Tr. 2004. When the incident was reported to managers, Agins admitted that he had cursed on the floor, that he knew he was wrong to do so, and that the district manager had talked to him previously about

such outbursts. Tr. 2502, Tr. 2525-2526. Because “this was the second occurrence of the same type of behavior,” within a short period of time, Tr. 2504, Starbucks terminated Agins.

C. Procedural History

The ALJ ruled that Starbucks unlawfully discharged Agins, reasoning that Agins’ second profane outburst, which precipitated his discharge, was part of the *res gestae* of protected concerted activity protesting Starbucks prior pin policy. Bd. Dec. 29-33. Applying the four factor test of *Atlantic Steel*, 245 N.L.R.B. at 816, the ALJ concluded that Agins’ conduct was not “sufficiently egregious” to lose protection under the Act, Bd. Dec. 29. A three-member panel of the Board ultimately upheld the ALJ’s finding that Agins’ outburst did not lose the protection of the Act under the *Atlantic Steel* test, and affirmed the ALJ’s finding of an unfair labor practice on that basis.²

The Board petitioned for enforcement and Starbucks cross-petitioned for review. The Court of Appeals refused to enforce that part of the Board’s order holding that Starbucks committed an unfair labor practice when it discharged Agins, holding that the Board’s analysis “improperly disregarded the entirely legitimate concern of an employer not to tolerate employee

² The ALJ also analyzed Agins’ discharge under *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced by* 662 F.2d 899 (1st Cir. 1981), in which the Board adopted a burden-shifting analysis for determining whether disciplinary actions were caused by anti-union animus. The majority of the Board, however, declined to reach the ALJ’s *Wright Line* analysis, and sustained the finding only on the basis of *Atlantic Steel*. 355 N.L.R.B. No. 135, slip op. at 1 n.3. Even if the *Wright Line* analysis were applicable, however, the record establishes that Starbucks would have discharged Agins regardless of his union activity, consistent with its treatment of other employees who engaged in similar outbursts. *See* Resp. Ex. 53; Brief in Support of Exceptions of Employer Starbucks Coffee Company to the Decision of the Administrative Law Judge at 47-50. Indeed, the ALJ’s analysis under *Wright Line* also impermissibly discounted Starbucks interest not to tolerate employee profanity in front of customers, because the ALJ did not consider that context in evaluating Starbucks legitimate non-discriminatory reason for discharging Agins after *two* profane outbursts, *both* of which were in front of customers. *See* Bd. Dec. 33-34.

outbursts containing obscenities in the presence of customers.” *Starbucks*, 679 F.3d at 79. Because the *Atlantic Steel* test was developed in the context of employee misconduct in the “factory floor or backroom office,” the court found it was insufficiently protective of the employer’s interest with respect to employee “obscenities in a public place in the presence of customers,” and was thus inapplicable to Agins’ outburst in front of Starbucks patrons. *Id.* The Second Circuit declined to resolve, however, “whether an employee’s outburst in which obscenities are used in the presence of customers loses otherwise available protection if the employee is off duty although on the employer’s premises.” *Id.* at 80. The court noted that it is “arguable that section 7 never protects an employee who uses obscenities in the presence of customers, even when discussing employment issues, whether or not the employee is present as an identifiable employee or only as a customer,” but left it to the Board to resolve whether any employee who utters profanity loses the protection of the Act, or only those “persons whom the employer reasonably believes customers would reasonably perceive to be an employee” lose such protection. *Id.* Judge Katzmann concurred in the remand of Agins’ discharge but would not have rejected the *Atlantic Steel* balancing test because, unlike the majority of the panel, he was “not convinced that the remaining factors become irrelevant simply because the outburst occurred within earshot of customers.” *Id.* at 82 (Katzmann, J., concurring).

ARGUMENT

I. THE BOARD LACKS A QUORUM

The present Board lacks the necessary quorum to accept the remand and issue an order in this case. The Board must have quorum of three members in order to act. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2642 (2010). All three members of the present Board, however, were appointed pursuant to purported recess appointments that were constitutionally “invalid from their inception.” *Canning v. NLRB*, No. 12-1115, slip op. at 30 (D.C. Cir. Jan. 25, 2013).

The appointments were made during a period when the Senate was not in “recess” within the meaning of the Recess Appointments Clause, U.S. Const. Art. II, § 2, cl. 3, because that Clause refers only to intersession recesses, *Canning*, slip op. at 30. The members of the Board were appointed “after Congress began a new session *** and while that new session continued.” *Id.* Accordingly, the appointments were not made during “the Recess” between sessions, U.S. Const. Art. II, § 2, cl. 3, and are constitutionally invalid.

Indeed, the appointments at issue were not made during any recess at all, intersession or otherwise, as the Congress did not recess during the relevant time. The Senate convened every three days during the purported “recess,” 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011), and had not received the consent of the House of Representatives to adjourn for more than three days, *see* U.S. Const. Art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days[.]”). But even if the members of the Board had been appointed during an intersession recess, the appointments would nonetheless be invalid because the vacancies were not subject to recess appointments. The Recess Appointments Clause allows appoints without the advice and consent of the Senate only for “Vacancies that may happen during the Recess,” U.S. Const. Art II, § 2, cl. 3, which means the vacancy must have arisen during, and not before, the recess, *Canning*, slip op. at 31. None of the vacancies filled by the appointments of the current Board arose during an intersession recess. *Id.* at 40. Because none of the members were validly appointed, the Board lacks a quorum, and any decision of the presently-constituted Board would be void. *Canning*, slip op. at 30.

II. EMPLOYEE PROFANITY IN FRONT OF CUSTOMERS IS NOT PROTECTED UNDER THE ACT

Where customers are present, the use of profanity alone is egregious enough to lose the Act’s protection. Under that standard, Agins’ profane outburst in front of customers is clearly

unprotected. Consistent with longstanding Board precedent, such conduct by even off-duty employees is lawfully subject to employer discipline, because it disrupts the customer environment and relationship regardless of an employee's duty status. But even if the Board were to conclude that only employees whom customers would reasonably identify as employees were covered, Agins' discharge is permissible, because the record makes clear that customers would have reasonably identified Agins as a Starbucks employee.

A. The Court Of Appeals' Decision Settles That Any Profanity In Front Of Customers Is Unprotected

In rejecting the *Atlantic Steel* test as insufficiently protective of the employer's interest in preserving customer service areas free from by employee profanity, the Court of Appeals rejected any approach that would balance away that interest in light of other factors, such as any purported provocation or the nature of the outburst beyond the use of profanity. *Starbucks*, 679 F.3d at 79; *id.* at 82 (Katzmann, J., concurring) (disagreeing with the majority that "the remaining factors [of the *Atlantic Steel* test] become irrelevant"). The Court of Appeals has settled that the Act simply does not protect a an employee's use of profanity in front of customers, leaving open only the question whether off-duty employees that are not recognizable as employees are subject to the same rule. *Id.* at 79-80. Indeed, even under the *Atlantic Steel* test, and outside of customer service areas, "an employee's offensive and personally denigrating remarks alone can result in loss of protection." *Plaza Auto Center, Inc. v. N.L.R.B.*, 664 F.3d 286, 293-294 (9th Cir. 2011); *Indian Hills Care Center*, 321 N.L.R.B. 144, 151 (1996) ("Among the specific types of conduct that could exceed the protection of the Act are vulgar, profane, and obscene language directed at a supervisor or employer, even though uttered in the course of protected concerted activity."). In "public venues where customers are present," an employer need not tolerate any profanity whatsoever under the Act. *Starbucks*, 679 F.3d at 79; *see also id.*

at 82 (Katzmann, J., concurring) (describing majority’s rule as reaching any situation in which an “employee utters a profane word in the presence of customers”). Agins’ outburst, which involved the repeated use of “fuck” during a loud, heated, and disruptive confrontation, is clearly unprotected under this standard.

B. Consistent With The Board’s Recognition Of The Special Nature Of The Retail Environment, Profane Outbursts In Customer Areas By Even An Off-Duty Employee Fall Outside The Act’s Protection

The Act does not prohibit an employer from disciplining even an off-duty employee for a profane outburst—and certainly not the prolonged obscenity-laced tirade at issue here—in retail spaces with customers present. This rule is consistent with the well-established precedent of the Board that “special rules, differentiated from those considered applicable within manufacturing plants, should define employee rights to participate in *** concerted activity within retail business establishments.” *Saddle West Restaurant & Casino*, 269 N.L.R.B. 1027, 1042 (1984). It properly recognizes an employer’s right to preemptively address conduct that poses a risk to its customer relationships before that conduct causes damage. And it recognizes that an employer’s interest in having its employees preserve a certain atmosphere for its customers is not diminished because an employee is off-duty.

First, as the Board has long recognized, even core concerted activity that is protected on the factory floor and in other employment contexts may be restricted in the public areas of a retail or restaurant business because “the nature of retail establishments, including restaurants, requires that an atmosphere be maintained in which customers’ needs can be effectively attended to.” *Restaurant Horikawa*, 260 N.L.R.B. 197, 198 (1982). Thus, an employer may prohibit union solicitation—no matter how respectfully and peacefully done, and even between off-duty employees—in the sales areas of a retail business because “active solicitation in a sales area may disrupt a retail store’s business.” *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112, 113 (2004);

see also J.C. Penney Co., 266 N.L.R.B. 1223, 1224 (1983) (“It is *** well settled that in the case of retail establishments an employer may prohibit solicitation in the selling areas of a retail store even when employees are on their own time.”). For the same reason, an employer may forbid employees from—calmly and non-profanely—discussing working conditions in direct customer service areas. *Double Eagle Hotel*, 341 N.L.R.B. at 113 (“[A]s with a retail store’s selling floor, the [employer casino] lawfully could prohibit employees from *** discussing their working conditions in the casino’s gambling areas, and adjacent aisles and corridors frequented by customers[.]”).

In light of employers’ significant interest in regulating the customer relationship, an employer may restrict employees who are working in the presence of customers from even *silently* showing support for a union through the wearing of union pins, when the union apparel would “unreasonably interfere with a public image that the employer has established.” *Starbucks*, 679 F.3d at 78 (quoting *W San Diego*, 348 N.L.R.B. 372, 373 (2006)); *see also Midstate Tel. Corp. v. NLRB*, 706 F.2d 401, 403 (2d Cir. 1983) (noting “fashionable department store was allowed to prohibit large union campaign buttons because of the store’s legitimate concern over the appearance of its sales personnel”); *NLRB v. Harrah’s Club*, 337 F.2d 177, 180 (9th Cir. 1964) (employer permitted to protect appearance of employees coming into contact with the public when presenting a particular image is important to the employer’s business). If an employer need not tolerate silent, visual insignia that disrupts its established public image, then it necessarily need not tolerate employee profanity that disrupts a respectful customer atmosphere. *See Southwestern Bell Tel. Co.*, 200 N.L.R.B. 667, 670 (1972) (employer could prohibit union shirt that was “susceptib[le] to [a] derisive and profane construction,” even on the shop floor, “to assure decorum *** in the plant”).

Any employee profanity in customer service areas when customers are present—and even more so the heated, loud, and disruptive tirade of obscenities leveled here—disrupts the customer relationship, the employer’s cultivated atmosphere for customers, and the public image Starbucks has established for its employees. And it does so to a greater degree than the core concerted activity like the wearing of union pins or the discussion of working conditions that the Board has long recognized may be restricted in the interest of maintaining “general atmospheres *** wherein customers may be effectively served,” *Saddle West Restaurant*, 269 N.L.R.B. at 1042; *see Starbucks*, 679 F.3d at 78; *Double Eagle Hotel*, 341 N.L.R.B. at 113. At the same time, a profane tirade like Agins’ has a much feebler claim to the Act’s protection because it rests entirely on the coincidental relationship between the personal outburst concerning Agins’ father and a protest regarding Starbucks then-prevailing policy on buttons. The Act accordingly must likewise recognize an employer’s right to prohibit employee profanity—and enforce that prohibition—even when the profanity is tangentially related to a protest regarding employment conditions.

Second, the Act preserves the employer’s right to protect the professional, business atmosphere for customers before employee misconduct does damage to its customer relationships. The record in this case establishes that Agins’ tirade was loud enough for customers to hear, that customers were aware of it, and that it disrupted the hospitable, business-conducive atmosphere that otherwise prevailed at that time in the store. Tr. 1018, 2004. Regardless, any employee’s profane outburst poses a reasonable risk to the customer relationship in the retail context, and that harm is sufficient to preserve Starbucks right to discipline such conduct. An employer need not wait for customers to flee or react, but “may take appropriate preemptive steps to protect its business.” *Pathmark Stores, Inc.*, 342 N.L.R.B. 378, 379-380

(2004) (employer need not present evidence that particular T-shirt had led to reduced sales when the shirt’s slogan “rais[ed] the genuine possibility of harm to the customer relationship”); *Nordstrom, Inc.*, 264 N.L.R.B. 698, 701 n.12 (1982) (noting that “[t]he absence of complaints about the button” was “irrelevant” in evaluating employer’s interest in prohibiting particular union pins because an employer “need not await customer complaint before it takes legitimate action to protect its business”). For an employer to be empowered to take preventive action, Board precedent requires no “additional evidence beyond a relationship between [the employer’s] business and the banned message”—here, profanity. *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 701 F.3d 710, 717 (D.C. Cir. 2012).

Although the Board has recognized that some conduct from off-duty employees may not be disruptive, such as one potentially overheard, non-profane remark, *Saddle West Restaurant*, 269 N.L.R.B. at 1042-1043, or a brief and quiet letter delivery, *Thalassa Restaurant*, 356 N.L.R.B. No. 129, slip op. 1 n.3 (Mar. 31, 2011), the Board itself has also recognized that profanity is subject to a different calculus, *Aliante Station Casino & Hotel*, 358 N.L.R.B. No. 153, slip op. 3 n.16 (Sept. 28, 2012) (citing *Starbucks*, 679 F.3d at 80).³ Any employee profanity in front of a customer is disruptive to the comfortable and professional environment that Starbucks strives to create for its customers, and Agins’ highly visible outburst no doubt “infringed on the customers’ dining enjoyment,” *Restaurant Horikawa*, 260 N.L.R.B. at 198; see Tr. 1018, 2004. And a rule allowing employers to prohibit profanity in front of customers will not chill legitimate protected activity; it is not “reasonably defensible” to presume that

³ It is irrelevant that the Board has found some employee profanity in retail areas protected under the *Atlantic Steel* test. See, e.g., *Walmart Stores, Inc.*, 341 N.L.R.B. 796, 807 (2004), enforced by 137 F. App’x 360 (D.C. Cir. 2005). That test “disregard[s]” Starbucks “entirely legitimate concern *** not to tolerate employee outbursts containing obscenities in the presence of customers.” *Starbucks*, 679 F.3d at 79.

“employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive *** language” in the presence of customers. *See Adtranx ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001). Given that the Act allows an employer to prohibit even calm discussions of working conditions in front of customers in the selling areas of a store, Starbucks is not required to tolerate profanity from an employee that is at best incidental to protected activity.

Finally, that Agins was off duty when he erupted in repeated profanity on Starbucks retail floor, loud enough for customers to hear, does not diminish Starbucks legitimate interest in maintaining public areas free of profane outbursts, including through rules governing the conduct of its employees and attendant discipline. The Board has long recognized that an employer may discipline an employee for off-duty participation in on-premises disturbances, *Restaurant Horikawa*, 260 N.L.R.B. at 198-199, and may adopt rules governing the conduct of off-duty employees in areas where customers are served, *Double Eagle Hotel*, 341 N.L.R.B. at 113. It is simply irrelevant whether customers are aware that a disturbance is caused by employees; it is enough that such employee conduct “may unduly interrupt or disturb the customer-salesperson relationship with a detrimental effect upon the employer's business.” *Marshall Field & Co. v. NLRB*, 200 F.2d 375, 380 (7th Cir. 1953). Profane tirades in front of customers—even when linked to some discussion of working conditions—will almost inevitably disturb the customer relationship and have a detrimental effect on Starbucks business. This disruption to the customer experience is the same whether customers identify an employee as such or not. Accordingly, the Act does not preclude Starbucks from regulating that conduct regardless of the employee’s duty status or customer recognition of employee status.

C. Customers Reasonably Perceived Agins To Be An Employee

Even if the Board determines that only those individuals whom customers would reasonably perceive to be employees lose the protection of the Act for their profanity in front of customers, Agins' discharge was legitimate. Customers would have reasonably perceived Agins to be an employee from the totality of circumstances surrounding the outburst. Agins and his companions were wearing union apparel, *Starbucks*, 679 F.3d at 73, which is indicative of employee status. Agins did not come to Starbucks simply as a customer, as he did not purchase a drink, but went directly to speak with his co-worker working at the cash register. Tr. 694; 1504. And the context of Agins' confrontation with Yablon—which was loud enough for everyone to hear, Tr. 1018—made clear that Agins was an employee. Specifically, Yablon discussed with Agins why Agins needed a union when Starbucks provided good employee benefits, Tr. 1506-1507. In context, customers disturbed by Agins' outburst would have reasonably concluded that he was an employee, and his conduct thus reflected adversely on Starbucks and the atmosphere that it strives to maintain for customer business and enjoyment of their purchases. Accordingly, under any rule consistent with the Court of Appeals' decision, Starbucks discharge of Agins was permissible.

III. UNDER A BALANCING TEST THAT GIVES STARBUCKS INTERESTS APPROPRIATE WEIGHT, AGINS' LOUD, HEATED, AND PROLONGED PROFANE OUTBURST IN FRONT OF CUSTOMERS IS NOT PROTECTED

The Court of Appeals' decision supports a categorical rule that allows employers to discipline employees for engaging in profanity in front of customers, at the least where the employees are identifiable as such. *Starbucks*, 679 F.3d at 79. But even if the Board were to conclude that a categorical rule is not required, Agins' discharge was permissible. Any balancing approach adopted by the Board would have to afford Starbucks "entirely legitimate concern *** not to tolerate employee outbursts containing obscenities in the presence of customers" greater

weight than the Board afforded that interest under the *Atlantic Steel* test. *Starbucks*, 679 F.3d at 79. When the appropriate weight is given to that interest, the balance necessarily tips against any protection under the Act for Agins’ loud, profane, and prolonged confrontation.

First, even under the rejected *Atlantic Steel* test, the Board found that the place of discussion weighed against protection, noting that both customers and fellow employees were present. Bd. Dec. 32. Given that the presence of other employees alone is enough to lose the protection under the Act—even outside the customer context, *Starbucks*, 679 F.3d at 79-80—the addition of customers, when that interest is given its proper weight, necessarily tips the balance and renders Agins’ conduct unprotected.

Second, the Board previously found the place of the outburst “counterbalanced” by the nature of the outburst, along with its subject matter. Bd. Dec. 33. But in considering the nature of the outburst, the Board gave short shrift to the opprobriousness of merely “utter[ing] obscenities in the presence of customers,” *Starbucks*, 679 F.3d at 80. Moreover, Agins’ outburst was not merely the utterance of profanities—although that alone weighs against protection, *id.* at 79-80—but involved loud and repeated uses of obscene words, in the context of a “disruptive” confrontation, Bd. Dec. 32. This is precisely the sort of “disturbance likely to risk loss of customers” that at the very least weighs against protection when committed in the presence of customers. *See Starbucks*, 679 F.3d at 80. When the customer context is appropriately weighed, the nature of the outburst can only subtract from, never add to, the case for protection. Because that leaves only the subject matter of the outburst as the sole fact potentially weighing in favor of

protection, no appropriate balancing of the competing interests at stake would allow Agins' obscene tirade in front of customers to retain the protection of the Act.⁴

CONCLUSION

For the foregoing reasons, the Board should hold that Agins' loud, heated, and profane disturbance in the public area of a Starbucks restaurant in the presence of customers lost any claim to protection under the Act and reverse the ALJ's finding that Starbucks committed an unfair labor practice by discharging Agins.

Respectfully submitted,

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⁴ That is doubly true here where the content of the obscene exclamations was personal—anger over prior insults targeted to Agins' father—rather than focused on union or working conditions.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2013, I caused a copy of the foregoing Statement of Position on Remand from the Court of Appeals to be served, via electronic mail on the following:

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