

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

Case Nos. 15-1110, 15-1129

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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Healthbridge Management, LLC; 710 Long Ridge Road Operating Company II,  
LLC d/b/a Long Ridge of Stamford,  
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent,*

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On Petition For Review From a Decision And Order of  
The National Labor Relations Board

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**REPLY BRIEF OF PETITIONERS**

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September 25, 2015

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**GLOSSARY OF ABBREVIATIONS**

<b>Term</b>	<b>Abbreviation</b>
National Labor Relations Act (29 U.S.C. §151 <i>et seq.</i> )	Act
Administrative Law Judge	ALJ
National Labor Relations Board	Board
Healthbridge Management, LLC	Petitioner or Healthbridge
710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge Road of Stamford	Petitioner or Long Ridge
The Board's General Counsel	GC
New England Health Care Employees Union, District 1199, SEIU	Union
Joint Appendix	JA
Supplemental Joint Appendix	SJA

## INTRODUCTION

Given the Act's stated purpose of promoting labor peace, it is not surprising that Board law holds that intimidating, threatening, and abusive conduct is unacceptable and unprotected by the Act, even when taking place during concerted activity. *See Starbucks Corp.*, 354 NLRB 876 (2009). In this case, Patrick Atkinson, a six foot two inch male, walked into the small office of Polly Schnell, the five foot five female Administrator of the nursing facility, with a group of fifteen (15) to twenty (20) employees in tow. The employees crowded in to Schnell's office, and Atkinson proceeded to berate and insult Schnell. Atkinson, who was almost a foot taller than Schnell, admitted that he spoke loudly to Schnell and repeatedly pounded one hand into the other in front of Schnell.

Understandably, Schnell was intimidated and frightened by Atkinson's conduct, and told the employees that she only felt comfortable continuing the discussion with another member of management present. Recognizing that Schnell was intimidated and frightened, the other employees tried to reassure her that no one was there to be violent. Although Atkinson purportedly wanted to speak to Schnell about a grievance, Atkinson and the other employees left when Schnell returned with another individual and attempted to actually discuss the grievance. It was clear from Atkinson's departure that the stated reason for the "Walk-In" was pretextual, and the true purpose of the office invasion was to intimidate and berate.

These facts are undisputed and fit squarely within the Board's rule that intimidating conduct, especially when directed at a supervisor in front of other employees, is not protected by the Act. The Board's departure from its rule in this case is inexplicable. The goals of the Act, to promote labor peace and afford employees a means of addressing workplace concerns without retribution, are not furthered by protecting Atkinson's conduct here. Atkinson organized and planned an event solely to intimidate and abuse his supervisor – and he succeeded. Unsurprisingly, Atkinson was subsequently discharged due to his "atrocious" behavior and to "uphold Schnell's standing in the" facility, which was well within Long Ridge's right to maintain order and respect in the workplace.

The conclusion that Atkinson's discharge was actually lawful does not even take into account ALJ Green's blatantly incorrect ruling to exclude the testimony of Laurence Condon, Regional Director of Operations for Petitioner Healthbridge, who testified as to Schnell's account of the "Walk-In." Schnell's account of the "Walk-In" was clearly admissible as one of two exceptions to the hearsay rule – either as an excited utterance or a present sense impression. Condon's description contained further details of Atkinson's threatening, abusive, and intimidating behavior, including that Atkinson pounded his fist into the palm of his other hand fifteen (15) to twenty (20) times in front of Schnell's face and that Atkinson tried to block Schnell from leaving her office to get another member of management.

Although the Board acknowledged that ALJ Green's ruling was incorrect, the Board used faulty logic to twist ALJ Green's admissibility determination in to some type of implicit credibility determination. The Board rubber stamped ALJ Green's decision based on this fabricated credibility determination, which is an abuse of discretion also requiring this Court to overturn the Board's decision.

Throughout this case, the Board and ALJ Green seem to have forgotten Board precedent, or decided to ignore it outright. In its Opposition, the Board either tries to downplay Atkinson's behavior or cite to cases that are clearly distinguishable from the instant case. However, the Board cannot escape what this Court has mandated: that an employee "denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms" weighs against the Act's protection. *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001).

## ARGUMENT

### **II. Long Ridge Did Not Violate The Act When It Terminated Atkinson For His Physically Threatening, Verbally Abusive, Intimidating, And Otherwise Abhorrent Behavior**

In its Opposition, the Board relies heavily on its faulty assertion that Long Ridge "admittedly discharged Atkinson for *leading the January walk-in* concerning conditions of employment at Long Ridge." (Opp. 9) (emphasis added.) Unfortunately for the Board, Long Ridge made no such admission. To the contrary, Long Ridge discharged Atkinson for the way he conducted himself

during the “Walk-In.” His “verbally abusive and physically threatening” and otherwise “abhorrent” behavior directed towards his supervisor, Polly Schnell, during the “Walk-In” caused his discharge. (JA 222-223.) It is undisputed that because Atkinson was discharged for actions while engaged in concerted activity, the governing law is set forth by *Atlantic Steel Co.*, 245 NLRB 814 (1979). However, neither ALJ Green nor the Board correctly applied the *Atlantic Steel* factors. Rather, both ALJ Green’s decision and the Board’s rubber stamp of ALJ Green’s decision were based upon on legally and factually incorrect evidentiary rulings and a misapplication of the law and facts.

**A. The Board’s Analysis Of The First *Atlantic Steel* Factor Is Legally and Factually Incorrect**

The Board’s analysis of the facts in this case regarding the first *Atlantic Steel* factor, the location of Atkinson’s conduct, is simply not supported by Board precedent. The Board initially cited to cases where the first *Atlantic Steel* factor weighed in favor of employees retaining the Act’s protection because the offending conduct occurred away from work areas and customers and there was no disruption to work. (Opp. 12.) That was not the issue here. Doubling down on the inapposite cases, the Board then deduces from those cases that in order for the first *Atlantic Steel* factor to weigh against an employee retaining the Act’s protection, the offending conduct *must* occur near work areas or customers or cause a disruption to work. (*Id.*) Again, unfortunately for the Board, this is not the law.

Board precedent is not so limited regarding when the first *Atlantic Steel* factor will weigh against an employee retaining the Act's protection. The Board ignores in its Opposition – and ALJ Green and the Board never even considered in their decisions – that “[t]he location of an employee’s conduct weighs against protection *when the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees.*” *Starbucks Corp.*, 354 NLRB, 876, 878 (2009) (emphasis added). The underlying reason is that misconduct witnessed by other employees “would reasonably tend to affect workplace discipline by undermining the authority of supervisors subject to [an employee’s] vituperative attacks.” *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005); *Aluminum Co. of America*, 338 NLRB 20, 22 (2002).

The Board’s sole argument that the Court should ignore this established Board precedent<sup>1</sup> is that the employees in front of whom Atkinson exhibited his intimidating, abusive, and threatening behavior towards Schnell were also participating in the “Walk-In.” (Opp. 13.) According to the Board, these employees should therefore be categorically excluded from consideration in determining whether Atkinson engaged in “insubordinate or profane conduct toward a supervisor in front of other employees.” *Starbucks*, 354 NLRB at 878. However, such a categorical rule should be rejected because: it (i) runs squarely

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<sup>1</sup> And, by ignoring this established Board precedent, affirming the decisions of ALJ Green and the Board, who similarly ignored it.

against Board precedent; (ii) is not supported by the cases to which the Board cites; and (iii) is not supported by the policy considerations set forth by the Board in its Opposition. Taken to its logical extreme, under the Board's theory, any conduct in a grievance meeting would be insulated from discipline. That is not – and cannot be – the law.

First, the categorical rule that the Board attempts to set forth here has not been previously adopted by the Board. In analyzing the first *Atlantic Steel* factor, the Board in *Starbucks* held that the determinative question “is whether there is a likelihood that other employees were exposed to the misconduct.” *Id.* The Board in *Starbucks* did not equivocate<sup>2</sup> or suggest, in any way, that it did not consider in its analysis those employees who witnessed the misconduct but who were simultaneously engaged in concerted activity. *Id.* Whether coworkers witnessing misconduct towards a supervisor would reasonably undermine the supervisor's authority is not affected by those employees simultaneously engaging in concerted activity. Rather, it is the nature of the employee's misconduct, the fact that coworkers witnessed it, and the negative effect on the supervisor's authority that is significant. *See Aluminum Co.*, 338 NLRB at 22 (employee's misconduct “took

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<sup>2</sup> In fact, the Board in *Starbucks* specifically rejected the argument that off duty employees should not be considered in its analysis, stating that “[t]he location of an employee's conduct weighs against protection when the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees *regardless of whether those employees are on or off duty.*” *Starbucks*, 354 NLRB at 878 (emphasis added).

place in employee breakrooms, where [employee's] sustained profanity could be overheard by coworkers and would reasonably tend to affect workplace discipline"). Here, Atkinson's conduct was reasonably likely to undermine Schnell's authority because Atkinson gathered fifteen (15) to twenty (20) of Schnell's subordinates to witness him berate her in her office. (JA 131, 135.)

The Board's attempt to distinguish the instant case from *Starbucks* does not further the Board's cause. The Board contends that, unlike *Starbucks*, employees engaged in the "Walk-In" here "were participants in the protected concerted activity," and "not uninvolved bystanders." (Opp. 13.) However, when answering the determinative question of whether there was a "likelihood that other employees were exposed to the misconduct," the Board in *Starbucks* stated:

There were at least 15 demonstrators involved in the rally, including at least 2 then-current employees under McDermet's authority. Moreover, as McDermet exited the store and walked through the crowd that was taunting and shouting at him, Saenz and at least five of her companions began to pursue him in view of those present, including the two current employees who participated in the rally. . . . In light of the public nature of this misconduct, which commenced in plain view of employees under McDermet's authority, we find that the place factor weighs against Saenz retaining the Act's protection.

*Starbucks*, 354 NLRB at 878.

It is clear that each and every employee who witnessed the employee's misconduct in *Starbucks* was simultaneously engaged in concerted activity, and that they were not "uninvolved bystanders." *Id.* It is simply inconceivable how, based on

*Starbucks*, the Board could argue that a categorical rule ever existed prohibiting the Board from considering the presence of coworkers simultaneously engaged in concerted activity in its analysis.

Second, the cases cited by the Board, ostensibly to support its position, are equally unhelpful to its cause, and are distinguishable from the instant case. (Opp. 12.) In *Staffing Network Holdings, LLC*, 362 NLRB No. 12 (2015), the Board affirmed the ALJ's analysis that the first *Atlantic Steel* factor weighed in favor of the employee retaining the Act's protection. The coworkers in *Staffing Network Holdings* who witnessed the offending conduct were simultaneously engaged in concerted activity when they asked their supervisor not to discipline the offending employee. *Id.*, slip op. at 9. However, the ALJ did not find it determinative – or even significant – that the coworkers who witnessed the offending conduct were simultaneously engaged in concerted activity. *Id.* Instead, the ALJ noted that the supervisor sought out the offending employee to confront her, and reasoned “that when a supervisor makes statements to an employee on the shop floor he should expect that other employees will react and an employee's outburst in response to such a public display retains the protection of the Act.” *Id.*

In *Inova Health System*, 360 NLRB No. 135, slip op. at 26 (2014), *denying review, enforcing order, Inova Health System v. NLRB*, Nos. 14-1144, 14-1176, 2015 WL 4490275 (D.C. Cir. Jul. 24, 2015), the ALJ – affirmed with little analysis

by the Board – “place[d] great weight on the fact that the encounter between [the employee], her fellow nurses and [the human resources representative] was happenstance” in determining that the first *Atlantic Steel* factor weighed in favor of the employee retaining the Act’s protection. The group of employees in *Inova Health System* by chance ran into the human resources representative in the hallway, where the offending conduct took place. *Id.* The ALJ did not find to begin with that the offending conduct was reasonably likely to undermine the supervisor’s authority.<sup>3</sup> *Id.* Lastly, in *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 669 (2007), the Board found that the first *Atlantic Steel* factor weighed in favor of the employee retaining the Act’s protection because the offending conduct occurred during “one of [the employer’s] monthly . . . meetings,” the purpose of which was “to facilitate discussion of work-related issues.”

Contrary to these three cases, Atkinson specifically sought out Schnell, and purposefully brought as many of Schnell’s subordinates as possible to confront her in her office and witness him berate her. Unlike *Staffing Network Holdings*, Schnell did not seek Atkinson out in a public place, and could not have expected Atkinson’s outburst based on her own actions (sitting in her own office doing work). Unlike *Inova Health System*, Atkinson organized and planned the “Walk-

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<sup>3</sup> It should also be noted that the offending conduct was not even directed towards a supervisor, but a member of human resources, thus lessening the probability that it would undermine supervisory authority.

In” and his conduct towards Schnell was not the result of a “happenstance” encounter. (Opp. 4.) Lastly, unlike *Datwyler*, Atkinson’s conduct did not occur during a meeting designed to discuss workplace issues, where a heated exchange would be expected and appropriate, as opposed to the unexpected “Walk-In” that startled Schnell and caused her to feel uncomfortable and frightened. (JA 152.)

Third, the Board’s policy considerations set forth in its Opposition do not support the unreasoned categorical rule advanced by the Board here. (Opp. 14.) In furtherance of the Act’s policy to grant protection to concerted activity, the Board affords employees “leeway” in their behavior when engaging in such concerted activity. *See Starbucks*, 354 NLRB at 877. However, this leeway is not boundless; rather, the Board balances this leeway “against an employer’s right to maintain order and respect.” *Id.* Furthering its policy goals, the Board has balanced the competing interests and determined that the first *Atlantic Steel* factor weighs against an employee retaining the Act’s protection where the place of the employee’s conduct “would reasonably tend to affect workplace discipline by undermining the authority of supervisors subject to” the employee’s conduct. *DaimlerChrysler*, 344 NLRB at 1329; *Aluminum Co.*, 338 NLRB at 22.<sup>4</sup> The

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<sup>4</sup> The Board also argues that Atkinson’s conduct deserved protection because it was “consistent with the Union’s practice of raising employees’ concerns over terms and conditions of employment through ‘walk-ins.’” (Opp. 15.) This point, however, is irrelevant. The fact that the Union has a longstanding practice does not necessarily mean that the practice is lawful, or, that under certain circumstances

Board has thus already taken into account policy considerations in setting forth its rule regarding the first *Atlantic Steel* factor, which did not include categorically excluding employee witnesses simultaneously engaged in concerted activity.

Long Ridge does not argue that “[the first *Atlantic Steel*] factor *always* weigh[s] against protection” when coworkers witnessing the misconduct are simultaneously participating in concerted activity. (Opp. 14) (emphasis added.) Long Ridge merely argues that Board policy involves balancing employee considerations with employer considerations, and that the Board’s categorical rule proposed here is irreconcilable with this policy. The Board’s balancing of the leeway afforded to employees engaged in concerted activity with an employer’s rights to maintain order and respect would not “act as a disincentive to the concerted aspect of Section 7 activity,” as the Board claims in its Opposition. (Opp. 13.) Rather, it would simply act as a disincentive to employees from engaging in concerted activity in ways in which the Board already holds weighs against the employee retaining the Act’s protection, such as where the employee’s

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the practice can lead to an employee losing the Act’s protection. Atkinson admitted that the Union instructed him to behave as follows during a “Walk-In”: “No confrontation, no swearing, just be...professional about it.” (JA 136.) Here, Atkinson ignored that advice to corner Schnell in her office and berate her in front of fifteen (15) to twenty (20) of her subordinates, so even if the “Walk-In” was entitled to some deference because it was a long standing Union practice, which it should not be, Atkinson clearly did not follow the Union’s instruction and chose a method of executing the “Walk-In” that weighs against him retaining the Act’s protection.

behavior would reasonably tend to undermine the authority of his or her supervisor.

Lastly, in its Opposition, the Board mostly ignores the fact that the location of the “Walk-In” in Schnell’s office “accentuated and exacerbated” the intimidating, abusive, and threatening nature of Atkinson’s behavior. *See Trus Joist MacMillan*, 341 NLRB 369 (2004) (finding that the employee lost the Act’s protection where he chose meeting place off of the shop floor but in front of other managers in order to maximize embarrassment of supervisor). The Board attempts, in a footnote, to argue that *Trus Joist MacMillan* is distinguishable, but its articulation of the differences between *Trus Joist MacMillan* and the instant case is not persuasive. In *Trus Joist MacMillan*, the employee invited other members of management to a meeting where the misconduct took place to accentuate and exacerbate the embarrassment of the supervisor. While Atkinson did not gather other members of management to embarrass Schnell, he did gather fifteen (15) to twenty (20) of Schnell’s subordinates to corner her in her office to intimidate and berate her. The point remains that where an employee chooses a location that “accentuates and exacerbates” the effects of his or her misconduct, the first *Atlantic Steel* factor will weigh against the employee retaining the Act’s protection. Atkinson’s chosen location – in Schnell’s small office while she was by herself seated at her desk with fifteen (15) to twenty (20) employees between her and the

door – accentuated and exacerbated the intimidating, abusive, threatening, and, ultimately, insubordinate nature of Atkinson’s misconduct.

**B. The Second *Atlantic Steel* Factor Does Not Strongly Weigh In Favor Of Atkinson Retaining The Act’s Protection**

Long Ridge does not dispute that the second *Atlantic Steel* factor, the subject matter of the “Walk-In,” weighs in favor of Atkinson retaining the Act’s protection; the only question is to what degree this factor weighs in favor of Atkinson retaining the Act’s protection. What is significant here is that Atkinson led the “Walk-In” to insult Schnell’s performance as Administrator, and not to actually address any workplace concerns.<sup>5</sup> When Schnell returned to her office with another member of management seeking to have a productive conversation, Atkinson immediately ended the “Walk-In” and refused to discuss the “issues” that he was purportedly there to discuss. (JA 132-133; 214.) The employees’ departure clearly demonstrated that the grievance and any other “issues” the employees wished to discuss were mere pretext for Atkinson to get in to Schnell’s office to intimidate and berate her.

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<sup>5</sup> Although the Board claims that Long Ridge cited to discredited evidence in describing the nature of the “Walk-In,” this is not the case. As discussed in Section II of Long Ridge’s Brief and Section I.C, *infra*, the evidence to which Long Ridge cited was not discredited, but mistakenly deemed inadmissible by ALJ Green. Regardless, Atkinson and the Union admitted that a main purpose of the “Walk-In” was to tell Schnell that the employees “had a total lack of faith in [Schnell]” and that “worker[s] had lost confidence in [Schnell’s] leadership [and that] we want to meet with corporate to address ongoing issues.” (JA 130; 88.)

This fact is what distinguishes the instant case from those cited by the Board in its Opposition. (Opp. 16.) In the cases cited by the Board, the offending conduct occurred during confrontations meant to address actual workplace issues. *See, e.g. Felix Indus., Inc.*, 339 NLRB 195, 196 (2003) (offending conduct took place during phone call between employee and supervisor to resolve issue over pay differential); *Inova Health Sys.*, 360 NLRB No. 135, slip op. at 26 (offending conduct took place during discussion encouraging employer not to discipline a coworker); *Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1322 (2006) (offending conduct took place during discussion over merits of coworkers grievance); *Consumers Power Co.*, 282 NLRB 130, 131 (1986) (offending conduct took place during discussion over providing police protection to meter readers making house calls).

Long Ridge does not argue that an employee must state specific grievances or be within the formal framework of bargaining or a grievance investigation in order to retain the Act's protection. However, the goal of the Act to promote labor stability is not advanced by strongly protecting an employee who simply seeks to insult his supervisor under the guise of addressing workplace issues. *See Media General Operations, Inc. v. NLRB*, 560 F.3d 181, 188 (4th Cir. 2009) (“[I]nsulting, obscene personal attacks by an employee against a supervisor need not be tolerated, even when they occur during otherwise protected activity.”)

(citations omitted). Therefore, the second *Atlantic Steel* factor should not weigh strongly in favor of Atkinson retaining the Act's protection where Atkinson led the "Walk-In" to insult and berate Schnell and left when Schnell actually tried to address Atkinson's pretextual workplace issues.

**C. ALJ Green And The Board's Decision Was Not Based Upon The Substantial Evidence In The Record As Objectively Analyzed, And Was Based Upon An Incorrect Evidentiary Ruling For Which It Abused Its Discretion**

The Board's decision affirming ALJ Green in regards to the third *Atlantic Steel* factor, the nature of Atkinson's conduct, resulted from the Board ignoring the undisputed record evidence, as well as failing to consider – because of a factually and legally incorrect hearsay ruling – a credible description of what occurred during the "Walk-In." The Board's arguments in its Opposition to the contrary are simply unavailing. First, the Board emphasizes that an objective standard must be used in analyzing the egregiousness of employee behavior under *Atlantic Steel*; however, when the undisputed record evidence is viewed – *objectively* – it is clear that the Board's decision was not supported by the substantial evidence in the record. Second, the Board abused its discretion by turning ALJ Green's admissibility determination into a credibility determination. In fact, ALJ Green never reached the issue of whether Condon's testimony was credible because he ruled in the first instance that he was prohibited from even considering that testimony. Thus, it was an abuse of discretion by the Board to

rely on ALJ Green's admissibility determination to fabricate its own credibility determination.

- i. *Objectively viewed, the undisputed record evidence demonstrates that the third Atlantic Steel factor weighs against Atkinson retaining the Act's protection*

In its Opposition, the Board correctly points out that "settled precedent tasks the Board with 'using an objective standard,' rather than a subjective standard, to determine whether challenged conduct is threatening." *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 3 (2014) (quoting *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 29 n.2 (D.C. Cir. 2011)); *see also* Opp. 23. However, the Board's arguments regarding the undisputed record evidence all focus on what Atkinson *subjectively intended* his actions to be, and not on how those actions were reasonably objectively viewed by Schnell. The question in regards to the third *Atlantic Steel* factor is simply whether Atkinson's conduct – *objectively* – "would have reasonably...intimidated" Schnell. *Starbucks*, 354 NLRB at 878; *see also Plaza Auto Center*, 360 NLRB No. 117, slip op. at 3.

In its Opposition, the Board makes much of the fact that "the employees stood back from Schnell's desk and along the walls of her office" to try to counter Long Ridge's description of Schnell as "surrounded." (Opp. 22.) However, regardless of exactly where in Schnell's office the employees stood, the fact that

fifteen (15) to twenty (20) employees appeared unannounced<sup>6</sup> in Schnell's small office and placed themselves between Schnell and the door would – objectively – reasonably lead Schnell to feel surrounded and intimidated.<sup>7</sup> Atkinson admitted that the employees lined up just a few steps from Schnell's desk, only eight (8) to ten (10) feet away. (JA 139-142.) Furthermore, GC's own witness – Tequila Watts – testified that Schnell was startled by the number of employees who entered her office unannounced, stating that Schnell remarked “wow, it's a lot of you.” (JA 152.) In addition, the Board attempts to downplay the tone of Atkinson's voice, stating that Atkinson only intended to “[speak] loudly enough for everyone in the room to hear him.” (Opp. 22.) However, the fact of the matter is that Atkinson admittedly spoke loudly to Schnell in an enclosed office. (JA 142-143.)

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<sup>6</sup> The Board also takes issue with Long Ridge calling the “Walk-In” “unannounced,” stating that Long Ridge's use of this term lacked evidentiary support. (Opp. 16.) Long Ridge is utterly confused by the Board's point here. It is undisputed that the employees were not arriving to a previously scheduled meeting with Schnell, and GC's own witness testified that Schnell was startled and surprised when the employees walked in to her office at the beginning of the “Walk-In.” (JA 152.) Nor does it seem that the Board argues anywhere in its Opposition that Schnell was aware that fifteen (15) to twenty (20) employees were going to enter her office when the “Walk-In” began.

<sup>7</sup> Although there is evidence that the door remained open during the “Walk-In,” there was also evidence from GC's witnesses that the employees closed the door behind them. Regardless, the undisputed evidence was that Schnell was sitting behind her desk while the fifteen (15) to twenty (20) employees filled up her office and lined up by the door.

In its Opposition, the Board also argues that Atkinson only attempted to “touc[h] his left palm with the grievance he was holding in his right hand to indicate emphasis.” (Opp. 22.) Again, regardless of Atkinson’s intention to only indicate emphasis with his gestures, Atkinson admitted that he was “pounding” one hand in to the other. (JA 133.) An objective view of this admitted “pounding” motion would be that the aggressive motion reasonably led Schnell to feel intimidated. This is true even assuming that it was not Atkinson’s subjective intention to act aggressively, as the Board claims.<sup>8</sup> The Board similarly tries to split hairs by stating that “Atkinson made no attempt to prevent Schnell from exiting her office, but merely stood near the door.” (Opp. 22.) However, Atkinson admitted that he was one of the employees closest to the door and another employee present – Mathias – testified that Atkinson was in front of the door. (JA 131, 139-141, 147, 174.) Although Atkinson may have denied blocking Schnell’s path to the door, an objective view of the situation clearly demonstrates a reasonably intimidating atmosphere, given: (i) a very large group of employees entered Schnell’s office unannounced; (ii) Atkinson was indisputably positioned near the door when Schnell came around her desk to attempt to leave; (iii) Atkinson was nearly a foot taller than Schnell; (iv) Atkinson had just spoken in a

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<sup>8</sup> Moreover, despite Atkinson testifying that his hand motions were of a “pounding” nature, ALJ Green, affirmed by the Board, merely described Atkinson’s gesture as “touching,” further demonstrating that the Board’s decision was not supported by the substantial evidence in the record.

loud and aggressive manner towards Schnell; and (v) Atkinson had aggressively “pounded” one hand in to the other in front of Schnell, who was clearly upset by the “Walk-In.”<sup>9</sup> Each factor, on its own, when viewed objectively, demonstrates the existence of a reasonably intimidating atmosphere. When all five (5) factors – the large number of employees in Schnell’s office, the position of Atkinson and the employees in the room, the physical size difference between Atkinson and Schnell, Atkinson’s tone of voice, and Atkinson’s pounding hand motions – are taken together, and the totality of the circumstances are considered, the evidence objectively demonstrates that Schnell would have reasonably been intimidated by Atkinson’s conduct.

The Board further argues that “the Company’s focus on Schnell’s undisputed statement that she felt uncomfortable or frightened during the walk-in is also misguided” because this was a statement regarding Schnell’s subjective feelings. (Opp. 24.) However, the fact that Schnell immediately told the fifteen (15) to twenty (20) employees in her office that she felt uncomfortable or frightened is an objective indication that Atkinson’s behavior did, in fact,

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<sup>9</sup> Although the Board harps on the fact that the “Walk-In” was similar to other Union-sanctioned “Walk-Ins,” Atkinson admitted that this was the first “Walk-In” with Schnell. (JA 137.) Therefore, that Atkinson may have lead “Walk-Ins” with previous administrators or that this was some sort of tactic encouraged by the Union in other workplaces does nothing to counter that an objective view of the undisputed evidence demonstrates that Schnell, who was involved in a “Walk-In” with Atkinson for the first time, was reasonably intimidated by the situation.

intimidate her. Furthermore, after Atkinson's intimidating, abusive, and threatening conduct, the employees participating in the "Walk-In" felt the need to reassure Schnell that no one was there to be violent. (JA 174, 179, 182,213.) This, too, is an objective indication that Atkinson's behavior reasonably intimidated Schnell because the other employees, besides Atkinson, recognized what any objective and reasonable person would in that situation – that Schnell was intimidated and needed reassurance. The Board then argues that because the employees reassured Schnell that there was nothing to fear, Atkinson's intimidating behavior should be excused. Such an argument is clearly faulty, as Atkinson was discharged for his abusive and threatening behavior that caused Schnell to be reasonably intimidated in the first place. It is irrelevant if at some point during the "Walk-In" Schnell no longer felt intimidated because the other employees successfully reassured her.

*ii. The Board abused its discretion in its ruling on Condon's testimony*

In its Opposition, the Board argues that the Board made a determination to discredit Condon's testimony that obviated the need for it to rule on whether Condon's testimony was admissible to begin with. (Opp. 25.) However, the Board's so-called "credibility determination" was based upon its view that "in crediting the testimony of Atkinson and the other employees [ALJ Green] implicitly discredited Condon's testimony as to what occurred." (JA 250.) Such

“analysis” – or lack thereof – constitutes an abuse of discretion by the Board.

Once ALJ Green ruled Condon’s testimony to be inadmissible, ALJ Green only had before him uncontroverted testimony from Atkinson and the other employees regarding what occurred during the “Walk-In.” Thus, ALJ Green had no choice but to credit the testimony of Atkinson and the other employees. In other words, ALJ Green made an *admissibility* determination, not a *credibility* determination. The Board then fabricated a credibility determination out of thin air in order to rubber stamp ALJ Green’s decision on the merits. The Board’s use of ALJ Green’s admissibility determination to fabricate a credibility determination, and then relying on that fabricated credibility determination to make its decision on the merits, requires this Court to overturn the Board’s decision.<sup>10</sup> *See Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1063 (D.C. Cir. 2001) (D.C. Circuit not required to “rubberstamp” conclusory decisions based upon “incomplete analysis” by the Board).

The Board next argues in regards to the admissibility of Condon’s testimony that “it is not at all certain that [Schnell’s] statement was sufficiently proximate to the walk-in to qualify as [a present sense impression],” stating that

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<sup>10</sup> It should also be noted that despite Atkinson stating on several occasions that there were at least fifteen (15) but as many as twenty (20) employees involved in the “Walk-In”, ALJ Green described the “Walk-In” as a group of “about 15” employees. (JA 235.) This further demonstrates that the factual basis for the decision in this case is premised on numerous errors.

Schnell “[telephoned] Condon 30-40 minutes” after the “Walk-In.” (Opp. 26-27.) However, it is unclear where the Board gets the 30-40 minute time period, as the Board does not cite to any record evidence, and Condon unequivocally stated that Schnell called him “shortly after” the “Walk-In.”<sup>11</sup> As discussed further in Section II.A.i and II.A.ii of Long Ridge’s Brief, Schnell’s statements to Condon were, in fact, admissible as a present sense impression and an excited utterance exception to the hearsay rule.

The Board’s argument in its Opposition that Long Ridge failed to raise the excited utterance issue in its exceptions to ALJ Green’s decision is unavailing.<sup>12</sup> (Opp. 27.) Long Ridge clearly stated in Petitioners’ Brief in Support of their Exceptions that ALJ Green failed to consider the excited utterance exception to the hearsay rule.<sup>13</sup> (SJA 72.) Contrary to the Board’s argument, it makes no difference whether Long Ridge discussed the excited utterance exception in a footnote as opposed to the text of its brief. Long Ridge explicitly raised the

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<sup>11</sup> Moreover, the “Walk-In” and Schnell’s description to Condon were so close in time that Schnell was still very upset and emotional about what had occurred. (JA 212-213).

<sup>12</sup> It should be noted that the Board in its Opposition makes no argument and cites to no case law refuting the merits of Long Ridge’s excited utterance argument.

<sup>13</sup> Long Ridge also notes that unlike with the present sense impression hearsay exception, ALJ Green never made a ruling regarding the excited utterance exception. Thus, it would have been impossible to specifically except to a ruling by ALJ Green on the excited utterance exception, as none was made.

excited utterance exception, which clearly “apprise[d] the Board that [the] issue [would] be pursued on appeal.” *Consol. Freightways v. NLRB*, 669 F.2d 790, 793 (D.C. Cir. 1981).

Lastly, in its Opposition, the Board argues that even if Atkinson engaged in the conduct described by Schnell and Condon, the third *Atlantic Steel* factor weighs in favor of Atkinson retaining the Act’s protection. However, this Court has held that “[i]f an employee is fired for denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms...then the nature of his outburst properly counts against according him the protection of the Act.” *Felix Industries, Inc. v. NLRB*, 251 F.3d at 1055. Here, the “Walk-In” as described by Schnell and Condon involved personally-denigrating, insubordinate, and intimidating behavior, which the Board and this Court have held weighs against an employee retaining the Act’s protection. Atkinson told Schnell that “people were sick and tired of her lies, that she was a cheat, and she was mismanaging, and [there] was bad leadership in the building.” (JA 212-213.) This is exactly the type of “insulting, obscene personal attacks by an employee against a supervisor [that] need not be tolerated.” *Media General Operations, Inc.*, 560 F.3d at 197; *see also DaimlerChrysler*, 344 NLRB at 1329-30 (a “loud ad hominem attack on a supervisor that other workers heard” balances the third *Atlantic Steel* factor against the employee retaining the Act’s protection).

Moreover, as discussed in Section III.C.i of Long Ridge's Brief and Section I.C.i, *supra*, the Board has held that the third *Atlantic Steel* factor weighs against an employee retaining the Act's protection when a supervisor exposed to the offending conduct "would have reasonably been intimidated." *Starbucks*, 354 NLRB at 878. The undisputed evidence, alone, demonstrates that Schnell was reasonably intimidated.

The Board, on the other hand, cites cases in its Opposition where the offending conduct was a far cry from the conduct Atkinson engaged in here. (Opp. 28.) Atkinson's conduct here involved personal attacks and physical intimidation, not merely nonaggressive physical contact to get someone's attention,<sup>14</sup> making vague threats,<sup>15</sup> getting into a shouting match with a supervisor provoked by the supervisor,<sup>16</sup> cursing once at a coworker,<sup>17</sup> or

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<sup>14</sup> See *Inova Health System*, 360 NLRB No. 135, *denying review, enforcing order, Inova Health System v. NLRB*, Nos. 14-1144, 14-1176, 2015 WL 4490275 (D.C. Cir. Jul. 24, 2015). The Board's description of the offending conduct in this case as "allegedly aggressive" is blatantly misleading. (Opp. 28.) The Board, affirmed by this Court, specifically found that the employee did not make contact with her supervisor "in an aggressive or hostile manner," and, furthermore, that the employer knew the contact was not aggressive or hostile. *Id.*, slip op. at 26.

<sup>15</sup> See *Kiewit Power Constructors Co.*, 652 F.3d at 28 (employees were clearly "speaking in metaphors" when referring to dispute as turning into a "boxing match"); *Fairfax Hosp. v. NLRB*, Nos. 93-1467, 93-1272, 1993 WL 509372 (4th Cir. Dec. 8, 1993) (employee did not lose Act's protection for vague threat of "retaliation" to her supervisor during conversation about the Union).

<sup>16</sup> See *Battle's Transp., Inc.*, 362 NLRB No. 17 (2015) (union delegate told

reflexively raising ones fist in response to a supervisor's similar actions.<sup>18</sup> Moreover, this Court has “expressly disavowed any rule whereby otherwise protected activity would shield any obscene insubordination short of physical violence” from legal disciplinary action. *Felix Indus.*, 251 F.3d at 1055. Although the Board described Schnell and Condon's description of the “Walk-In” as Atkinson merely displaying “intemperate” behavior (Opp. 27), making a supervisor – or any coworker – fear for their physical safety while personally attacking them verbally does not further the goals of the Act and is not conduct protected by the Act.

**D. The Fourth *Atlantic Steel* Factor Weighs Strongly Against Atkinson Retaining The Act's Protection**

ALJ Green and the Board properly found that the fourth *Atlantic Steel* factor, whether the “Walk-In” was in response to an unfair labor practice, weighed against Atkinson retaining the Act's protection. The Board does not seem to argue otherwise in its Opposition, but takes exception to Long Ridge's

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supervisor to “shut up” and called supervisor a “liar and stupid” during grievance meeting, where supervisor provoked the situation by first telling union delegate to “shut up”).

<sup>17</sup> See *Beverly Health & Rehab. Servs.*, 346 NLRB at 1322-23 (employee cursing at coworker “was unaccompanied by insubordination, physical contact, or threat of physical harm.”) (citing *Felix Industries*, 339 NLRB at 196).

<sup>18</sup> See *Consumers Power*, 282 NLRB at 132 (“[E]mployee raised his fists to [his supervisor] reflexively, responding to [the supervisor] moving his hands in front of [the employee] as if to gesture or shake a finger in [the employee's] face.”)

argument that ALJ Green and the Board did not afford the proper weight to this factor. (Opp. 28-30.) The Board argues that cases to which Long Ridge cites, such as *Media General Operations, Inc. v. NLRB*, do not hold that the lack of immediate provocation “dictates that the final *Atlantic Steel* factor necessarily weigh heavily against protection.” (Opp. 29.) The Board’s argument is simply incorrect.

The Fourth Circuit in *Media General Operations, Inc.*, held that “[t]he lack of concurrence between [the employer’s lawful action] and [the employee’s inappropriate] comment *particularly disfavors protection*. This was not a spontaneous outburst in response to an illegal threat but an ad hominem attack made in the context of a discussion [the employee] initiated with two supervisors.” 560 F.3d at 188 (emphasis added). Conversely, the Board has “found that an outburst provoked by statements or conduct not deemed unlawful weigh *slightly* against retaining the Act’s protection.” *Staffing Network Holdings, LLC*, 362 NLRB No. 12, slip op. at 9 (emphasis added) (citing *Tampa Tribune*, 351 NLRB 1324, 1325 (2007)).

Thus, it is clear that there is a distinction between the two types of employee misconduct – planned misconduct and spontaneous outbursts – that can be taken in response to lawful employer action. Planned misconduct in response to lawful employer action weighs *heavily* against an employee retaining the Act’s

protection, while, spontaneous outbursts in response to lawful employee conduct weigh *slightly* against an employee retaining the Act's protection.

Here, similar to the misconduct in *Media General Operations, Inc.* that was found to weigh *heavily* against the employee retaining the Act's protection, Atkinson planned and organized the "Walk-In," and was not immediately provoked by any unfair labor practice – or any conduct – by Schnell or Long Ridge. In its Opposition, the Board attempts to focus on the fact that Atkinson purportedly planned the "Walk-In," to some degree, to discuss a grievance. (Opp. 29.) However, this focused is misplaced. The purpose of the fourth *Atlantic Steel* factor is to give leeway to employees who commit spontaneous misconduct that they otherwise would not have committed absent provocation. *See Stanford New York, LLC*, 344 NLRB 558, 559 (2005) ("As to the fourth [*Atlantic Steel*] factor, [the employee's] outburst was a direct and temporally immediate response" to the supervisor's conduct, and "an employer generally may not provoke an employee through unlawful conduct to a point where the employee commits an act of insubordination and then rely on that insubordination to discipline the employee."). The fact that Atkinson's misconduct may have been motivated to some extent<sup>19</sup> by a grievance is completely separate from the fact that Atkinson was not immediately provoked by any behavior – unlawful or otherwise – by

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<sup>19</sup> A fact which is belied by Atkinson and the other employees ending the "Walk-In" as soon as Schnell was ready to discuss the employees' concerns.

Long Ridge.

### CONCLUSION

Based on the foregoing facts, arguments and authorities, Petitioners respectfully request that this Honorable Court set aside the March 24, 2015 Decision and Order of the National Labor Relations Board. (JA 249-257.)

Dated: September 25, 2015

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,803 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced 14-point type using Microsoft Word 2010.

Dated:       September 25, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system.

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